# Chapter 2
# The Law of Obligations

## 2.1 The General Statement of Obligations

### *2.1.1 The Concept and Meaning of Obligations*

The term 'obligation' comes from the Latin *obligare*, the root of which (*ligare*) means 'to bind'. It denotes a relation between two persons which entitles one of them to claim from the other some act or omission recognized as capable of producing a legal effect.[1] Any giving, doing, or forbearing may be the subject of an obligation, provided only that it be something possible and not contrary to law. A person who is entitled to the performance of an obligation, whatever its nature may be, is, according to Thai legal terminology, called the 'creditor' (*jao nee*), and the person who is under the obligation is called the 'debtor' (*look nee*). For the sake of brevity, the terms 'creditor' and 'debtor' will be used in this sense, though in ordinary English language they have a somewhat narrower meaning.[2]

An obligatory right is invariably directed against a determinate person (the debtor). Ownership may be asserted against the entire world, but an obligation can only be asserted against, say, the vendor, if it arises from a sale, the lessor, if it arises from a contract of letting and hiring, and so forth. Obligatory rights are rights that only operate relatively, viz., as against the person of the debtor. The main point to be observed is that an obligatory right consists, as such, in the fact

[1]Justinian defines an obligation as follows: '*Obligatio est juris vinculum, quo necessitate adstringimur alicujus solvendae rei, secundum nostrae civitatis jura'* (J. iii. 13. *pr.*), i.e. as the legal tie between two persons which binds one of them to do or forbear from doing something for the benefit of the other. The Thai Civil and Commercial Code describes such an act or omission by the general term *gaan chamra nee* which in the course of this treatise will be translated by 'performance'.

[2]On this point, see Stasi (2015). See also Setabutr (2006, p. 2).



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that a particular other person (the debtor) is bound to do something.[3] In other words, an obligatory right is simply and solely a right to require a particular other person (the debtor) to act in a specific way.[4]

Some obligatory relations have a limited legal effect, notwithstanding the fact that they do not create any rights enforceable by action. Thus, for instance, the transactions characterized by Sections 853–855 of the Civil and Commercial Code as gambling or betting transactions do not impose any liability enforceable by action on the losing party, but a party who has paid the amount of his loss cannot recover it on the ground that he was under no legal liability to make the payment (Section 853, Civil and Commercial Code).[5]

A person who has freely done an act as if in performance of an obligation, knowing that he was not bound to effect the performance, is not entitled to restitution (Section 407, Civil and Commercial Code). In other words, no return or reduction can be claimed in respect of any performance, made in satisfaction of any liability incapable of legal enforcement. Pursuant to Section 408 of the Civil and Commercial Code, the following persons are not entitled to restitution: (1) a person who performs an obligation subject to a time clause before the time has arrived; (2) a person who performs an obligation which has been barred by prescription; and (3) a person who performs an obligation in compliance with a moral duty or with the requirements of social propriety. In all these cases, there is no claim in the technical sense of the word, but, on the other hand, the performance is not deemed an *indebitum*. The term 'imperfect obligation' is used by some textbook writers to denote the obligations belonging to the class now referred to, while others apply the term 'natural obligation'.

### *2.1.2 Classification of Obligations*

The Civil and Commercial Code deals with the general rules which apply to all obligations without regard to whether they are derived from contracts or any other form of liability, before it defines the different types of contracts. Although this classification is based on logical considerations, it is inconvenient in practice. As a matter of fact, some specific modalities of obligations, such as conditions and time limitations, are directly related to contract law. Other modalities of obligations, such as joint and several liability, would be better analysed under the general

[3]It should be added, however, that some of the rights against definite persons which arise under family law (e.g. the right to the custody of an infant, or the personal rights of one spouse against another) are not usually included among obligatory rights, though strictly speaking they would come under the definition.

[4]See Sohm (1907, p. 379).

[5]As mentioned above in Sect. 1.7.2, the payment of a debt barred by prescription cannot be recovered, even if it was made in ignorance of the fact that the debt had become barred by prescription (Section 193/28, Civil and Commercial Code).

heading of contracts even if they may arise in the absence of agreement. For now, we will limit our attention to the main classifications of obligations and discuss them in detail in subsequent sections.

Obligations may be pure and simple, may be subject to a term or condition, may be currently existing, or may arise in the future. A pure and simple obligation is an absolute engagement which is not encumbered with any conditions or time limitations: the debtor binds himself unconditionally and without reserve. It produces its effects immediately and may be enforced without delay. However, these types of obligations may always be modified by mutual agreement of the contracting parties or, in some circumstances, by the law. Accordingly, in such a case the obligation will produce different effects from what might be expected from a pure and simple obligation.[6]

Obligations are generally legal, valid, and immediately binding. This means that the creditor has the right to enforce performance by its debtor without delay and the debtor has no available defence against that enforcement. But the obligation may also be subject to a condition and, consequently, receive all its effects at the moment a future and uncertain event happens. If time is given for the performance of the obligation, the performance is made to depend on the occurrence of a certain and future event that constitutes the term. This is to say that the obligation becomes immediately binding, but rights and duties under the obligation are suspended until the happening of the stated event.[7]

Generally speaking, the object of obligations may be either a specific thing, in the proper and confined signification of the term, which the debtor obliges himself to give, or a specific act which the debtor obliges himself to do or not to do. In some cases, however, the object may be composed of two or more acts. In such cases, there are different possibilities. The obligation may contain several parts or objects that are connected together. Here the debtor must perform all the acts so that he can obtain a discharge. In this case, each act is regarded as the object of a separate obligation and the obligation is said to be conjunctive.[8] Alternatively, the obligation may require the debtor to perform only one act in order to obtain a discharge and extinguish the obligation. In this case, two or more things are promised disjunctively and the obligation is considered to be alternative. Where the debtor is under an obligation to perform one out of several specified acts, then, in the absence of any contrary agreement between the parties, the election rests with the debtor.[9] After the election has been made and communicated to the other party, the selected performance is deemed to be the only performance stipulated for *ab initio*. If the debtor does not exercise his right of election, and the creditor's claim has to be enforced by judicial proceedings, judgment is given in an alternative form. Such

[6]See above Sect. 1.5.8. On this point, see also Maneesawat (1993, p. 27).

[7]See in particular Stasi (2016, p. 44 ff).

[8]On this theme, see especially Pramod (1965, p. 138).

[9]It must be pointed out that when the creditor has the right to elect, and he delays his election, the debtor may request him to notify his election within a specified reasonable period of time. If after the lapse of the period the request remains unsatisfied, the right of election passes to the debtor.

a judgment entitles the creditor to enforce such of the alternative obligations as he may think fit, but the debtor may, prior to the completion of such enforcement, satisfy his obligation by doing one of the alternative acts stipulated for by him.[10]

If one of the promised alternative acts is, or becomes, impossible, the obligation is deemed to refer to the other alternative act or acts. In case, however, the impossibility was caused by the act or default of the non-electing party, the electing party may elect the impossible act. The result of such an election is that if the electing party is the debtor, he may consider his obligation satisfied; if the electing party is the creditor, he may claim damages for non-performance.[11]

Obligations can further be divided into divisible and indivisible. An obligation is divisible when it is capable of partial performance. This means that the object of the performance is susceptible to division. On the other hand, an obligation is indivisible when the object of the performance, because of its nature, because of the law, or because of the intent of the parties, does not admit any division.[12]

An obligation may also be several or joint if there are several debtors or several creditors. In these cases, it may be that the obligation is split between each person: each debtor is bound to bear a specific share of the total obligation and each creditor is entitled to a specific share of the total obligation. This is said to be a joint obligation. It may also be that the obligation is a several and joint one. This occurs when each of the debtors is liable in respect of the same liability and owes an obligation for the whole, or each of the creditors has the right to demand performance of the whole debt. In the first case, the debtors are considered to be several and joint debtors, and in the second case the creditors are considered to be several and joint creditors.[13]

### *2.1.3 Formation of Obligations*

As a general rule, an obligation cannot be created by any juristic act except a contract (*sanyaa*) between the parties.[14] A juristic act, constituted by concurrent

[10]An example will clarify the point. Suppose that A agrees to sell to B either his red motorcycle or his green motorcycle for the sum of 50,000 baht but fails to perform his agreement. B obtains judgment directing A 'to deliver to B the said red motorcycle or the said green motorcycle against payment of the sum of 50,000 baht'. B obtains an order enabling the official process server to obtain possession of the red motorcycle, but before this order has been carried out B delivers the green motorcycle. The claim is satisfied.

[11]In the example above, if the green motorcycle is destroyed owing to A's negligence, B may at his option accept the delivery of the red motorcycle in satisfaction of A' promise, or claim damages for non-performance of the promise to deliver the green motorcycle.

[12]For a detailed analysis on this point, see Stasi (2016, p. 45).

[13]On this point, see below Sects. 2.2.5 and 2.2.6.

[14]There are, however, certain unilateral acts which create obligations, the effect of which is expressly recognized. Thai law recognizes the public offer of a reward and the execution of an 'obligation to bearer' as unilateral acts creating a binding obligation without the necessity of acceptance on the part of another party. On this point, see Setabutr (2006, pp. 31–32).

declarations of at least two parties, is called a contract (or obligatory agreement). A contract can thus be defined as agreement between two or more parties which creates a legal obligation between them and is normally constituted by an offer and an acceptance. If a contract does not produce these effects, then it is not considered a contract at all. It is said to be void and no person is bound by it.[15]

A contract may result in a unilateral obligation (e.g. the obligation to repay a loan) or in a bilateral obligatory relation. The creation of a bilateral obligatory relation may be intended by the parties, but even where the primary intention of the parties was the creation of a unilateral obligation only, an obligation may be created on the other side as an incidental result. Thus, in the case of a mandate, the primary intention is to impose on the mandatary the duty to act according to his instructions, but the principal may incidentally come under an obligation to reimburse the mandatary for his expenses. In such cases, the Roman law gave to the party entitled to the performance of the primary obligation the *actio directa*, while the party entitled to the performance of the incidental obligation became entitled to the *actio contraria.*

Contracts intending to create obligations on both sides are called reciprocal contracts (*sanyaa dtaang dtop taen*). Contracts primarily intended to create an obligation on one side only, but incidentally resulting in the creation of an obligation on the other side, are called imperfectly reciprocal contracts.

With regard to contracts in favour of third parties, Roman law did not allow a person who was not a party to a contract to assert any rights created thereby. English law, according to the finally established doctrine on this subject, follows the rule of Roman law, but the effect of a contract giving rights to a third party may be attained by the creation of a trust. The Thai Civil and Commercial Code expressly recognizes the principle that a performance may by agreement be stipulated for in favour of a third party, with the effect of giving a direct right to such third party to claim such performance. In fact, according to Section 374 of the Code, 'if a party by a contract agrees to make a performance to a third person, the latter has a right to claim such performance directly from the debtor'. In this case, the right of the third person comes into existence at the time when he declares to the debtor his intention to take the benefit of the contract.

The question whether a third party for whose benefit a contract is entered into is to have an enforceable right, whether such right is to vest forthwith, or whether it is intended to be subject to any condition or stipulation as to time, and, finally, whether such a contract may be revoked or modified by the parties thereto without the concurrence of the third party, must, in default of any express declaration of intention on the subject, be ascertained from the circumstances, and more particularly from the object of the contract (Section 375, Civil and Commercial Code).

[15]Under English law, an agreement is inoperative unless supported by valuable consideration, but no similar rule exists in Thai private law. An agreement is formed by offer and acceptance in the manner shown in Sect. 1.5.3, subject to such rules as to form and other matters affecting the validity of juristic acts as have also been mentioned above.

It must be added that under Thai private law there are some presumptions and rules of interpretation which operate in so far as no contrary intention is shown by the contract. Precisely, a promise to the effect that the promisor will pay a debt owing by the promise to a third party does not give such third party a right to claim payment of the debt from the promisor. If any benefit is conferred on the promisor exclusively in consideration of a promise in favour of a third party, however, such third party has a right to claim performance of such promise. The Civil and Commercial Code also states that 'all defences available as between the promisor and the promisee are also available as between the promisor and the third party' (Section 376).

Furthermore, in case the date of the promisee's death is to be the date of performance (e.g. if A insures his life for the benefit of B), the third party, for whose benefit the promise is made, does not acquire a vested interest until the date of such death. Such a contract may, therefore, during the life of the promisee be rescinded without the third party's concurrence, and if the third party dies before the promisee, his representatives are not in any event entitled to claim performance on the death of the latter.[16]

### *2.1.4 Obligations Created Otherwise Than by Juristic Act*

It was customary in the older continental codes to classify all obligations as being *ex contractu, quasi ex contractu, ex delicto, quasi ex delicto*, but this mode of classification has been rejected by the Civil and Commercial Code. Under Thai law, there is a broad line of demarcation between obligatory rights created by juristic act and other obligatory rights. The latter may be subdivided under two principal heads, namely: remedial obligatory rights and obligatory rights conferred by outside circumstances. A remedial obligatory right may arise on the breach of an antecedent right, or on the commission of an unlawful act by which an absolute right is violated. In both cases, the remedial right is of an obligatory nature, and in both cases, it is a right to receive compensation in accordance with the definition of that term given below.

Among the obligations imposed by outside circumstances, those created by the rendering of voluntary services (*jat gaan ngaan nok sang)* and those created by the receipt of unjustified benefits (*laap mee quan daai*) require special attention.[17] Mutual obligations also arise between parties who are joint owners of property, or subject to joint liabilities by reason of some act or event not brought about by their

[16]If the third party is not as yet born on the promisee's death, the period of vesting is postponed to the time of his birth. The agreement cannot in such a case be rescinded between the date of the promisee's death and the date of the third party's birth.

[17]For a detailed analysis on this point, see Poonyapun (1978, p. 74).

own agreement, e.g. co-heirs of a deceased person. There are finally the obligations which in this treatise are described as liabilities created 'by estoppel', and the obligations imposed on finders of lost objects.[18]

## 2.2 Circumstances Affecting Liability

### *2.2.1 Absolute Liability and Liability for Default*

A debtor may under a special legal rule applicable under the circumstances, or under the terms of his promise, be bound by his obligation, even if its performance becomes impossible without any default on his part. As a general rule, however, he is not liable for non-performance or incomplete performance if the performance or the complete performance was rendered impossible by any circumstance not brought about by his own default.

The default may be wilful or negligent. The expression 'wilful default' is used as an equivalent of *la-loie*, which term denotes any default made by the debtor with the consciousness of the consequences of his conduct, though not necessarily with the intention to violate his obligation.[19] Negligence is called *kwaam bpra-maat lern ler* and means the omission of the degree of diligence in which under the special circumstances of the case the debtor was bound to give. In the absence of any contrary legal rule applicable under the special circumstances, or of any express or implied stipulation, the diligence usual 'in ordinary intercourse' must be applied. In certain specified cases, it is sufficient to give the degree of care which the person concerned usually gives to his own affairs (*diligentia quam suis*) but a person whose liability is reduced in this manner is in any event liable for damage caused by gross negligence in the performance of his obligation. Gross negligence (*kwaam bpra-maat lern ler yaang raai raeng*) is not defined by the Civil and Commercial Code, but the definition of Roman law still holds good: *Lata culpa est nimia negligentia*, *id est non intelligere quod omnes intelligunt*. To disregard a risk which is obvious to everybody constitutes gross negligence.[20]

In all cases where liability is based on the grounds of fault, a debtor is released therefrom if it can be proved the existence of circumstances excluding liability. More precisely, a person is not responsible for damage caused by any act done in a state of unconsciousness or disturbance of the mental faculties, excluding the free action of the power of volition, unless such unconsciousness or mental disturbance was brought about by culpable indulgence in stimulants or narcotics.[21]

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[18]On this point, see below Sect. 2.7.4.

[19]It must be noted that when an aggravated liability is attached to intentional default the Civil and Commercial Code uses the word *pit-nat*.

[20]The cases in which a debtor's responsibility is restricted to damage caused by his wilful default and gross negligence are exceptional.

[21]If the act was done under the influence of culpable indulgence in stimulants or narcotics, the person by whom it was done is responsible as if he had been guilty of negligence.

Where the damage was caused by an unlawful act for which compensation cannot be obtained from a third party, the person by whom the act was done, though released from direct responsibility by the effect of the rules stated above, has to compensate the injured party in so far as this appears equitable under the circumstances, regard being had to the pecuniary position of the parties, and in so far as the payment of such compensation does not deprive the party by whom the damaging act was done of the means for his own maintenance and for the performance of his statutory duties as to the maintenance of others.

Under English law, a promisor must, as a general rule, carry out his promise and is liable for its non-performance, even if he is not guilty of wilful default or negligence. At first sight, this rule seems to be diametrically opposed to the Thai rule, but as English law recognizes that under special circumstances, the non-performance of an agreement is excused unless caused by the promisor's wilful or negligent default, the difference between the two systems is not so great as it appears. The distinction between various degrees of diligence, though sometimes mentioned in English judgments, is not so consistently carried out as in Thai law.

It is noteworthy to observe that the degree of diligence which a person is bound to give under the circumstances of any particular case may be modified by agreement between the parties concerned. However, the responsibility for the debtor's own wilful default cannot be excluded beforehand by mutual agreement. In this regard, Section 373 of the Civil and Commercial Code provides that 'an agreement made in advance exonerating a debtor from his own wilful default is void'. The creditor may, of course, after the occurrence of the default, waive any rights to which he becomes entitled by reason of the default.[22]

In certain cases where the debtor is liable without reference to any default on his part, the performance is excused if it was prevented by *force majeure* (*hayt sut wisai*). *Force majeure* corresponds to the 'act of God' of English law and is assumed to exist in any case in which the non-performance or the incompleteness of the performance of an obligation could not have been avoided, even if the highest degree of diligence had been applied. Section 8 of the Civil and Commercial Code defines *force majeure* as 'any event the happening or pernicious result of which could not be prevented even though a person against whom it happened or threatened to happen were to take such appropriate care as might be expected from him in his situation and in such condition'.[23]

### *2.2.2 Contributory Default of Plaintiff*

Under English law, the plaintiff's contributory default affects the defendant's liability in the case of claims for damage done by unlawful acts. Under the rules of

[22]See in particular Sodpipan (2002, pp. 114–115).

[23]Ibid., p. 123.

the present Thai private law, the liability created by an agreement or other juristic act is affected in the same way by the contributory default of the other party as the liability for an unlawful act. Under Thai as well as under English law, the proof of the plaintiff's own default is relevant only for the purpose of showing that the defendant's default was not the 'decisive' or 'preponderant' cause of the damaging event, but while under English law the fact that the defendant's default was not the decisive cause deprives the plaintiff of his entire claim to compensation, Thai law leaves it to judicial discretion to determine whether the defendant's liability to make compensation is entirely destroyed or merely reduced by contributory default on the part of the plaintiff. In this respect, Section 223, paragraph 1, of the Civil and Commercial Code states that 'in case any fault of the injured party has contributed in causing the injury, the obligation to compensate the injured party and the extent of the compensation to be made depends upon the circumstances, especially upon how far the injury has been caused chiefly by the one or the other party'.

Contributory default also applies when the fault of the injured party consisted only in an omission to call attention of the debtor to the risk of an unusually serious loss which the debtor neither knew not ought to have known, or in an omission to avert or mitigate the injury (Section 223, paragraph 2, of the Civil and Commercial Code).

The contributory default of a person for whose default the plaintiff is liable under the rules mentioned below has the same effect as the plaintiff's own default.

### *2.2.3 Liability for the Default of Others*

The regime of liability for default of others is based on two main categories depending on whether the liability arises under a juristic act or under an unlawful act of another person. With regard to the performance of obligations arising under a juristic act, the Civil and Commercial Code states that in the case of any act done by a person's legal representative on his behalf, the principal is liable for the agent's default in the same way as he would be liable for his own default if his capacity was unrestricted. More precisely, Section 220 of the Civil and Commercial Code provides that 'a debtor is responsible for the fault of his legal representative, and of person whom he employs in performing his obligation, to the same extent as for his own fault'.

In the case of an act done by any other agent on behalf of a principal, a distinction must be drawn between acts specially delegated to independent persons and acts done in the ordinary course by assistants. As regards independent persons, the general rule is that the performance of an obligation undertaken by A may not, in the absence of express permission, be delegated by him to B. If such delegation takes place A is liable for all consequences due to the unauthorized delegation of his duty. If the debtor has authority from his creditor to delegate the performance of his obligation to another, the question as to the liability of the original

debtor for the default of the substitute employed by him depends upon the agreement between the parties or the specific legal rules applicable under the particular circumstances.

With respect to the employment of assistants, it is of course clear that many kinds of obligations cannot be carried out in detail by the promisor in person, but that the performance must be effected by employees working under his superintendence. In such cases, there is an implied authority to employ assistants, and where such implied authority exists (and also where the employment of assistants is expressly authorized) the debtor, in the absence of a special stipulation to the contrary, is answerable for any default on the part of his assistants as though it had been his own. Thus, if the principal is himself only liable for gross negligence, he is only liable for gross negligence on the part of his assistants; if the principal is answerable for *diligentia quam suis,* the assistants must show the degree of care which such principal exercises in his own affairs.[24]

If the employment of assistants is unauthorized (e.g. if the promisor has agreed to perform the promise in person, or if the work is of a nature which according to ordinary custom is not handed over to assistants), the promisor commits a wilful default by such unauthorized employment of assistants and is therefore liable for the consequences, whether attributable to the assistants' default or otherwise.

As to unlawful acts, the question as to the liability of a person for the unlawful acts of employees, agents, or others who are under his control is one which in all countries has given rise to considerable controversy. French law imposes a general responsibility on parents, schoolmasters, and employers for the acts of any infant children, pupils, apprentices, and servants who are under their custody or control. The responsibility, however, for a particular act is excluded by proof that such act could not have been prevented by the person exercising the control (Art. 1384, Code Civil). The Swiss Code of Obligations imposes a similar liability and recognizes a similar ground of exemption, with the modification that the responsibility is excused if it is proved that due diligence has been used for the purpose of preventing the damaging act. Under English law, although there is no responsibility for the acts of children, pupils, or apprentices, there is a general rule that an employer or principal is responsible for damage caused by any wilful or negligent act of an employee or agent acting within the scope of his employment. The proof that the damaging act could not have been prevented by the employer or principal is not of any avail, and to that extent the liability for the default of others goes further than in French or Swiss law.

In Thailand, the Civil and Commercial Code lays down a special regime of liability which applies to persons who are under a legal duty to supervise others due to their minority or their mental or physical condition (Section 429). This is to say that parents of minors, as well as guardians of incapacitated persons or persons of unsound mind, are jointly liable with them for all damage unlawfully inflicted upon any third party. For example, if a father forgets a loaded shotgun on the table and the son uses it, the father may be held liable with his son for the harm inflicted to a third party.

[24]On this point, see Setabutr (1980, p. 126).

The supervisor's liability for the unlawful acts committed by the person requiring supervision is not strict. To rebut this presumption, the supervisor has to show that he has exercised proper care as to the duty of supervision. Proper care is a standard of conduct which is imposed upon all individuals in the same circumstances. The purpose is to apply the standard objectively, instead of attempting to assess the degree of fault according to the individual capabilities of the parties involved. If a supervisor is held liable for failing to act according to the conduct determined by the duty of care standard, then he will be answerable for the damage caused under his supervision.

The same regime of liability applies to teachers, employers, and other persons who undertake the supervision of an incapacitated person, either permanently or temporarily (Section 430, Civil and Commercial Code). Thus, the supervisor is jointly liable with the person requiring supervision for any unlawful act committed by the latter while under his supervision, provided that it can be proved that he has not exercised proper care. If it cannot be proved that the supervisor did not comply with his supervisory duty, then he will be relieved of any liability. Classic examples include liability of classroom teachers, school administrators, and coaches for damages suffered by students engaging in sports activities, damages arising in schools when children play in a schoolyard during the break time, or injuries caused by a failure to adequately supervise a pool during hours that swimming is allowed.

The general rule that a person is liable for damage only if such damage is caused by his wilful or negligent default is varied in the direction of greater severity in the case of persons engaged in certain kinds of activities. More precisely, the Civil and Commercial Code imposes a regime of strict liability upon employers, juristic persons, innkeepers, and carriers. Pursuant to Section 425 of the Civil and Commercial Code, an employer is jointly liable with his employee for the consequences of an unlawful act committed by such an employee in the course of his employment.[25] These rules apply whether the employer is a natural person or a juristic person.[26] Conversely, an employer is not liable for damage done by an independent contractor to a third person in the course of the work unless the employer was at fault in regard to the work ordered or to his instructions or to the selection of the contractor (Section 428, Civil and Commercial Code).[27] The employer who makes compensation to a third person for an unlawful act committed by his employee is entitled to indemnity—full reimbursement—from said employee (Section 426, Civil and Commercial Code).[28]

[25]The law on the subject is complicated by the fact that there are specific modifications of the general rules in the case of particular employments and trades.

[26]The course of employment is a legal consideration of all acts committed by the employee while he is performing the usual duties of his employment. On this point, see Poonyapun (1978, p. 89).

[27]Ratification by the employer of acts committed by the contractor is equivalent to a prior command and retroactive to the date of the act done.

[28]This means, of course, that such compensation on the part of an employer has not been paid in vain, and this mimics the Roman quasi-delicts *deiectum vel effusum.* On the other hand, the law does not cover cases where the burden of vicarious liability falls on the employee himself. See Prachoom (2015, p. 403).

The liability of a juristic person for the unlawful acts of its representatives is similar to the strict liability of an employer for an employee. Specifically, a juristic person may be held liable for any damage done to other persons by its representatives or the person empowered to act on behalf of the juristic person in the exercise of their functions (Section 76, Civil and Commercial Code). In other words, the juristic person is liable for the *intra vires* wrong of its organs by a fiction of the law. The representatives or the person empowered to act on behalf of the juristic person, however, may exercise the right of recourse against any or several or all of the causers of the damage.[29]

With respect to the innkeeper's liability, the Civil and Commercial Code provides that the proprietor of an inn, hotel or other such place is liable for any loss or damage to the property which the traveller or guest lodging with him may have brought (Section 674). Specifically, an innkeeper, who in the regular course of trade gives sleeping accommodation to guests, is liable for the loss or deterioration of anything brought into his inn by a guest accommodated in the course of such trade unless the loss or deterioration was caused by the guest, by the condition of the thing itself, or by *force majeure*. The innkeeper is liable for loss or damage to the property of the guest, even caused by strangers going to and from the inn. In the case of money, negotiable instruments, or valuables not deposited for safe custody with special notice of their nature, however, the liability is limited to certain ceiling amounts under Section 675 of the Civil and Commercial Code. A notice posted in the inn repudiating the innkeeper's liability is ineffective, but an express agreement between innkeeper and guest excluding such liability is binding on the latter (Section 677, Civil and Commercial Code). As to the necessity of immediate notice of any loss suffered by the guest, Section 676 of the Civil and Commercial Code states that 'on discovery of the loss or damage to the property not expressly deposited, the guest must communicate the fact to the proprietor of the inn'. Thus, the claim to which the guest is entitled under this title lapses if the guest fails to notify the innkeeper without undue delay of the loss or damage.

As regards the liability of carriers, Section 616 of the Civil and Commercial Code states that the carrier is liable for any loss, damage, or delay in delivery of the goods entrusted to him, unless he proves that the loss, damage, or delay is caused by *force majeure* or by the fault of the sender or consignee.[30] The carrier is also liable for loss, damage, or delay caused by the fault of the other carries or persons to whom he entrusted the goods.[31]

[29]For a detailed analysis on this point, see Stasi (2016, pp. 126–127).

[30]If the goods were transported by several carriers, they are jointly liable for loss, damage, or delay.

[31]The rules as to the liability of the owner of animals or buildings for damage caused by such animals, or by the fall of such buildings, will be discussed below in Sect. 2.6.6.

### 2.2.4 Types of Delay (Mora)

Under Thai private law, an obligation must be fulfilled on time and properly. A debtor is in delay (*mora solvendi*)[32] if the promised act remains unperformed at the time fixed for its performance and after a demand on the creditor's part. The creditor's demand is not required if the time of performance is either originally, or by notice after default, fixed with reference to the calendar year (*dies interpellat pro homine*). In this regard, Section 204, paragraph 2, of the Civil and Commercial Code states that the debtor is in default without warning if a time by calendar is fixed for the performance and he does not perform at the fixed time. The same rule applies if a notice is required to precede the performance, and the time is fixed in such manner that it may be reckoned by the calendar from the time of notice.[33]

The creditor's demand is also dispensed with if judicial proceedings for the enforcement of the claim have been initiated against the debtor. The institution of judicial proceedings[34] places the debtor in *mora* and subjects him to the increased liability mentioned above. In such cases, interest runs from the date at which a claim is brought forward, but if the action is brought before the claim is due, interest runs from the date on which the claim becomes due.[35]

A debtor who is in *mora* subjects himself to an increased liability. Specifically, he must apply the highest degree of diligence, whatever degree of diligence was originally required and is liable even for accidental damage to the subject matter of the obligation. In this sense, Section 217 of the Civil and Commercial Code provides that 'a debtor is responsible for all negligence during his default. He is also responsible for impossibility of performance arising accidentally during the default unless he can prove that such damage could not have been avoided by the punctual performance of his obligation'.

A debtor who is in *mora* is liable for all damage caused by the delay. In the case of a claim for money other than a claim for interest, interest runs from the time at which the delay begins, the rate being seven and half per cent per annum (Section 224, Civil and Commercial Code). If the debtor is bound to pay compensation for the value of an object which has perished during the default, or which cannot be delivered for a reason which has arisen during the default, the creditor may also claim interest on the amount of such compensation, from the date which serves as the basis for the assessment of such compensation (Section 225, Civil

[32]This term will be used as an equivalent of the Thai *look nee pit naat*, as no convenient English expression can be found.

[33]The debtor, however, is not deemed to be in *mora* if the punctual performance of his obligation has been prevented by any circumstance for which he is not responsible (Section 205, Civil and Commercial Code).

[34]The effects of the judicial proceedings begin at the date of the service of the process by which the proceedings are instituted, or in the case of a supplemental claim brought forward at any hearing of the action, at the date of such hearing.

[35]Where a right to a periodical payment is in question, a declaration as to the right to future payments may be claimed in an action.

and Commercial Code). The same rule applies if the debtor is bound to make compensation for the diminution in value of an object which has deteriorated during the default. According to Section 216 of the Civil and Commercial Code, if by a reason of default, the performance becomes useless to the creditor, he may refuse to accept it and claim compensation for non-performance.

As opposed to the delay of the debtor, the delay of the creditor (*mora accipiendi*)[36] occurs whenever the creditor refuses to accept, without legal ground, the performance tendered by the debtor (Section 207, Civil and Commercial Code). If the performance is tendered before it is due in any case in which the debtor is not entitled to anticipate the performance, the creditor is not deemed to be in *mora.*[37]

The performance must be effected in the manner in which the creditor is entitled to claim it. A verbal tender, however, is sufficient if the creditor declares that he will not accept the performance or if the completion of the performance depends on an act of the creditor (e.g. if it is the creditor's duty to carry away the thing which he is entitled to claim). In the latter case, a request on the debtor's part asking the creditor to do the required act is deemed equivalent to a verbal tender of the performance. The request is unnecessary where the creditor's act has to be done at a time, or at the expiration of a notice, fixed by reference to the calendar (Sections 208 and 209, Civil and Commercial Code).

The creditor is not in *mora*, if at the time of the tender, or at the time fixed for the creditor's act of acceptance, the debtor in fact is unable to perform the obligation (Section 211, Civil and Commercial Code).[38] In the case of reciprocal obligations, the creditor is in *mora* if he is willing to accept the other party's performance, but fails to tender performance on his part (Section 210, Civil and Commercial Code).

As regards the effects of the *mora accipiendi,* it must be noted that whatever degree of diligence the debtor may have been bound to apply up to the time when the delay began, he ceases as from such time to be responsible for any damage not caused by his wilful default or gross negligence. In case the obligation was to deliver a generically defined thing, the risk of the performance passes to the creditor[39] from the moment of the tender of a specific thing offered in satisfaction of the obligation. The debtor is entitled to claim reimbursement of any expense incurred by the unsuccessful tender, or by the storage of the subject matter of the obligation during the continuance of *mora*.[40]

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[36]The term *mora accipiendi* is used in this treatise as the equivalent of the Thai expression *jao nee pit naat*.

[37]Where no time of performance is fixed, or where the debtor is entitled to anticipate the time of performance, a creditor who is temporarily unable to accept a tendered performance is not thereby placed into *mora* unless the debtor has given him reasonable previous notice of his intended performance.

[38]See Panthulap (1979, p. 133).

[39]Before such tender the debtor bears the risk: he has to deliver a thing answering the description, whatever may happen to the thing which may have been appropriated by him for such delivery.

[40]Following the same logic, interest on a debt bearing interest ceases as soon as *mora accipiendi* begins.

### 2.2.5 Joint Liabilities

The much discussed and somewhat obscure distinction existing in Roman law between debtors who are under a 'correal' obligation and debtors who are under a 'solidary' obligation, corresponds in a certain manner to the English distinction between 'joint debtors' and debtors who are liable 'jointly and severally'. Although in the later stages of both systems the distinction has lost in importance, according to English law, there is still the important difference, that—except in the case of a partnership liability—the liability of one of several joint debtors on his death becomes discharged *ipso facto*, while the obligation of one of several persons liable jointly and severally is binding on his estate. Under Roman law, there was also a distinction between 'correality' and 'solidarity' on the creditors' side, which, however, does not correspond with the English distinction between rights held 'jointly' and rights held by several persons as 'tenants in common'.

Thai law has not retained the distinction between correality and solidarity, either on the passive or on the active side. There is only one class of joint liabilities, while joint rights, as shown below, are divided into two classes, but the present classification has nothing in common with the classification of Roman law. The Thai Civil and Commercial Code defines joint debtors (*look nee ruam*) as persons whose liability to perform an obligation is such that each of them is bound to perform the whole obligation, while the creditor is not entitled to claim more than one performance of the obligation (Section 291). In a corresponding way, joint creditors (*jao nee ruam*) are defined as persons whose right to claim the performance of an obligation is such, that each of them is entitled to claim the whole performance, while the debtor cannot be called upon to perform his obligation more than once (Section 298, Civil and Commercial Code).

Where several persons are liable for the performance of one obligation, they may be liable jointly[41] in accordance with the definition given above, or each may be liable in respect of part of the obligation only. The question which of the two kinds of liabilities is intended is determined by Section 290 of the Civil and Commercial Code, which states that each co-debtor is only liable for an equal share unless it appears otherwise from the source of the obligation or from the law. In other words, the law establishes a general presumption of limited liability, which applies in the absence of an agreement between the parties, or of a special rule of law providing otherwise.

If several co-debtors, however, owe performance in such a way that each is obliged to effect the entire performance, but the creditor is only entitled to demand the performance once, the creditor may at his discretion demand full or part performance from each of the co-debtors (i.e. joint and several liability). This means that where the liability is a joint liability, the creditor may claim performance from

[41]The expression 'joint liability' will in the further course of this treatise be used as the equivalent of the liability arising under a *nee ruam*, which, according to the usual English terminology, would be described as a 'joint and several liability'.

each of the joint debtors wholly or in part. Until the complete performance of the obligation, all the joint debtors remain liable (Section 291, Civil and Commercial Code).

Once the performance is complete by a joint and several debtor, it is also effective for the other co-debtors. Thus, the performance by one of the joint debtors of the obligation, either according to its original tenor, or in some other manner accepted by the creditor, or by set-off, or by deposit with a public authority, operates in favour of the other joint debtors.

It must also be noted that a release of the debt, agreed upon between the creditor and one of the joint debtors, releases the other joint debtors only in so far as it can be shown that this was the intention of the parties to the agreement. The creditor's *mora accipiendi* upon the tender of the performance by one of the joint debtors operates in favour of the other joint debtors.

Other facts exonerating one of the debtors, or affecting his liability, do not exonerate the other joint debtors, or affect their liability. It follows that impossibility of performance, prescription, or its interruption, or suspension, or the fact that one of the joint debtors acquires the creditor's rights, whatever its effect on the obligation of the debtor whom it concerns, does not alter the obligations of the other joint debtors. For example, if A takes an assignment of a debt for the payment of which A and B are jointly liable, B cannot allege that the debt has become extinguished by merger. To take another example, suppose that the creditor takes proceedings against A for the enforcement of a debt for the payment of which A and B are jointly liable. Subsequently, the creditor takes proceedings against B, after the period of prescription has run. In this case, the creditor cannot allege that the prescription in favour of B was interrupted by the proceedings against A.

After the death of one of the joint debtors, the question whether his estate remains liable is determined by the same rules as if the liability had been exclusively his own.[42] For instance, if two artists enter into a joint agreement to produce a painting or a work of sculpture, the liability is a joint one. In the event of the death of one of the artists before the time fixed for performance, however, his estate is not liable in damages for the breach of the obligation.

Joint debtors as between themselves, in the absence of a contrary agreement, are liable in equal shares (Section 296, Civil and Commercial Code).[43] If the contribution of one of the joint debtors remains unsatisfied, the deficiency must be borne by the others. In so far as a joint debtor, being entitled to contribution from the other joint debtors, satisfies the creditor, the creditor's right is *ipso facto* transferred to him, but the right so acquired must not be exercised to the detriment of

[42]As a general rule an obligation is not discharged by the debtor's death, but when the obligation is of a strictly personal nature its performance, on the debtor's death, is rendered impossible by an event for which he is not responsible; his estate is therefore discharged from liability.

[43]This rule also applies as between several wrongdoer. Under English law, one out of several wrongdoers has no right of contribution against the others, if his participation in the unlawful act was wilful. On this point, see Panthulap (1979, p. 141).

the original creditor. This means, for instance, that the subrogated creditor, who has satisfied part of the debt, cannot, as regards the remaining part of the debt, claim any rights of priority to the prejudice of the original creditor.

### *2.2.6 Joint Rights*

Where several persons are entitled to the benefit of a right, they are not deemed joint creditors (*jao nee ruam*) unless otherwise provided by law or agreed by the parties (Section 290, Civil and Commercial Code). Section 298, Civil and Commercial Code, however, states that if more than one person is entitled to demand performance in such a way that each may demand the entire performance but the debtor is only obliged to effect the performance once (i.e. joint and several creditors), the debtor may at his discretion effect performance to each of the creditors.[44]

Where the creditors are joint creditors, the debtor, as mentioned above, can discharge his obligation by a performance for the exclusive benefit of one of them. *Mora accipiendi* on the part of one out of several joint creditors operates against all, and if the debtor acquires the right of one of the joint creditors, the debt is extinguished by merger. In all other respects, the rules relating to joint liabilities are applied, *mutatis mutandis.*

Joint creditors, as between themselves, are, in the absence of any special provision to the contrary, entitled in equal shares (Section 300, Civil and Commercial Code). Therefore, if one of them obtains satisfaction, each of the others is entitled to claim from him such part of the value of the benefit of the performance as corresponds to his share.[45]

## 2.3 Performance of Obligations

### *2.3.1 Mode of Performance*

Performance of an obligation means the fulfilment of its contents. It occurs when the debtor faithfully and appropriately does something or abstains from doing something. Generally speaking, the debtor is bound to do or forbear from doing some particular act with the prudence and care of a reasonable person.[46] Thus, the subject of the performance of the obligation is the exact execution of the prestation

[44]It must be noted that persons who as joint owners of property are entitled to assert claims arising by virtue of their common ownership, are not in the position of joint creditors.

[45]For a detailed analysis on this point, see Setabutr (2006, p. 71).

[46]See Maneesawat (1993, p. 87).

stipulated in the contract or by law with regard to the proper place, the proper time, the proper kind, the proper quality, and the proper value.

As a general rule, the debtor is under an obligation to effect the promised performance in such manner as good faith between the parties requires, due regard being had to ordinary usage. The mode of performance depends on the nature of the particular obligation. If the obligation arises under a juristic act, the mode of performance is in the first instance regulated by the intention of the parties as shown by their declarations of intention; if the obligation arises under a rule of law, applicable under the particular circumstances of the case, the mode of performance depends in the first instance on such rule of law.[47]

The rules governing performance of obligations are provided for by the Civil and Commercial Code under Sections 194–202 and 314–339. The provisions in these sections deal with, among other things, place, time, and mode of performance.[48] The special rules concerning the place and time of performance apply in the absence of any contractual stipulation or of any special circumstances (such as the nature of the obligatory relation between the parties or any specific rule of law applicable thereto) from which the place and time of performance can be inferred. In the case of an agreement by which several obligations are undertaken, each obligation may, of course, have a separate place and time of performance.

The ascertainment of the place of performance is frequently of importance for the purpose of determining the choice of law, the interpretation of a particular expression, or the jurisdiction of a particular court. Under Thai private law, performance must be made at the place in which the debtor is domiciled unless another place of performance arises from the nature of the obligation or is designated by the parties. However, if a specific thing is to be delivered, the debtor is generally not compelled to bring it to the domicile of the creditor. Pursuant to Section 324 of the Civil and Commercial Code, if a specific thing is to be delivered which at the time of making the contract was located elsewhere, the delivery is to be made at the place where the thing was at the time when the obligation arose. This means that the debtor is not as a rule bound to find the creditor. On the contrary, the onus is on the creditor to find the debtor for performance of the obligation.[49]

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[47]As stated in the section dealing with the interpretation of juristic acts, the general rules there mentioned are supplemented by the special rules stated below as to the manner in which obligatory duties must be carried out, in the absence of any express or implied agreement to the contrary. These rules, as far as the nature of the case admits in each particular instance, are applied to obligations imposed by law (e.g., under the rules of family law), as well as to those created by act of the parties concerned.

[48]On this point, see Stasi (2016, p. 48).

[49]The place of performance must be distinguished from the place of destination. Thus, if a seller undertakes to deliver goods by forwarding them from one place to another, the place from which they are to be forwarded is, as a general rule, the place of performance for the seller's obligation, whereas the place to which they are forwarded is the place of destination. The circumstance that the debtor has undertaken or is under a legal duty to pay the carriage does not in itself justify the conclusion that the place of destination is the place of performance but such an intention may be gathered from other circumstances. In the case of a sale of goods, the place of destination is, as a

With regard to time, the basic rule in Thai private law is that the time may be agreed by the parties. When no time for performance is expressly agreed or where it is not implied from the circumstances, the performance of the obligation may be offered or claimed as soon as the obligation is incurred. If the debtor does not fulfil the performance immediately upon the creditor's demand, he is in default. Specifically, Section 203, paragraph 1, of the Civil and Commercial Code states that if a time for performance is neither fixed nor to be inferred from the circumstances, the creditor is entitled to demand the performance immediately, and the debtor has to perform his part immediately. However, the debtor should be granted a reasonable period of time to carry out the performance of his obligation.

If performance is to be rendered at a fixed time or upon the happening of an uncertain event, the creditor cannot claim performance before that time or the event happens, but the debtor may offer performance before the stipulated time (Section 203, paragraph 2, of the Civil and Commercial Code).[50] It follows that when parties prescribe a specific day by which performance is due, the debtor is not in default until the day for performance pursuant to the underlying obligation has expired. If a time by calendar is fixed for the performance, the debtor is in default when he does not fulfil his obligation within the specified time limit. In this case, the creditor does not need to put the debtor in default by sending a formal notice.[51]

Where the mode of performance is to be determined by one of the contracting parties or by a third party, such determination must, in the absence of an express stipulation allowing unfettered discretion, be made in an equitable manner. In particular, if the mode of performance is made by one of the parties it must be communicated to the other party; if the mode of performance is made by a third party, it must be communicated to one of the parties.[52] Where an equitable determination is not made within a reasonable time the aggrieved party may refer the matter to the determination of the competent court. However, in cases where it is expressly

Footnote 49 (continued)

general rule, the place of performance for the buyer's obligation to receive the goods, while the place of performance for the seller's duty to deliver under the general rule is the seller's place of business; in the case of a money debt, the creditor's place of business is presumed to be the place of destination if the debt arose in the course of his business, and the place of his domicile is the place of destination in any other case. A debtor who owes a money debt is presumed to have undertaken the cost and risk of transmission, unless such cost and risk are increased by the fact that the creditor after the date of the creation of the obligation has removed his domicile or his place of business, in which event the increase of the cost and the whole risk has to be borne by the creditor.

[50]Where a time is fixed if the debt does not bear interest, a debtor who repays it before the stipulated time is not entitled to claim any abatement. In the case of interest-bearing debts, there is, as a general rule, an expressed or implied agreement not to repay before a stipulated time; in the absence of such an agreement interest is payable up to the date of payment only.

[51]It is noteworthy that under Section 206 of the Civil and Commercial Code, in obligations arising from an unlawful act, the debtor is in default from the time when he committed it. On this point, see Stasi (2016, p. 52).

[52]The determination made by a third party may be impugned by one of the parties to the agreement on the ground of mistake, fraudulent misrepresentation, or unlawful threats.

stipulated that a third party is to determine the mode of performance in his unfettered discretion, and where such third party is unable or unwilling to determine the matter, or unduly delays such determination, the agreement becomes inoperative.

With regard to an obligation where the quality of the things which must be delivered is not specifically defined and it cannot be determined by the nature of the juristic act or the intention of the parties, the debtor must deliver a thing of medium quality (Section 195, Civil and Commercial Code). As soon as the debtor has done everything required on his part for performing his obligation in this manner, his obligation is deemed to refer to the thing appropriated to the agreement. The appropriation of the thing to the performance of the obligation converts the generic into a specific obligation.

The Civil and Commercial Code also states that 'where the payment is stipulated for in a foreign currency, the payment may be made in Thai currency' (Section 196, Civil and Commercial Code). The commutation is made according to the rate of exchange current at the time and place of payment.[53] With respect to the legal rate of interest, Section 224, paragraph 1, of the Code stipulates that a money debt bears interest during default seven and half per cent per annum. If the creditor can demand higher interest on any other lawful ground, this shall continue to be paid. This means that if parties agree on the payment of interest in excess of seven and half per cent per annum, such higher interest may be claimed for the period of the default. In the absence of an express agreement between the parties, interest cannot be applied except by the operation of the law as damage. Where interest is agreed to be paid but no rate is fixed, the current rate of interest is applied. In this regard, Section 7 of the Civil and Commercial Code states that 'Whenever interest is to be paid, and the rate is not fixed by a juristic act or by an express provision in the law, it shall be seven and a half per cent per year'.[54]

The duty to compensate for outlay in money or in kind, whether arising by virtue of a juristic act or under any rules of law, includes a duty to pay interest on the money spent, or on the value of the material used, as from the date of the outlay. If a person entitled to the reimbursement of outlay had the enjoyment of the fruits or profits of the thing for which such outlay was incurred, the duty to pay interest only arises in so far as consideration was given for such fruits or profits. In the case that the duty to compensate for outlay is limited to the amount by which the value of the thing for which the outlay was incurred has been increased, interest on outlay is payable only in so far as the aggregate amount of principal and interest does not exceed that amount.[55]

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[53]Section 197 of the Civil and Commercial Code adds that 'If a money debt is payable in a specific kind of money which is no longer current at the time of payment, the payment shall be as if the kind of money were not specified'.

[54]On this point, see Stasi (2016, p. 51). See also Pramod (1965, p. 178).

[55]If a person, entitled to claim compensation for outlay made for a specific purpose, has incurred an obligation in order to effect such purpose, he is entitled to be released from the obligation or, in the case of an obligation the performance of which is not yet due, to receive security.

### *2.3.2 Acceptance of Performance*

The acceptance of a performance made in discharge of the debtor's obligation has the effect of shifting the burden of proof. If the creditor after such acceptance alleges that the debtor's performance was not the performance promised by him, or that it was incomplete, it is for him to prove these allegations (Section 320, Civil and Commercial Code). In some cases, the acceptance may preclude all further questions as to the completeness of the discharge, but this fact must under the general rules be proved by the debtor. Special rules, however, are applicable in the case of any bilateral sale. In the case of sale, the buyer must, so far as practicable, examine the goods immediately on delivery. Defects noticeable on such examination must be communicated to the seller forthwith, defects not so noticeable, immediately on discovery. Failure to comply with these requirements, in the absence of intentional concealment on the seller's part, deprives the buyer of all claims on the ground of defective performance unless the goods are so obviously different from the purchased goods, that the buyer cannot be deemed to have accepted them in performance of the agreement.

As a general rule, the Civil and Commercial Code states that by virtue of an obligation the creditor is entitled to claim performance from the debtor (Section 194). Full performance of an obligation extinguishes it. It may be rendered directly by the debtor or by his agent generally or specially authorized for that purpose. Indeed, performance may be rendered by a third person, even against the knowledge of the debtor, with the result that the obligation will be extinguished, unless the performance is of such a personal nature that the debtor has an interest in performance only by the debtor in person. Therefore, performance on the part of a third party must be accepted, unless the promised act is by its nature required to be done by the debtor in person or the parties concerned have declared a contrary intention (Section 314, Civil and Commercial Code). A creditor, who refuses the performance offered by a third party in a case where no such objection has been raised by the debtor, renders himself liable to the consequences of *mora accipiendi*.

The Civil and Commercial Code further provides that an obligation is not deemed to be discharged unless the performance is made for the creditor's benefit. However, if it is made for the benefit of a third party, with the creditor's assent, the debtor is discharged (Section 315). In other words, performance may be made to the creditor, to his representative, or to other persons who are entitled to receive payment. A person is presumed to be authorized to receive an object if he produces a receipt for such object signed by the person who is entitled to receive it. Correspondingly, a third party entitled to any right over an object threatened with seizure by a judgment creditor of the debtor may avert such seizure by satisfying the judgment debt on the debtor's behalf, or by giving security, or by means of

set-off. In so far as the creditor in such a case receives satisfaction for his claim, the third party is entitled to be subrogated to his rights as against the debtor.[56]

It is necessary to distinguish between the performances of obligations which must be executed in instalments from the performance of obligations which must be executed at one time. In fact, the creditor has the right to refuse to accept partial performance by the debtor if full performance is due.[57] In this regard, Section 320 of the Civil and Commercial Code provides that the creditor cannot be compelled to receive part performance or any other performance than that which is due to him. However, if the creditor accepts, part performance extinguishes the corresponding proportion of the debt.[58]

Questions in regard to the appropriation of payments arise when a debtor owes several distinct debts to the same creditor and makes payment which is not sufficient to cover the whole amount. The rules relating to the appropriation of payment are stated under Section 328 of the Civil and Commercial Code and can be briefly summarized.[59] Specifically, when several obligations of the same kind are outstanding, and where a performance on the debtor's part does not satisfy all such outstanding obligations, the debtor may determine in what order the obligations are to be deemed satisfied. In the absence of any such determination, priority must be given to claims which are due over those which are not due. Among claims which are due, the following elements determine the priority in the order in which they are mentioned: (1) the security given for the performance of the obligation (a less well-secured obligation is satisfied before a better secured obligation); (2) the nature of the obligation (a more onerous obligation is satisfied before a less onerous obligation); (3) the date of the creation of the obligation (an obligation of older date is satisfied before an obligation of more recent date). Where none of the indicated elements make a distinction possible, the outstanding obligations are deemed to be satisfied *pro rata* of their respective values.

An important matter to consider in relation to payment is the subject of interest if payment is not made by the due date. Section 329 of the Civil and Commercial Code states that if the debtor, besides the principal performance, has to pay interest and costs, the value of an act of performance sufficient to discharge the whole debt is applied first to the claim for costs, then to the claim for interest, and lastly to the principal claim. If the debtor desires another mode of appropriation, the creditor may decline the performance.

The person making performance is entitled to a receipt from the person who receives performance, and if the performance is wholly performed, he is entitled to have the document embodying the obligation surrendered to him or cancelled (Section 326, Civil and Commercial Code). If such document is declared to be lost, he is entitled to have the extinction of the obligation mentioned in the receipt

[56]Under English law, a third party, who makes a payment on behalf of a debtor without his authority, does not acquire any rights against the debtor, nor does the creditor incur any liability by refusing the tender of a performance on the part of a person other than the original debtor.

[57]Maneesawat (1993, p. 29).

[58]English law has the same general rule on the subject as Thai law.

[59]On this point, see Stasi (2016, p. 50).

or in a separate document.[60] In case the obligation is partly performed or the document gives the creditor any other right, the debtor is only entitled to a receipt and to have the performance noted in the document.

### *2.3.3 Impossibility of Performance*

Under English law, an agreement is void if its performance is physically or legally impossible under any conceivable circumstances. If the impossibility of the performance is due to any special circumstances affecting the particular case, the agreement is not void on the ground of impossibility of performance. Under Thai private law, impossibility of performance may either exist *ab initio* or be caused by an event occurring subsequently to the formation of the agreement. When impossibility of performance exists *ab initio*, the agreement is void, but a party who was ignorant of the impossibility is within certain limits entitled to compensation from the other party, if such other party knew, or ought to have known, of the impossibility. According to Section 150 of the Civil and Commercial Code, in fact, when an agreement contains an obligation to perform an impossible act, it is void from its inception.[61]

In the case, however, that the agreement is made with the implied or expressed condition that it shall become operative on the removal of the impossibility, then it is considered to be binding if the impossibility can be removed. By the same token, an agreement made subject to a condition precedent, or to a stipulation postponing its operation to a future date, is valid, if the impossibility is removed before the fulfilment of the condition or before the date fixed by the stipulation.

Impossibility caused by an event subsequent to the creation of the obligation requires more detailed discussion, being of much greater practical importance than impossibility existing *ab initio*. As mentioned above, a debtor as a general rule becomes released from his obligation in so far as its performance becomes impossible by reason of any circumstance or event for which he is not responsible. In the absence of a contractual stipulation, or a special rule of law providing otherwise for the particular case, he is only responsible for circumstances or events due to his wilful default or negligence. In case of dispute, it is the debtor's duty to prove that the circumstance or event, by which the performance of the obligation has been rendered impossible, was one for which he was not responsible.[62]

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[60] If the creditor is unable to return any such document the debtor is entitled to a publicly certified acknowledgement of the discharge of his obligation.

[61] See Panthulap (1979, p. 208).

[62] It must be pointed out that where the debtor has undertaken to deliver a generically defined thing, his inability to deliver such thing, though not due to any default on his part, is not a ground of excuse, so long as the delivery of a thing belonging to the genus is possible. The most obvious example of the application of this rule occurs where a debtor undertakes to pay money or to deliver fungibles, and is unable to do so because he does not possess the necessary funds. The fact that the debtor has appropriated a specific thing to the performance of the obligation, and that such thing was subsequently destroyed without any default on his part, is not of any consequence, unless it can be shown that the creditor had agreed to accept such appropriations.

In so far as the performance of an obligation becomes impossible by reason of a circumstance for which the debtor is responsible, the creditor is entitled to compensation for the damage suffered through the non-performance of the obligation. In particular, the Civil and Commercial Code states that when the performance becomes impossible in consequence of a circumstance for which the debtor is responsible, the creditor has the right to rescind the contract (Section 389) and the debtor shall compensate the creditor for any damage arising from the non-performance (Section 218, paragraph 1).[63]

If, owing to any circumstance or event for which the debtor is responsible, the performance of his obligation becomes partially impossible, the creditor may decline to accept partial performance, and claim compensation for the non-performance of the whole agreement wherever partial performance is useless to him.[64] When the creditor cannot prove that partial performance is useless to him, he must accept it, but has a right of compensation in respect of the incompleteness of the performance. In this regard, Section 218, paragraph 2, of the Civil and Commercial Code states that 'in case of partial impossibility the creditor may, by declining the still possible part of the performance, demand compensation for non-performance of the entire obligation, if the still possible part of performance is useless to him'. An example will clarify this point. Suppose A agrees to buy from B a pair of horses. One of the horses is killed by an event for which A is responsible. If B can prove that he valued the two horses only as a pair, and that the remaining horse is of no use to him singly, he can refuse to take it back and claim damages for the loss of the pair. If this cannot be proved, he must take the remaining horse and has a claim for damages in respect of the loss of the horse killed by A's default.

Also, it must be noted that if the circumstance or event by which the debtor's performance has been rendered impossible is one entitling him to partial or total indemnity from another (e.g. from an insurance company, which has taken the risk of such circumstance or event, or from a wrongdoer who is liable for the damage caused thereby), the creditor is entitled, in satisfaction *pro tanto* of his claim for compensation, to an assignment of the claim for indemnity, or to the delivery or payment of any object or sum of money received by the debtor in respect of such claim. In this respect, Section 228 of the Civil and Commercial Code provides that in case the creditor has a claim for compensation on account of non-performance, 'the compensation to be made to him is diminished by the value of the substitute received or of the claim for compensation'.

### *2.3.4 Performance of Reciprocal Agreements*

In the case of a reciprocal agreement, there are three main possibilities. It may be intended that each party shall be bound independently of the question whether the

[63]Ibid., p. 215.

[64]The creditor's and debtor's mutual rights and duties are in such a case governed by the same rules as apply in the case of the rescission of an agreement.

other party performs his promise or otherwise; or that one party shall perform his part of the agreement before he has any claim for performance by the other; or that both parties shall be contemporaneously willing and ready to perform their promises.[65]

Where, in the case of a reciprocal agreement, there is no express or implied stipulation to the contrary, each party is entitled to refuse performance, unless the other party is ready and willing to perform the whole of his promise at the same time. Specifically, Section 210 of the Civil and Commercial Code states that 'if the debtor is bound to perform his part only upon counter-performance by the creditor, the creditor is in default if, though prepared to accept the performance tendered, he does not offer the required counter-performance'. This right of refusal is not affected by the counter-promise being made up of several distinct promises by different persons. Let us consider an example to illustrate the concept. Suppose A makes a contract with B and C for the purchase of a quantity of fungibles, it being agreed that B and C shall each be liable to deliver one half of the purchased quantity, and that each is to receive half of the purchase price. B then tenders his half. In this case, A is not required to pay B's share of the purchase price, until C is ready and willing to deliver the remaining half.

A deviation from the general rule is authorized where the counter-promise has been partly performed, and where—owing to the fact that the outstanding part of the performance is of trifling importance, or to some other special circumstances—the refusal of the counter-performance would be a breach of good faith. Following the same logic, the Civil and Commercial Code provides that in the case that performance on the part of A must precede the performance on the part of B, A may nevertheless claim contemporaneous performance, if B's financial position has become seriously weakened after the formation of the agreement, and if the performance of his promise has thereby been rendered insecure.[66]

Where, in the case of a reciprocal agreement between A and B, the impossibility of the performance of A's promise is caused by an event subsequent to the formation of the agreement,[67] such an event may be (1) an event for which neither A nor B is responsible; or (2) an event for which B is responsible; or (3) an event for which A is responsible. To illustrate the first case, suppose that A makes a contract for the sale of jewellery to B. If the jewellery, before the completion of the sale and without any default on A's part, is accidentally destroyed, the performance becomes impossible. As an example of the second case, assume that A undertakes

[65]Under English law, the last-mentioned intention is presumed in the case of an agreement for the sale of land or of goods. In the case of other kinds of agreements, no legal presumption exists, and the intention of the parties must be ascertained in accordance with the ordinary rules of liability.

[66]This provision may cause great hardship, as it enables unscrupulous persons to repudiate disadvantageous transactions; no doubt the repudiating party must prove his case, but the other party will frequently shrink from the public investigation of his financial position.

[67]Where the performance of the promise of one of the parties is impossible *ab initio* the agreement is void from its inception.

to make a dress for B, for delivery on a given date (time being of the essence of the agreement), the terms being that B is to furnish the material, while A is to find the accessories and charge a lump sum for the whole. If B does not furnish the material at the proper time, the completion of the dress on the agreed date becomes impossible. As a simple illustration of the third case, suppose that A makes a contract for the sale of jewellery to B and the jewellery, before the completion of the sale is accidentally destroyed due to A's negligence.

The consequences as to A's rights under the agreement depend on the type of impossibility. In the first case, A has no right to the counter-performance if the performance is totally impossible; if the performance is partly impossible, the counter-performance is reduced *pro tanto* (Section 370, paragraph 1, Civil and Commercial Code). If B avails himself of the rule mentioned above and obtains the assignment of A's right of indemnity against a third party, A has a claim to the counter-performance, but subject to reduction in so far as such counter-performance would be of greater value than the right of indemnity (Section 370, paragraph 2, Civil and Commercial Code). Thus, if in the case referred above under the first example, A has insured the jewellery, and the insurance money exceeds the purchase price, B is entitled to the whole of the insurance money and must pay the whole purchase price; if the insurance money is less than the purchase price, then the purchase money is reduced proportionately. In the case that B has performed his counter-promise to a larger extent than he is required to do under the rules stated above, he is entitled to recover the excess value of his performance under the rules as to unjustified benefits.

In second case, A has a right to the counter-performance, but such counter-performance is reduced in so far as A in consequence of the non-performance of his promise saves any outlay, or uses the time which he would have applied to the performance of his promise, in some other profitable occupation[68] (Section 372, paragraph 1, Civil and Commercial Code). Therefore, in the case referred above under the second example, A is entitled to the agreed lump sum, but he must allow a deduction in respect of any saving of outlay for accessories which he would have incurred if he had made the dress, and for any remuneration which he receives, or by the application of proper diligence would have received, if he had employed the time intended for the making of the dress in some other work.

B is deemed responsible for the circumstance preventing the performance of A's promise, whatever his original liability may have been, if he is in *mora accipiendi* (Section 372, paragraph 2, Civil and Commercial Code). Suppose, for instance, A has agreed to warehouse B's furniture at a specified rent and for a specified period, and takes responsibility for the risk of fire; B refuses to take possession after the expiration of the period, and the furniture is subsequently destroyed by fire; B must pay the rent and has no right to compensation from A.

In the third case, B may, at his option, exercise one of the following alternative rights: he may claim compensation for non-performance, he may rescind the

[68]Any income which he intentionally neglects to earn is, for this purpose, treated like income earned by him.

agreement, or he may exercise the rights which he would be able to exercise under the first case. If the performance is partially impossible, B, if able to prove that partial performance will be useless to him, has the same rights as in the case of total impossibility; if he is unable to prove the uselessness of partial performance, he must accept the partial performance, his own liability for counter-performance being rendered proportionately less.[69]

In addition, Thai private law establishes special rules which are to be applied to the *mora solvendi* in the case of reciprocal agreements depending on whether time is of the essence of the agreement or not. Where time is not of the essence of a reciprocal agreement and one of the parties is in *mora solvendi*, the other party's only remedy, as a general rule, is to claim performance and damages in respect of the delay, unless he can prove that the belated performance would be useless to him, in which event he may either claim compensation for non-performance or rescission.

Time may be made of the essence of the agreement by a notice addressed to the party[70] who is in *mora solvendi* requiring him to perform within a specified reasonable period, and stating that after the lapse of the period the performance will no longer be accepted. In the event that such notice is not complied with, the party by whom it was given may claim compensation for non-performance, or rescission, but his right to claim performance can no longer be exercised. If, in any such case, the agreement is partly performed before the lapse of the period, the party by whom the notice was given has the same remedies as he would have had in the case of partial impossibility of performance brought about by the default of the other party (Section 388, Civil and Commercial Code).

Apart from the cases in which time is made of the essence by notice in the manner stated above, time, in the absence of any indication to the contrary, is deemed to be of the essence of a reciprocal agreement if it is stipulated that the promise of one of the parties is to be performed at a specific time, or within a strictly defined period (Section 388, Civil and Commercial Code). The mere mention of a time or period, at which, or within which, the promise must be performed, is not sufficient for this purpose; the stipulation in question must be so essentially an integral part of the transaction, that the performance or breach of the agreement on that point causes the transaction to stand or fall, and that, therefore, a performance after the agreed point of time is not to be deemed a performance of the agreement.

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[69]A party to a reciprocal agreement who has obtained judgment directing the other party to perform his promise may send a notice to such other party requiring him to perform within a specified period, and declaring that after the lapse of the period performance will no longer be accepted. If the notice is not complied with the party by whom it was given has the remedies open to B in the event mentioned in the text (Section 371, Civil and Commercial Code).

[70]In such a case, two notices are required as a general rule, and in particular the notice by which the debtor is placed in *mora solvendi*, and the notice declining performance after the lapse of a specified period. The second notice is not required in a case in which the debtor has expressly refused to perform his promise.

If one of the parties to such a contract does not perform his obligation punctually, the other party may rescind the agreement.

## 2.4 Termination of Obligations

### *2.4.1 Performance in Lieu of Promised Performance*

Under Section 321, Section 1, of the Civil and Commercial Code, an obligation is duly discharged if a creditor in lieu of the promised performance accepts a different performance (e.g. if a lessor entitled to the return of the leased object in a state of good repair agrees to accept it in its actual state with compensation in money for the damage).

The performance accepted in lieu of the promised performance may consist in the substitution of a new obligation for the obligation which has to be discharged (i.e. novation), but the mere fact that a debtor undertakes a new obligation is not accepted as proof of an intention on the part of the parties to consider the old obligation as discharged. In this regard, Section 321, Section 2, of the Civil and Commercial Code states that 'if the debtor assumes a new obligation to the creditor for the purpose of satisfying the latter, it is not to be assumed, in case of doubt, that he is assuming the obligation in lieu of performance of contract'. For example, suppose a promissory note is given by way of payment for a claim for sold goods, the claim for the sold goods, in the absence of an express agreement to the contrary, is not extinguished by the receipt of the promissory note.

Where the undertaking of a new obligation by the debtor does not operate as a discharge of the former obligation, such new obligation is said to be undertaken on account of performance, but where the creditor accepts the substituted obligation in lieu of the promised act, the substituted obligation is said to be accepted *gratam taen chamra nee* (in lieu of performance).

Pursuant to Section 322 of the Civil and Commercial Code, if a thing, a claim against a third party, or another right is given in lieu of performance of a contract, the debtor must provide warranty for defects or eviction in the same manner as a seller. This means that where the creditor accepts any right or thing in lieu of the promised performance, the debtor is under the same duty as to warranty of title and quality as a seller.

### *2.4.2 Release*

Under English law, the release (or waiver) by a creditor of his right to the performance of a contract is invalid, unless it is made for valuable consideration or in a special form. Thai law, on the other hand, allows an obligation to be discharged by

an informal and gratuitous agreement between the creditor and debtor.[71] Unless there is a specific agreement to the contrary, a release is presumed to be an act of liberality by the creditor who, without receiving any price or equivalent, renounces his claim.

It is unnecessary to state the reason which induces the creditor to waive his claim. However, the Civil and Commercial Code provides that if the obligation has been evidenced by writing, the release must also be in writing or the document embodying the obligation be surrendered to the debtor or cancelled (Section 340, paragraph 2). This means that if an instrument of debt is returned to the debtor, the debt is presumed to be discharged.[72] In addition, if it can be shown that the agreement was made without any legal ground (*causa*), or that the object of the transaction was not attained, the party who has waived his right may claim restitution on the ground of 'unjustified benefits'. The fact that the motive of the transaction was an intention on the creditor's part to make a gift to the debtor is sufficient to exclude the operation of the rule as to unjustified benefits, but it subjects the transaction to the rules as to gifts.

A mutual release made with the object of putting an end to a dispute, or to a state of uncertainty, is called a compromise (*bpranee bpranom yom kwaam*). Such a compromise is inoperative if it was made under a mistaken assumption as to the facts and if, but for such mistaken assumption, there would have been no dispute or uncertainty.

### *2.4.3 Deposit*

Under English law, a debtor can under certain specified circumstances discharge his obligation by deposit in court but there is no general rule on the subject, and a person who is liable to perform an obligation for the benefit of a person under disability or of uncertain address is sometimes placed at great disadvantage. The Thai Civil and Commercial Code deals with this difficulty in a very comprehensive manner by establishing general principles. According to Section 331 of the Civil and Commercial Code, if the creditor refuses or is unable to accept performance, the person performing may be discharged from the obligation by depositing for the creditor's benefit the thing forming the subject of the obligation at the expense of the creditor. More precisely, a person who is under an obligation to pay or deliver any money, negotiable instrument, valuable, or other similar object may deposit such object with the deposit office. However, if there are no special provisions by law or regulations as to the deposit offices, the debtor has the right, with the approval of the court, to designate a deposit office and appoint a custodian of the thing deposited (Section 333, paragraph 2, Civil and Commercial Code). The deposit is not effective

[71] An agreement by which the creditor acknowledges that there is no obligatory relation between him and his debtor has the same effect.

[72] On this point, see Pramod (1965, p. 220).

unless the object intended to be deposited actually comes into the possession of the public authority to whom it is intended to be delivered, but, in the case of transmission by post, the deposit, if it becomes effective, operates as from the time of dispatch. Such deposit, validly made, is equivalent to payment and the thing deposited remains at the risk of the creditor.[73]

According to Section 331 of the Civil and Commercial Code, if the creditor refuses or is unable to accept performance, the person performing may be discharged from the obligation by depositing for the creditor's benefit the thing forming the subject of the obligation. In other words, deposit may be effected if the creditor is in *mora accipiendi* or if the debtor, by reason of any personal disability of the creditor, is unable to perform his obligation (e.g. if the creditor is a minor and has at the time no legal representative). The same rule applies if the debtor is unable to perform his obligation with entire safety because through no fault of his own he is uncertain as to the creditor's identity (e.g. if the original creditor is dead, and the debtor, notwithstanding the application of proper diligence, has been unable to ascertain what persons represent his estate).

In the case that debtor is under an obligation to deliver a movable thing, not included among the objects which may be deposited with a public authority, he may, if the creditor is in *mora accipiendi*, sell such movable thing in the manner prescribed for that purpose, and deposit the proceeds of sale with the competent public authority. If the debtor cannot safely perform his obligation on account of any personal disability of the creditor, or of any doubt as to his identity, this right of sale may be exercised only in so far as the thing, which the debtor has to deliver, is of a perishable nature, or in so far as the expense of keeping it would be unreasonably great. In this regard, Section 336 of the Civil and Commercial Code states that 'if the thing forming the subject of performance is not suitable for deposit, or if in regard to the thing there is an apprehension that it may perish or be destroyed or damaged, the person performing may, with the permission of the court, sell it at auction and deposit the proceeds'. The same applies, if the keeping of the thing would be unreasonably expensive.

If the debtor is bound to perform only after the counter-performance has been effected by the creditor, he may make the right of the creditor to receive the thing deposited dependent upon counter-performance by the creditor (Section 332, Civil and Commercial Code). This is to say that where the debtor is not required to perform his obligation except after performance of some act on the creditor's part, the debtor may, on effecting the deposit, stipulate, that the creditor is not to be entitled to receive the deposited object, unless he can produce evidence of the performance of his own obligation.

As regards the effect of deposit, the Civil and Commercial Code states that 'the deposited object may be withdrawn by the debtor at any time before the deposit

[73]The fact that the rule as to the place of deposit or as to notice is disregarded does not deprive the deposit of its legal effect, but the debtor is liable for any damage which the creditor may suffer as a result of such disregard.

has become final' (Section 334, Civil and Commercial Code).[74] The deposit becomes final if the debtor waives his right of withdrawal, the creditor accepts the deposit in full discharge of his claim, or a final judgment in an action between the creditor and the debtor declares the deposit to be in order.[75] While the right of withdrawal subsists, the claim is undischarged, but the debtor can meet any demand on the creditor's part by reference to the deposit.[76] If the debtor exercises the right of withdrawal the deposit is without effect, and the costs of the deposit (which would otherwise have to be borne by the creditor) must be discharged by the debtor. As soon as the deposit has become final, the debtor is discharged to the same extent as if he had delivered the deposited object to the creditor at the time when the deposit was made (Sections 334 and 338, Civil and Commercial Code).[77]

The creditor's right to the payment of the deposited amount, or to the delivery of the deposited object, is barred after the lapse of ten years from the date at which notice of the deposit was received by him, unless payment or delivery is demanded before the lapse of the period. After the right of the creditor is extinguished, the debtor is entitled to withdraw the object notwithstanding a previous release of his right of withdrawal. In other words, as soon as the creditor's right is barred the debtor may withdraw the deposited object, even if he has waived the right of withdrawal (Section 339, Civil and Commercial Code).

### *2.4.4 Set-off*

Under English law, the right of set-off (or compensation) only arises in the course of an action: before action brought a debt is not extinguished *pro tanto* by reason of the fact that the debtor acquires a claim against the creditor. Thai law, on the other hand, recognizes an independent right of set-off (*hak glop lop nee*).

Set-off operates as a means of extinguishing obligations and takes place when both parties are creditors and debtors to each other. A claim may be set-off against another of the same nature (e.g. a money claim may be set-off against a money claim, a claim for delivery of stocks or debentures of a certain class, may be set-off against a claim for stocks or debentures of the same class). In this regard,

[74]The right of withdrawal cannot be exercised during the debtor's bankruptcy, nor can the object be seized by a judgment creditor of the debtor (Section 335, Civil and Commercial Code). On this point, see Pramod (1965, p. 229).

[75]The release or acceptance must be communicated, or the judgment produced to the public authority with whom the deposited object is lodged.

[76]The creditor must bear the risk of the safety of the deposited object and has no claim for interest or loss of profits.

[77]Where, according to the regulations of the public authority, the deposited object cannot be withdrawn without the debtor's authorization, the creditor may require the debtor to give such authorization, in the events in which he would have been entitled to claim the performance of the obligation if the deposit had not taken place.

Section 341 of the Civil and Commercial Code provides that if two persons are bound to each other by obligations whose subject is of the same kind and both of which are due, either debtor may be discharged from his obligation by set-off to the extent to which the amounts of the obligations correspond, unless the nature of one of the obligations does not admit of it. It follows that set-off is only allowed between countering claims of the same nature which are both liquid (i.e. immediately and unconditionally due) and collectible (i.e. not subject to term or condition). Therefore, the object of both obligations must be a mutual fungible debt which is fully due and enforceable by action. For example, money may be set-off against money or rice of a certain quality against rice of the same quality, but not rice of one quality against rice of another.[78]

A debtor may set-off a claim to which he is entitled against an obligation to which he is subject, if, at the time, he has both the right to demand satisfaction of the claim and to perform his obligation. The right of set-off is exercised by notice to the other party which specifies the obligation against which compensation is exercised and operates retroactively. This means that the declaration of intention by one party to another relates back in its effect to the time when both obligations began to exist. Set-off does not operate, however, if the parties have declared a contrary intention or compensation is made subject to any term or condition intention (Section 342, Civil and Commercial Code).

The fact that the place of performance or destination is not the same for two claims does not prevent their being set-off against one another, but a party against whom the right of set-off is exercised under such circumstances may claim compensation for any loss suffered by him owing to the fact that he is unable to perform his obligation, or to receive the other party's performance at the proper place If it was specially agreed that one of the claims should be satisfied at a fixed time and place such claim cannot, in the absence of an indication to the contrary, be set-off against an obligation which has to be performed in another place (Section 343, Civil and Commercial Code).

In the event the debt is due and the creditor brings a legal action against the debtor in a civil court to collect the debt, the debtor may plead the affirmative defence of extinguishment of the obligation by set-off. In this case, set-off is not effected by contract but by order of the court. Thus, the creditor's obligation is considered to be extinguished from the time the counter-claim was filed. A claim barred by prescription does not exclude set-off if it was not barred at the time when it could have been set-off against the other claim (Section 344, Civil and Commercial Code).[79]

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[78]To illustrate, suppose that A owes 10,000 baht to B, who in turn owes A 15,000 baht. If the requirements for set-off are fulfilled, A may declare to B that he sets-off his own obligation. Thus, the first loan agreement terminates by set-off, and B remains indebted to A in the sum of 5000 baht, corresponding to the part of the obligation not paid through set-off.

[79]Under English law, a plea of set-off is not available, if the claim to be set-off is barred by prescription.

A debt can be extinguished through compensation except where the law provides otherwise. In some cases, set-off is forbidden on grounds of public policy following the provisions stipulated under the Civil and Commercial Code. Specifically, claims arising from an unlawful act committed wilfully (Section 345, Civil and Commercial Code) and claims exempted from judicial attachment (Section 346, Civil and Commercial Code) cannot be set-off against another. The right of set-off is likewise excluded in case of a claim against a bankrupt acquired after the commencement of the bankruptcy, or with the knowledge of the bankrupt's insolvency. Therefore, these claims cannot be set-off against a debt owing to the bankrupt (Section 344, Civil and Commercial Code).

The two claims set-off against one another become extinguished to the extent of the smaller claim as from the date at which they began to coexist. Accordingly, a declaration of compensation exempts the parties from liability in the case of accidental destruction of the property, discharges a penalty agreed to be paid in the event of non-performance, and arrests the accrual of interest.[80] A person exercising the right of set-off may determine which out of several contemporaneous claims is to be set-off against his debt. In the absence of any declaration of intention on the subject, the rules as to the order of discharge of several coexisting obligations apply.

### *2.4.5 Merger*

An obligation may become extinguished by merger. Merger refers to the extinction of an obligation due to the confusion of rights and duties of the same person. It takes place when rights and liabilities in an obligation become vested in the same person. In other words, one person becomes both debtor and creditor with regard to the same performance.[81] This may occur, for example, when a guarantor becomes principal debtor, or when the debtor succeeds as heir to the creditor with regard to the same debt. It must be pointed out, however, that if the obligation becomes the subject of the right of a third person, which would be disadvantageously affected by a merger, then there will be no merger (Section 353, Civil and Commercial Code).[82]

### *2.4.6 Novation*

Novation is another mean of termination of an obligation. It occurs when the parties concerned have concluded a contract changing the essential elements of the

[80]On this point, see Stasi (2016, pp. 57–58).

[81]On this point, see Ratthanakorn (2007, p. 497).

[82]Ibid., p. 499.

obligation (Section 349, paragraph 1, Civil and Commercial Code). For instance, if a conditional obligation is made unconditional, or a condition is added to an unconditional obligation, or if a condition is changed, it is regarded as a change of an essential element of such obligation.

A novation may also occur by means of a party modification whereby the original obligation must be performed by the debtor for the benefit of a new person different from the original creditor (i.e. assignment of rights). Roman law, like the older English law, did not on principle allow rights to be assigned, but under all systems numerous exceptions became gradually engrafted on the general rule, more particularly with reference to rights embodied in negotiable instruments, and even apart from such special cases the tendency to modify or depart from the general rule became more marked as time went on.

Thai private law, on the other hand, recognizes the right to assign obligatory and other rights to the fullest extent. The Civil and Commercial Code lays down the rules that are applicable to assignments of obligatory rights.[83] In so far as the nature of the case admits, and no express rule of law excludes their applicability, these rules also apply to assignments of other rights, and to transfers of rights (Section 303, paragraph 1, Civil and Commercial Code). All rights, present or future, may be validly assigned except those which are exempt from attachment by a judgment creditor (e.g. a claim for wages, a claim for maintenance, or public fund created under the laws as to compulsory insurance). The Civil and Commercial Code also states that it is not possible to assign a right which by agreement between the debtor and creditor is declared to be incapable of assignment, and an obligatory right which would alter in character if it was exercisable by any person other than the original creditor (Section 303, paragraph 2).

With respect to the form of assignment, Section 306 of the Code provides that the assignment of an obligation performable to a specific creditor is not valid unless it is made in writing. It can be set up against the debtor or third person only if a notice has been given to the debtor, or if the debtor has consented to the assignor.[84] Such notice or consent must be in writing. Thus, in case of a conflict between several assignees the priorities depend on the first assignment which has been notified, or agreed to (Section 307, Civil and Commercial Code).

All securities for a debt, and all rights of priority to which the assignor is entitled, pass to the assignee by virtue of the assignment of the debt, unless expressly excluded from the assignment. The assignor is bound to furnish to the assignee all information required for the enforcement of the right assigned to the latter, and to deliver to him any documents in his possession which help to establish the claim.

Furthermore, Section 308 of the Civil and Commercial Code states that 'if a debtor has given the consent to the assignment of an obligation without reservation, he cannot set up against the assignee a defence which he might have made

[83]The technical expression used by the Civil and Commercial Code for the assignment of a right is *ohn sitti riak rong*.

[84]Similarly, under English law an assignment is not fully effective until notice is given to the debtor.

against the assignor'. If, however, in order to extinguish the obligation, the debtor has made any payment to the assignor, he may recover it, or if for such purpose he has assumed an obligation to the assignor, he may treat it as if it did not exist.

In cases where the debtor has only received a notice of the transfer, he may set up against the assignee any defence which he had against the assignor before he received such notice (Section 308, paragraph 1, Civil and Commercial Code). In other words, the debtor is entitled to avail himself of all defences and all rights of set-off against the assignee, which he could have used against the assignor at the time of the assignment. Section 308, paragraph 2, of the Civil and Commercial Code adds that 'if the debtor had against the assignor a claim not yet due at the time of the notice, he can set-off such claim provided that the same would become due not later than the claim transferred'. This rule applies to the claims against the assignor acquired by the debtor after the receipt of the notice of the assignment, or falling due after the receipt of the notice of assignment, and after the maturity of the assigned debt.

The assignment of negotiable instruments is governed by special rules. Specifically, the transferee of a negotiable instrument is in a much better position than an ordinary assignee of a claim. While the latter must submit to all the defences and rights of set-off available against the assignor, the transferee of a negotiable instrument, if in the position of a lawful holder, can only be defeated by specific defences, such as defences arising from the invalidity of the debtor's declaration expressed on the face of the instrument (e.g. want of authority of the person who signed the debtor's name on the instrument, incapacity, and the like), defences arising from the tenor of the instrument (e.g. formal defects), and defences available as between the transferee and the debtor (e.g. a right of set-off operating between such transferee and the debtor).

The endorsee of an instrument to order, in the absence of fraud or gross negligence, is a lawful holder if there is a continuous chain of endorsements down to the one under which he holds (even if any endorsement constituting a link in the chain is forged). Accordingly, the possessor of an instrument to bearer is, as between himself and the debtor, deemed to be the lawful holder, but if his possession is unlawful, the person entitled to possession can recover the instrument.[85]

The following classes of instruments pass by endorsement: bills of exchange and promissory notes;[86] any written order or promise by which a mercantile trader is requested or undertakes to pay or deliver to the order of another a sum of money

[85]One important distinction between Thai and English law is to be found in the fact that, according to English law, the holder does not acquire the full rights of a lawful holder unless he is a holder for value. In Thai law, this requirement does not exist. A person who in good faith acquires a negotiable instrument by way of gift has the same rights thereunder as a buyer for value. The rule of English law under which the negotiability of a cheque may be restricted by the holder for the time being does not exist in Thai law.

[86]The instruments of the second class include cheques (which, according to Thai law, are not deemed bills of exchange), and delivery orders for goods of a fungible kind. The law as to cheques in Thai is still regulated by the Cheque Act B.E. 2534.

or a negotiable instrument or a fungible thing, provided that such payment or delivery is not made dependent on some counter-performance on the part of the holder; bills of lading, carriers' receipts, warehousing receipts issued by any undertaking licensed for that purpose, policies against risks of carriage by land or sea if issued to order; and share certificates registered in the holder's name.[87]

The endorsement of a negotiable instrument, if accompanied by its delivery to the endorsee, has the effect of transferring all rights conferred by the instrument from the endorser to the endorsee, and the debtor is not bound to perform his obligation unless the instrument, duly receipted by the last endorsee, is handed to him. The rules of bill of exchange law as to the form of endorsement, the holder's title, and other similar matters apply to all negotiable instruments which pass by endorsement.

Another type of novation can apply when a third party spontaneously assumes the debt to the creditor. Under Thai law, as under Roman law, the assumption of the burden of an obligation by a new debtor in the place of the original debtor is looked upon as the creation of an entirely new obligation. According to this view, the creditor, whose assent must of course be given, agrees to accept the benefit of a newly created claim in satisfaction of the old claim, and thereby joins in a transaction having the character of a 'novation'. In this case, the third party (i.e. novator) becomes responsible jointly with the original debtor (i.e. novatee) to the novation creditor. In this regard, Section 350 of the Civil and Commercial Code states that 'A novation by a change of the debtor may be effected by a contract between the creditor and the new debtor, but this cannot be done against the will of the original debtor'.[88]

It follows that when the agreement is made between the new debtor and the creditor it becomes immediately operative. If the agreement is made between the original debtor and the new debtor, it must be ratified by the creditor in accordance with the ordinary rules as to ratification. The ratification is inoperative if made before notice of the agreement is actually received either from the original or the new debtor, and if such notice specifies a period of time within which the ratification must be made, it is deemed to be refused unless communicated to the new or to the original debtor within the specified period.[89] The parties may at any time before the ratification or repudiation of the agreement on the creditor's part, modify or rescind it. Subject to this provision and to any stipulation to the contrary, the new debtor is as between himself and the original debtor, bound to satisfy the obligation while the ratification is being awaited, and also after its refusal.

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[87]The law requires that the title to such certificates must pass by endorsement of bill.

[88]On this theme, see especially Maneesawat (1993, p. 104).

[89]Where the buyer of mortgaged property agrees with the seller to assume the personal liability for the mortgage debt, the rule is modified in the following manner: the notice must be given by the seller and cannot be effectively given before the buyer is registered as owner of the property. The mortgagee is deemed to have accepted the substitution of the buyer's for the seller's liability, unless he notifies his refusal within a period of six months from the receipt of the notice. The buyer may compel the seller to give the required notice, and the seller is bound to inform the buyer of the result of the notice as soon as such result is ascertained. Under English law, the seller remains liable, unless expressly released by the mortgagee; in such a case, the buyer usually indemnifies the seller against his liability.

After the assumption of the obligation by the new debtor, he may avail himself of the same defences as the original debtor, but he is not entitled to avail himself of any right of set-off to which the original debtor would have been entitled.

According to Section 352 of the Civil and Commercial Code, the parties to a novation may, to the extent of the subject of the original obligation, transfer a right of pledge or mortgage given as security for it to the new obligation, but if such security was given by a third person, his consent is necessary. Thus, a creditor who authorizes the transfer of the liability for a debt can no longer avail himself of the previously existing securities for such debt, unless the person who gave the security (e.g. a surety or a person who has charged or pledged any object as security) authorizes the assumption of the obligation by the new debtor.

It must be added that where a person by agreement takes over the whole of another person's property, he becomes liable jointly with the transferor of the property for the whole of the debts of the latter, but only to the extent of the value of the property and of the rights conferred upon him by such agreement. The liability of the assignee cannot in such a case be excluded by agreement between him and the assignor.

### *2.4.7 Rescission*

A party may, in certain events, instead of claiming the performance of a contract, claim rescission either alternatively to the right to claim compensation for non-performance, or without such alternative right. The right of rescission in certain events may also be stipulated for between the parties. Where a contract provides that a debtor, in the event of the non-performance of his promise is to forfeit his contractual rights, the creditor on the happening of such event is entitled to rescission. According to the provisions of Section 386 of the Civil and Commercial Code, if by contract or by the provisions of law one party has the right of rescission, such rescission is made by a declaration of intention to the other party. The declaration of intention cannot be revoked.[90]

Where no time is fixed for the exercise of the right, the other party may, by notice, require the party entitled to the right to exercise it within a specified reasonable period. If the notice is not complied with before the lapse of the period the right is forfeited.[91]

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[90]Section 390 of the Civil and Commercial Code provides that if in a contract there are several persons on the one or the other side, the right of rescission may be exercised only by all and against all. In the case that the right of rescission is extinguished in respect of one of those persons entitled, it is also extinguished in respect of the others.

[91]If the exercise of a contractual right of rescission is dependent on the payment of forfeit money, the right is forfeited unless such payment is made simultaneously with the communication of the notice of rescission, or immediately after the repudiation of the notice by the other party on the ground of such non-payment.

As regards the effect of rescission, Section 391 of the Civil and Commercial Code regulates all cases where a party exercises a right of rescission to which he is entitled under any legal rule or contractual stipulation. Specifically, it states that if one party has exercised his right of rescission, 'each party is bound to restore the other to his former condition; but the rights of third persons cannot be impaired'. A party who has to return a thing is under the same liability for the loss or deterioration of such thing and has to account for fruits and profits in the same way as a person who is in possession of a thing while an action for its recovery by the true owner is pending. In so far as any services have been rendered or the use of a thing has been allowed, the money value of such services or of such use must be paid.

The right of rescission is forfeited by the party entitled thereto (hereinafter called the rescinding party) if the rescinding party, after becoming subject to the effects of *mora solvendi* as to the return of the objects to be returned by him or of an essential part thereof, fails to comply with a notice requiring him to return such objects or such part thereof, within a reasonable time specified in such notice. Under Section 394, paragraph 1, of the Civil and Commercial Code, the right of rescission is also forfeited if any object which ought to be returned is destroyed, materially altered or deteriorated owing to the wilful default or negligence of the rescinding party, or of any party deriving title under him, or of any party for whose default he is responsible. Section 394, paragraph 2, of the Civil and Commercial Code, however, adds that 'if without the act or fault of the person who has the right of rescission the thing which is the subject of the contract of the contract has been lost or damaged, the right of rescission is not extinguished'.

In the case of a contractual right of rescission, the right of rescission is forfeited if the other party is in a position to discharge his obligation by set-off and immediately on receiving the notice of rescission avails himself of his right of set-off.

## 2.5 Remedial Obligatory Rights

### *2.5.1 Right to Performance of Restitution in Kind*

It is often stated that the remedies of 'specific performance' and 'injunction' introduced by the English equity courts by means of their power over the person of the defendant have no equivalent in civil law systems, and that, under civil law systems, as under English common law, the only remedial right is a right to pecuniary damages. This assertion is incorrect as regards the continental law and is equally incorrect as regards the Thai law.

The primary remedial right under Thai law is a right to performance[92] where the obligation results either from a juristic act, or from surrounding circumstances,

[92]Where the obligation is of a negative character, the right to performance resolves itself into a right to prohibit any course of conduct by which such obligation is violated.

and a right to compensation (*kaa sin mai tot taen*) where the obligation results from an unlawful act. The right to compensation is not primarily a right to pecuniary damages. Section 176, Civil and Commercial Code, in fact, states that 'A person liable to make compensation is bound to restore the state of things which would have existed, if the event creating the liability had not happened'. This means that the right to receive compensation for damage suffered by reason of an unlawful act is therefore primarily a right to restitution in kind.[93]

The general rule that every obligation gives rise to a claim for specific performance or restitution in kind is subject to some exceptions. Firstly, on the grounds of public policy, claims for personal services as well as claims for the performance of a promise of marriage, and for the restitution of conjugal rights cannot be specifically enforced. Secondly, the Civil and Commercial Code provides that in certain events a person entitled to the performance of a contract may claim rescission in lieu of performance (Section 386).[94]

In the case of a claim for performance of the promise of one of the parties to a reciprocal agreement, the remedial right may be exercised contemporaneously or successively. Precisely, if under the reciprocal agreement the performance of the mutual promises is to be contemporaneous, the plaintiff may claim an order directing the defendant to perform contemporaneously with the plaintiff's performance. In contrast, if the performance of the plaintiff's promise is under the agreement to precede the defendant's performance, and the defendant is in *mora accipiendi*, the plaintiff may claim an order directing the performance of the defendant's promise; if the *mora accipiendi* continues, the plaintiff may enforce the performance of the defendant's promise without being first compelled to perform his own promise (Section 369, Civil and Commercial Code).

### *2.5.2 Right to Pecuniary Damages*

Under certain specified circumstances, the claim for performance or restitution in kind is transformed, *ipso facto*, into a claim for pecuniary damages. Under other specified circumstances, the creditor may at his option claim either performance, restitution, or pecuniary damages. And there are finally circumstances under which the debtor may substitute pecuniary compensation for restitution in kind.

According to Section 213 of the Civil and Commercial Code, the claim is transformed, *ipso facto*, if performance or restitution in kind is impossible,[95] or possible only in such a way as not to afford sufficient compensation to the creditor. In the case that performance of a contract is partially impossible and partial performance

[93]An order restraining a person guilty of unlawful conduct from a continuance of such conduct comes under the same head.

[94]See Ratthanakorn (2007, pp. 175–176).

[95]In the case of impossibility of performance of an agreement, a claim to compensation only arises in so far as the impossibility is caused by a circumstance for which the debtor is responsible.

is useless, the creditor may at his option claim pecuniary damages in place of performance or restitution in kind. Similarly, where damages are payable for injury to a person or damage to a thing, the debtor may demand the required monetary amount in lieu of restoration.

The Civil and Commercial Code also provides, in certain instances, that money may be demanded in compensation for damage that is not pecuniary loss. In particular, Section 446 of the Code states that in the case of injury to the body or health of another, or in the case of deprivation of liberty, the injured person may also claim compensation for the damage which is not pecuniary loss. The claim is not transferable and does not pass to the heirs, unless it has been acknowledged by contract, or on action on it has been commenced.

Where pecuniary damages are payable, they are assessed according to the general principles laid down in the Civil and Commercial Code. As a general rule, compensation must be paid for loss of profit as well as for other loss. Under Section 222 of the Code, the creditor may demand compensation 'even for such damage as has arisen from special circumstances, if the party concerned foresaw or ought to have foreseen such circumstances'.[96]

In certain cases, a party injured by the fact that a contract is invalid has a claim to be indemnified for the actual loss suffered by him in consequence of his belief in its validity. The interest in the agreement for which he is entitled to compensation is called the 'negative' interest in contradistinction to the 'positive interest' or 'interest in the performance' which a party is entitled in the case of a valid agreement.[97]

Special rules are laid down as to the measure of damages on the breach of certain classes of agreements. More precisely, where, on a sale agreement, there is a breach of warranty of essential qualities, the compensation (if compensation is claimed) takes the shape of a reduction of the purchase price. Damages payable by a carrier, in respect of the deterioration or loss of the goods, are also assessed according to special rules. In particular, full damages including loss of expected profit are payable if the loss or deterioration is caused by the wilful default or gross negligence of the carrier, or of any person for whose default he is responsible. Where, however, the carrier is liable for loss or deterioration not caused by wilful default or gross negligence, his liability does not extend beyond the payment of the value of the lost goods, or of the loss in value caused by the deterioration of the goods.

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[96]It must be noted, however, that such profit as, according to the ordinary course of events, and in view of the preparations and precautions of the parties, might reasonably have been expected is deemed to have been lost.

[97]If a party has not altered his position on the faith of the agreement, the value of the negative interest cannot exceed the expenses incurred by him in connexion with the formation of the agreement; if he has done any act in reliance on the validity of the agreement (e.g., if in the case of an invalid sale he has resold the article bought by him), he is entitled to claim the amount of the loss suffered in consequence of such act. Whatever the value of the negative interest no greater amount can be claimed in respect thereof than could have been claimed if the agreement had been valid and had been broken.

With regard to unlawful acts, the Civil and Commercial Code states that a person who injures the life, body, health, liberty, property, or any right of another person must compensate the injured person for all injurious effects on his earning power and success in life, caused by such unlawful act (Section 420). Damage may include, in a case coming within the exceptional rules mentioned above, compensation for physical pain or mental suffering. Section 439 of the Civil and Commercial Code adds that a person who is liable to return a thing taken away from another by means of an unlawful act must compensate such other for all loss arising from the deterioration or loss of such thing, though not due to his default, 'unless destruction or the impossibility of returning it or the deterioration would have happened even if the unlawful act had not been committed'. If compensation is to be paid for the value of a thing of which a person has been deprived, or if compensation is to be paid for the decrease in value of a thing as a result of damage, then the injured person may demand interest on the amount to be paid in compensation from the date on which the determination of the value is based (Section 440, Civil and Commercial Code).

### *2.5.3 Right of Subrogation*

A person who compensates another for the loss of a thing or a right is entitled to the assignment of the claims which the person receiving compensation has against any third party, in respect of the thing or right for which compensation has been given. In this respect, Section 227 of the Civil and Commercial Code states that when a creditor has received as compensation for damage the full value of the thing or right which is the subject of the obligation, the debtor is, by operation of law, subrogated into the position of the creditor with regard to such thing or right. For example, a bailee, who compensates the owner of the bailed goods wrongfully taken out of the bailee's custody, may ask for an assignment of the owner's right to recover the goods from their unlawful possessor.

Pursuant to Section 229 of the Civil and Commercial Code, subrogation takes place by operation of law and ensues to the benefit of the following persons: (a) the person who, being himself a creditor, pays another creditor who has priority to him owing to such other creditor having a preferential right, pledge, or mortgage; (b) the person who, when acquires an immovable property, uses the purchase price in paying off the persons who have mortgages thereon; (c) the person who, being bound with others or for others to pay a debt and was interested in paying the same, has paid it.[98]

[98]It must be added that a person, who has compensated another for the loss of a right which through his negligence has been barred by prescription, may claim the assignment of such right, as it would be of value to him in the event of the debtor declining to avail himself of the defence of prescription.

If, in consequence of the circumstance which makes the performance impossible, the debtor acquires a substitute or a claim for compensation for the object owed, the creditor may demand delivery of the substitute received or may claim for compensation by himself. In cases where the creditor has a claim for compensation on account of non-performance, the compensation to be made to him is diminished by the value of the substitute received or of the claim for compensation.[99]

### *2.5.4 Penalties*

Under the English rules of equity, a penalty, which a party to a contract promises to pay in the event of the non-performance of his obligation, can only be recovered in so far as the penalty is deemed to have been intended as a contractual assessment of the damages recoverable on breach of the agreement (liquidated damages). Where such a construction is impossible under the circumstances, a penalty exceeding the value of the damage cannot be awarded. The rules of Thai law on this subject are entirely different. On principle the parties may agree to the payment of a penalty (in Thai: *bia bprap*) in addition to full damages, and it is only in a case in which the amount of the penalty seems out of proportion to the importance of the matter, that the court may reduce the amount of the penalty to a reasonable amount, making, however, full allowance for all damage actually suffered whether pecuniary or otherwise. In this regard, Section 383 of the Civil and Commercial Code states that if the amount of the penalty seems disproportionately high compared with the actual loss or the severity of the breach, it is within the competence of the court to reduce it to a reasonable amount. In judging the reasonableness, every legitimate interest of the creditor, not merely his financial interests, must be taken into account.[100]

The Thai rules as to penalties distinguish two principal cases, namely the case of a penalty payable in lieu of damages or on account of damages and the case of a penalty payable irrespectively of the other rights to which the creditor is entitled. The first case applies where the debtor promises to pay the penalty in the event of his failing to perform his obligation. In contrast, where the debtor promises to pay the penalty in the event of failing to perform his obligation in the agreed manner, or at the agreed time, the agreement is deemed to have the effect mentioned under the second case.

In the first case, the agreement is similar to an English agreement as to liquidated damages, but the position of the Thai creditor is more favourable. He may at his option claim the performance of the agreement or the penalty, and, where he is entitled to compensation by reason of the breach, he may claim damages in excess of the amount of the penalty; the penalty only represents the minimum amount of the damages.

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[99] A comprehensive overview of the issue can be found in Ratthanakorn (2007, p. 242 ff).

[100] For a detailed analysis on this point, see Setabutr (2006, p. 119).

In the second case, the creditor may claim performance as well as the penalty, but if he accepts performance without reserving his right to the penalty, he forfeits his right to the penalty. If he is entitled to damages for defective performance, he may claim such damages in lieu of the penalty (Sects. 380 and 381, Civil and Commercial Code). When the penalty is to be satisfied otherwise than by the payment of money, damages cannot be claimed in addition to the penalty (Section 382, Civil and Commercial Code).

The penalty falls due when the debtor fails to comply with the terms of the obligation. More precisely, pursuant to Section 379 of the Civil and Commercial Code, if the debtor promises the creditor the payment of a sum of money as penalty if he does not perform his obligation or does not perform it in the proper manner, the penalty is payable if he is in *mora solvendi*. However, if the performance due consists in a forbearance from specific acts, the penalty is due as soon as any act in contravention of the obligation is committed.

As to the burden of proof, if the debtor contests the forfeiture of the penalty on the ground of having performed his obligation, he must prove performance, unless the performance due consisted in forbearance.[101]

It must also be pointed out that if the promise of an act of performance is invalid, then the agreement of a penalty made for the event of failure to fulfil the promise is likewise ineffective, even if the parties knew of the ineffectiveness of the promise (Section 384, Civil and Commercial Code). In other words, no penalty is payable in respect of the breach of an obligation which is inoperative under any rule of law.

### *2.5.5 Earnest Money*

If, on entering into a contract, something is given as 'earnest money' (in Thai: *mat jaam*), this serves as evidence of the formation of the agreement with reference to which it is made and as security for the performance of the agreement (Section 377, Civil and Commercial Code). For instance, a contract to sell or to buy immovable property is not enforceable by action unless there is some written evidence signed by the party liable or unless earnest money deposit is given (Section 456, paragraph 2, Civil and Commercial Code).

In the absence of a contrary agreement by the contractual parties, the earnest money is governed by the following principles: (1) if the contract is performed, the earnest money shall be returned or treated as part payment upon performance; (2) if the party giving it fails to perform, the earnest money shall be forfeited; (3) if the party receiving it fails to perform, the earnest money shall be returned (Section 378, Civil and Commercial Code). It follows that if the performance of the obligation of the giver of the earnest money becomes impossible by reason of a

[101] Ibid., p. 125 ff.

circumstance for which he is responsible, or if the agreement is rescinded by reason of any default on his part, he forfeits the earnest money. In the absence of a contrary agreement, the earnest money cannot be retained, if the agreement is duly performed, or if damages for its breach are recovered. It must be accepted as either part performance of the agreement, or part payment of the damages, or it must be returned. If the agreement is rescinded without any default on the part of the giver, it must be returned.[102]

### *2.5.6 Right of Retention*

The expression *burim sitti*, in the sense given to it by the Thai Civil and Commercial Code, has a somewhat wider meaning than the term 'right of retention' by which it is here translated. The Thai right, though called a right of retention, enables the person entitled to it not only to retain a thing belonging to the debtor, but also to refuse the performance of any act which the debtor is entitled to claim until the debtor performs his own obligation (Section 241, Civil and Commercial Code). With reference to reciprocal agreements requiring contemporaneous performance, this right is specially regulated and has already been discussed above, but the Civil and Commercial Code confers the same right in a number of cases, where no reciprocal agreement, in the technical sense of the word, is in existence between the parties—e.g. where mutual obligations arise in the case of voluntary services, or unjustified benefits.

The right of retention is available: (1) in all cases in which the debtor has a matured counterclaim arising out of the same legal relation as his own obligation; (2) in all cases in which a person, who is under a duty to deliver an object not obtained by him by means of an unlawful act, has at the same time a matured claim in respect of any outlay incurred or damage suffered in respect of such object.

In case of insolvency of the debtor, the creditor has the right of retention even if his claim is not yet due. Section 243 of the Civil and Commercial Code adds that 'if the insolvency has occurred or become known to the creditor after the delivery of the property, he can exercise the right of retention even if an obligation previously assumed by him or the instruction given by the debtor, opposes it.'[103]

On the contrary, the right of retention does not exist if it is incompatible with the obligation assumed by the creditor, or with the instructions given by the debtor at the time of delivery of the property, or if it is against public order (Section 242, Civil and Commercial Code).

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[102]The object of the earnest money may consist in money as well as other things of value which one party delivers to the other contractual party when entering into a contract. The expression 'earnest money' has been used for the sake of brevity, but the rules given above are applicable, whether money or any other object be given in earnest to bind the bargain. Immovable property cannot represent the object of the earnest money deposit since it cannot be delivered.

[103]See Panthulap (1979, p. 327 ff).

Pursuant to Section 249 of the Civil and Commercial Code, the debtor may claim the extinction of the right of retention on giving proper security.[104] Also, a right of retention is extinguished by the loss of possession of the property. However, this does not apply to the case where the property retained is let or pledged with the consent of the debtor.

## 2.6 Obligations Arising from Unlawful Acts

### *2.6.1 Introductory Statement*

Under Roman law, there was no general rule by virtue of which a person injured by an unlawful act was entitled to claim compensation from the wrongdoer. A liability was imposed in respect of certain specified injuries to the person or property, but the satisfaction to the injured person was more in the nature of a penalty than of compensation for the damage suffered by him, and this penal character of the liability for torts was demonstrated by various results, as for instance by the rule according to which, in the case of some kinds of torts, each of several wrongdoers had to pay the full penalty ('*nam ex lege Aquilia quod alius praestitit, alium non relevat, quum sit poena*' Dig. 9, 2, 11, § 2), and above all by the rule as to the extinction of the claim on the death of the wrongdoers or of the injured person, which to a certain extent is still preserved in English law.[105]

Civil law in continental Europe gradually substituted the principle of compensation for the principle of punishment, and consistently with that principle made the heirs of the wrongdoer liable for the compensation to the extent of the value of the wrongdoer's estate. The claims of the injured person did not, however, pass to his heirs, unless an action for their enforcement was commenced in his lifetime. The Code Napoleon for the first time established a general liability for unlawful acts by stating that 'Everyone is liable for the damage he causes not only by his intentional act but also by his negligent conduct or by his imprudence' (Article 1383). By the same token, Section 823 of the German Civil Code states that 'A person who, wilfully or negligently, unlawfully injures the life, body, health, freedom, property or other right of another is bound to compensate him for any damage arising therefrom'. Similarly, Thai Civil and Commercial Code has a general

[104]The creditor may prevent the exercise of the right of retention by giving security, but personal security may be refused.

[105]It was a peculiarity of Roman law that its law of delicts was largely penal in character in that delictal actions were classified as penal by contrast to all other actions, whether *in rem* or *in personam,* which were reipersecutory. As a consequence, no part of the Roman compensation went to the state as it would in a purely criminal process; the payment of damages went directly to the victim. These particular features of Roman law are, of course, totally alien to the Thai legal architecture. In the Thai law of delicts, not only is the compensation for unlawful acts essentially restorative in nature but the eligible damage cannot be 'remote'. See Prachoom (2015, p. 397).

clause imposing liability for damage done by unlawful acts and a number of subsidiary clauses dealing with particular instances. Certain special kinds of damage done by unlawful acts are further provided for by separate statutes.

The rules determining liability for the unlawful acts of others and the rules as to the nature of the compensation to which the injured person is entitled have been discussed above. The rules as to contributory default will be discussed under the following sections.

### *2.6.2 General Rules as to Unlawful Acts*

The definition of unlawful act, as expressed under the Civil and Commercial Code, is identical to its German counterpart. Section 420 of the Code states: 'A person who, wilfully or negligently, unlawfully injures the life, body, health, freedom, property or any other right of another is bound to compensate him for any damage arising therefrom' (Section 420, Civil and Commercial Code). It follows that every culpable act that causes damage to another either by commission or by omission obliges the person who did it to compensate for it. In this way, the legislator wishes to prevent harm as a result of unsafe behaviour.[106] Hence, if a person knowingly causes damage to another, he must compensate the injured party.[107]

Any unlawful act done wilfully or negligently by means of which a right belonging to certain specified classes of absolute rights is infringed gives rise to a claim for damages under the general rules. The absolute rights referred to under Section 420, Civil and Commercial Code, are the right to freedom from violence, the right to health, the right to liberty, the right of ownership, and other rights similar to the right of ownership.[108] An obligatory right is not within the rights mentioned under the provisions of Section 420 of the Code. Therefore, the fact that C induces A to break a contract entered upon between A and B does not in itself entitle B to claim damages from C. An act violating one of these specified rights is unlawful, if it is not done in exercise of any right to which the person doing the act is entitled (e.g. the right of self-defence, or self-help), or by virtue of any authority conferred by public law (e.g. the authority of public officers to restrain the liberty

[106]See Setabutr (1980, p. 78).

[107]It must be noted that under English law, actions in respect of torts are frequently brought for the sole purpose of asserting a right (as in actions for trespass) or merely for vindicating the plaintiff's character (as in actions for libel and slander). Under Thai law, damages are not awarded unless a claim for substantial compensation can be proved; a judgment for nominal damages in an action founded on an unlawful act is therefore impossible, but the relief granted in such an action may, as shown above, consist in restitution in kind.

[108]The expression *siti yang neung yang dai ko dee* is somewhat freely translated by 'right similar to the right of ownership', but the translation is warranted by the interpretation put on the original words by the authoritative legal tribunals and textbook writers.

of individuals or to remove property in certain events), or with the consent of the injured person.[109]

Besides this first category of liability, one can distinguish a second category of delictual liability which may give rise to a claim for damages. It includes any unlawful act done wilfully or negligently that is contrary to an express provision of law and causes damage to another person. It follows that any unlawful act done wilfully or negligently by means of which an express provision of law intended for the protection of others is infringed gives rise to a claim for damages under Section 422 of the Civil and Commercial Code. The acts coming under this category are acts infringing absolute rights protected by statutory provisions, but not included in the specified rights mentioned above (e.g. acts wilfully or negligently disturbing possessory rights or the enjoyment of servitudes, both rights being protected by express provisions of law).

In the light of these considerations, it ought to be clear that actions for personal injuries, false imprisonment, and trespass relate to the class of acts described above under the first category, as also do actions for the infringement of rights relating to firm names, trademarks, and similar rights, in so far as they are not protected by special statutes. Actions for deceit, misappropriation, wrongful conversion, and defamation relate to the class of acts described under the second category, in so far as the damaging act is dealt with by criminal law.[110]

### *2.6.3 Capacity to Commit Unlawful Acts*

As mentioned above, the capacity for committing unlawful acts is regulated by rules entirely distinct from the rules governing the capacity for juristic acts. Under Section 429 of the Civil and Commercial Code, a person, even though incapacitated, on account of minority or unsoundness of mind, is liable for the consequences of his unlawful act. The parents or his guardian is jointly liable with him, unless they can prove that proper care in performing their duty of supervision has been extended. It follows that if the person responsible for supervision can demonstrate the use of proper care, no damages are payable.[111]

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[109]As a general rule, the incidence of liability is constrained by the defence of consent as enshrined in the maxim *violenti non fin iniuria* (i.e. an unlawful act is not committed against a consenting person). The consent of the injured person is, however, inoperative if, having regard to the nature of the act, the giving of such consent is *contra bonos mores*.

[110]On this theme, see especially Maneesawat (1993, p. 144).

[111]In English law, parents are not liable, as was the case in ancient Rome, for their children's unlawful acts, though they may be liable for their own negligence in failing to supervise or train their young children, where the absence of supervision or training has led them to cause damage to others. However, in the case of older children, a parent can be vicariously liable for the unlawful acts of children employed as servants or agents on ordinary principles of vicarious liability. On this point, see Prachoom (2015, p. 72).

Thai rules as to the capacity for unlawful acts appear to be very similar to English law. Under English law, neither infancy nor any other ground of incapacity affects the liability for torts, but as an unlawful act must be committed either wilfully or negligently, a person, who, without any default on his part, is in a mental condition—whether permanent or temporary—which prevents him from foreseeing the probable consequences of any particular act, is not under any circumstances liable for the consequences of such act. It follows that a party, whatever his age or general mental condition may be, is not released from his liability for damaging acts, unless he can prove that the mental condition under which the particular act was done made him incapable of foreseeing its probable consequences.

### *2.6.4 Parties Entitled to Claim Compensation*

An unlawful act frequently injures persons other than the immediate victim. The immediate victim is always entitled to compensation but Thai law also recognizes the rights of specific classes of persons. Firstly, Section 443, paragraph 1, of the Civil and Commercial Code states that in the case that the death does not ensue immediately, compensation must include all the expenses for medical treatment incurred by a victim who later dies. This is to say that the person whose duty is to pay the funeral expenses of a person killed by an unlawful act is entitled to the reimbursement of such expenses.

Secondly, under Section 443, paragraph 3, of the Civil and Commercial Code, any person entitled to be maintained by a person killed by an unlawful act, or who would have been so entitled if the death had not taken place (including any *nasciturus* in existence, but unborn at the time of such death) has a claim to be compensated for the loss of maintenance during the time during which the right to maintenance would have continued to be operative, having regard to the probable duration of the life of the person killed by such unlawful act.[112]

Thirdly, any person entitled by law to the services of a person killed or injured by an unlawful act is entitled to compensation in respect of the loss of such services. According to Section 445 of the Civil and Commercial Code, any party entitled to the services of the victim of the unlawful act may claim compensation with regard to the loss of such services.[113] Thus, if the injured person was bound by law to perform a service in favour of a third person in his household or industry, the person bound to make compensation must compensate the third person for the loss of such service. The rights to which the classes of persons severally mentioned above are entitled in the event of the death of the direct victim of an unlawful act are of course entirely distinct from any rights which his heirs may have as representatives

[112]The compensation is payable by means of periodical payments.

[113]Minakanit (2012, p. 103).

of his estate. Thus, a right to compensation for the medical expenses, and loss of income during the period preceding the death, may be asserted by the heirs concurrently with the claims of persons injured by loss of maintenance or loss of services.

The fact that the injury to the indirect victims of the unlawful act is treated as an independent tort, giving rise to a separate claim for compensation, would logically lead to the conclusion that the contributory default of the direct victim does not bar or reduce the claims of such indirect victims. It is, however, expressly provided that such contributory default has the same effect on the claims of the indirect victims, as on those of the direct victim, or of his heirs (Section 442, Civil and Commercial Code).[114]

It must be noted that the right to compensation for pecuniary loss does not become extinguished either by the death of the wrongdoer or by the death of the injured person but the right to damages for physical or mental suffering, which is recognized in certain classes of cases, does not pass to the heirs of the injured person unless it has been acknowledged by contract or an action on it has been commenced before the death (Section 446, Civil and Commercial Code).[115]

### *2.6.5 Defamation*

An important rule of delictual liability is laid down for the protection of a person's reputation and the integrity of his name. The overall category for these delicts is defamation. Defamation in Roman law was subsumed under the general delict of *iniuria* which rendered actionable contumelious behaviour towards others. It was irrelevant whether the defamation was written or spoken. In Thai law, defamation is defined under Section 423, paragraph 1, of the Civil and Commercial Code which states that 'A person who untruthfully asserts or circulates a fact that is qualified to endanger the reputation or the name of another or his earnings or prosperity in any other manner, is bound to make compensation for any damage which is occasioned by such acts'.

Wilful defamation is an offence against the criminal law (Section 326, Criminal Code), and therefore also an unlawful act entitling the injured party to compensation. This, where no pecuniary damage is inflicted, means restitution. Where pecuniary damage is inflicted, the injured party may either claim a judicial penalty not exceeding 200,000 baht (Section 328, Criminal Code), or damages. Negligent defamation is not, as a general rule, deemed an unlawful act, but a person, who makes or publishes an untrue statement which is likely to injure the credit of another or to curtail his earning powers, is liable to compensate such other. Ignorance of the untruth of the statement is no ground of excuse if such untruth would have been discovered

[114]See in particular Thingsapati (1984, p. 177).

[115]On this point, see Pramod (1965, p. 259).

by the exercise of proper care.[116] The compensation must not exceed the pecuniary loss and ought not to include a solatium for wounded feelings or annoyance.[117]

In the case that a statement is defamatory, it is *prima facie* actionable without proof of special damage. The main defences to an action for defamation other than consent of the party defamed include privilege, fair comment, and justification. It is generally held by the courts that privilege constitutes an absolute defence against defamation. Thus, statements in parliament, documents published under the authority of the parliament or any committee, as well as the publication of a document issued for the information of the public by or on behalf of the government are covered by absolute privilege. Another defence to avoid liability is fair comment. Fair comment entitles a person to express an opinion or otherwise comment on matters of public interest. The meaning of the expression 'matter of public interest' varies depending on the circumstances and has been interpreted widely by the courts as applying to works of art, books, songs, poems, paintings, and movies. Here, the defendant's communication must be a comment or a statement of opinion to be deemed fair and in good faith. Justification is another important defence to an action for defamation. If the person making, or the person receiving, the libellous statement is justifiably interested in the information conveyed thereby, no compensation can be claimed if the person making the allegation was ignorant of its untruth. In this regard, Section 423, paragraph 2, of the Civil and Commercial Code states that 'A person who makes a communication the untruth of which is unknown to him, does not thereby render himself liable to make compensation if he or the receiver of the communication has a rightful interest in it'.

Under English law, there are two types of defamation: oral defamation is slander; written defamation is libel. Libel is an unlawful act which subjects the defamer to tort liability without proof of special damages. Slander, on the other hand, does not subject the defamer to liability unless there is proof of special damages.[118] The principal characteristics differentiating Thai from English law, as to claims for compensation arising in cases of defamation may be summarized as follows: (1) there is no distinction in Thai law between slander and libel;[119] (2) no action lies

[116]It is no defence to an action for defamation to declare that the communication was not in fact understood in a defamatory sense or that the defendant did not know that the communication was false. The essential element is assertion, publication, distribution, or circulation of defamatory matter regarding the plaintiff without any justification or excuse.

[117]The basis of the Roman liability was different from that of Thai law: it rested not on the pecuniary loss but on outrage to the feelings of the aggrieved party such that it was not necessary to liability that it should have been published to a third party. Thus, an insulting letter to a person would seem to be an *iniuria* even though no one else saw it. See Prachoom (2015, p. 407).

[118]See Prachoom (2015, p. 402).

[119]The distinction has a practical advantage in that proof of libel is more straightforward than that of slander, and, had Thai law embraced it, it would have alleviated the plaintiff's burden of proof in many cases. In Roman law whether or not defamation was in writing appears to have been indifferent as far as liability was concerned, though it might make a difference when it came to assessing damages. Of course, this cold Roman attitude may have had an influence on the nature of Thai law on defamation. See Prachoom (2015, pp. 406–407).

under Thai law for negligent defamation, unless the plaintiff has suffered pecuniary loss, and no damages can be awarded except in respect of such pecuniary loss; (3) the distinction between absolute and qualified privilege does not exist in Thai law: wilful defamation is not privileged under any circumstances while negligent defamation is excused in every case in which the utterer or the recipient of the defamatory statement had a legitimate interest in its contents.

### *2.6.6 Rules as to Specific Classes of Unlawful Acts*

There is no general rule of Thai law corresponding to the rule of English law, under which a person who brings a dangerous object on to his land is liable in damages, if he fails to use proper precautions for preventing the danger. Specific rules of the Civil and Commercial Code, however, apply as to certain specific sources of danger and regulate the liability of legal persons in respect of danger arising from animals and buildings.

With respect to the liability for damage done by animals, Section 433 of the Civil and Commercial Code states that if damage is caused by an animal, the owner, or the person who undertakes to keep the animal on behalf of the owner is bound to compensate the injured party for any damage 'unless he can prove that he has exercised proper care in keeping it according to its species and nature or other circumstances, or that the damage would have been occasioned notwithstanding the exercise of such care'. It follows that when an animal causes injury to the life or health of a human being, or damage to a thing, any person who would have been entitled to compensation if the damage had been caused by an unlawful act is entitled to claim compensation for such injury from the person keeping the animal, whether there was any default on his part or not. A person so entitled may also claim compensation from any person who was placed in charge of the animal by the person keeping it, unless he can prove that he applied the degree of diligence usual under the circumstances, or that the damaging event could not have been avoided by the application of such diligence.[120]

As regards the liability for damage done by the collapse of a building, Section 434 of the Civil and Commercial Code states that 'If by the collapse of a building or other erection, or by the severance of any part thereof from the main part, the life or health of a human being is injured, any person who would have been entitled to compensation if the damage had been caused by an unlawful act may claim compensation for such injury from any person who is liable in respect thereof'. Thus, the proprietary possessor of the parcel of land on which the building or erection is situate is liable if the damaging event was caused by defective construction, or insufficient repairs, unless he can prove that he applied the diligence usual under the circumstances for averting the danger. If any person other

[120]As to the apportionment of the liability between the several persons liable to compensate the injured party see Sect. 2.6.7.

than the possessor of the land is in possession of the building, or erection, by virtue of any right in respect thereof—e.g. by virtue of a heritable building right—he is liable in the place of the possessor of the land.[121]

The special rules stated above do not exclude the general liability for damage to life or health, caused by dangerous animals or defective buildings. Thus, a person injured by reason of the bad condition of a staircase leading to a court of law in which such person had to attend is entitled to damages from the government of the state to which the court belongs if the danger could have been avoided by the application of proper diligence.

Under the general rules, the plaintiff must always prove that the defendant was in default, but under the special rules the liability sometimes arises apart from any question of default on the part of the defendant, and in all cases where the application of the proper degree of diligence affords a ground of excuse, the defendant must prove that such diligence was applied by him.

### *2.6.7 Apportionment of Liability Between Several Persons*

Where several persons have together committed an unlawful act[122] or are liable under any specific rule of law for damage caused by an unlawful act, they are liable as joint debtors (Section 432, paragraph 1, Civil and Commercial Code). The rules as to contributions between such joint wrongdoers are provided under Section 432, paragraph 3, of the Civil and Commercial Code. More precisely, the Code states that 'as between themselves the persons jointly bound to make compensation are liable in equal shares unless, under the circumstances, the court otherwise decides'.[123]

Where in the case of damage done by animals, or the collapse of buildings, any person other than the person liable under the special rules mentioned above is responsible for the damage (e.g. a builder through whose negligence the building has collapsed); such third party, as between himself and the person liable under the special rules, must bear the whole of the compensation.

It is noteworthy to observe that the rules as to the apportionment of the compensation may in some cases be modified by agreement between the parties.

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[121]It must be added that any person, who by agreement with the possessor undertakes to keep the building or erection in repair or has to keep it in repair by virtue of any right of user vested in him, is liable in the same way as the possessor.

[122]A person by whom the act was incited or assisted is for the purposes of the rule deemed a person acting together with the person doing the act (Section 432, paragraph 2, Civil and Commercial Code).

[123]As can be seen, in Thai law, as is the case generally in English law, the primary aim of compensation is to give the aggrieved party compensation for damage unlawfully inflicted on him. By contrast, a Roman delict was imbued with the idea of vengeance and the action was primarily for a penalty. Thus, if a delict was jointly committed by two or more persons, each was separately liable for the full amount; and even if there was only one wrongdoer, the 'fine' imposed might and frequently did exceed greatly an estimate of the damage sustained. See Prachoom (2015), p. 397.

It follows that a party who undertakes the care of an animal or of a building may agree with the person keeping the animal, or the possessor of the buildings, to undertake the whole of the liability.

### *2.6.8 Prescription*

A claim to compensation for damage caused by an unlawful act is barred after the lapse of one year, reckoned from the time at which the party entitled to compensation becomes aware of the damage, and of the identity of the party liable in respect thereof. In particular, Section 448 of the Civil and Commercial Code states that actions arising out of unlawful act are prescribed 'by the lapse of one year from the day when the unlawful act and the person bound to make compensation became known to the victim, or ten years from the day when the unlawful act was committed'. However, if the damages are claimed on account of an act punishable under the criminal law for which a longer prescription is provided, the longer prescription will apply.

A party liable to give compensation must, even after the lapse of the period of prescription, restore any benefit acquired by the commission of the unlawful act, in accordance with the rules as to unjustified benefits. If a person by means of an unlawful act acquires a personal claim against another (e.g. if he extorts a promise by fraud), the latter may refuse satisfaction of the claim, even after the date at which the right to rescind the transaction has become barred by prescription.

## 2.7 Obligations Imposed by Surrounding Circumstances

### *2.7.1 Introductory Considerations*

In all systems of law certain classes of obligations are recognized which neither result from a juristic act nor from an unlawful act done by the debtor, but which are imposed upon him where, owing to some accident, mistake, or other circumstance, he becomes entitled to a benefit at the expense of another. Under Roman law, the obligations arising by reason of *negotiorum gestio* and those enforceable by the various kinds of *condictiones* are instances of such classes of obligations. Under English law, they are not so common, but the actions 'for money had and received' and 'for money received to the use of another' may be referred to as instances of their recognition.

The rules as to 'unjustified benefits' and 'voluntary services' forming part of the Thai law give a general recognition to the principle that a person benefited by accident or mistake at the expense of another is bound to restore such benefit or to compensate the other for his sacrifice. The rules as to obligations arising by community of interests and by estoppel illustrate the same principle in a less direct way.

### 2.7.2 Management of Affairs Without Mandate

The claims of persons rendering voluntary services are recognized by the rules as to the 'management of affairs without mandate' (*jat gaan ngaan nok sang*), which correspond to the rules of Roman law as to *negotiorum gestio*.[124] A person who volunteers his services has, in certain events, a claim for reimbursement of outlay, but under the specific rules of the Civil and Commercial Code a reasonable reward may be claimed, as well as the reimbursement of outlay. English law, in contrast, maintains the maxim that no one can make himself the creditor of another against his will, and therefore does not generally give a claim for the reimbursement of outlay voluntarily incurred, though such outlay may have been beneficial to another.

A person, who conducts business on behalf of another without his request, and without being otherwise entitled to act on his behalf, is described by the Thai expression *poo jat gaan*, the person for whom he acts being described as the *dtua gaan*, which expressions in the further course of this treatise will, respectively, be reproduced by the 'English terms' 'voluntary agent', and 'involuntary principal'.

According to Section 395 of the Civil and Commercial Code, a person who takes charge of an affair for another without having received mandate from him or being otherwise entitled to do so in respect of him, has the obligation to conduct the involuntary principal's business in accordance with his interest, and pay regard to his actual or presumable wishes. This applies to all those situations where a person has conducted someone else's affairs without authority to do so, or rendered him some other service without a precedent mandate. If the act was not intended to be an act of kindness or benevolence but is an act apt to establish a legal relationship, the voluntary agent is entitled to the reimbursement of his outlay unless it can be shown that at the time of his intervention he did not intend to claim reimbursement.[125] This is to say that the voluntary agent is entitled to reimbursement of outlay in every case in which the intervention was in the principal's interest, and in accordance with his expressed or presumable wishes, or was ratified by him. In every other case, the voluntary agent has no claim in respect of his intervention, except in so far as the involuntary principal is liable under the rules as to

[124]Under Roman law, *negotiorum gestio* was where one person managed the affairs of another without the authority of the latter, e.g. the *negotiorum gestor* repaired his friend's house during the absence of the latter from Rome to prevent the property from falling down. The relationship is akin to *mandatum*, but differs in that the *mandatarius* had previous authority. In a proper case of *negotiorum gestio,* however, the person who benefited by the act done was liable, although he had neither authorized nor ratified the act and could be sued by the *actio negotiorum gestorum contraria* for the expenses or other liabilities which the *negotiorum gestor* had incurred in doing the work. On this point, see Leage (1906, p. 310).

[125]If a person who believes that he is acting on his own behalf is in fact acting on behalf of another, he is not entitled to the rights, or subject to the duties of an involuntary agent. Similarly, when a person transacts any business as his own knowing it to be the business of another, the person on whose behalf he is acting may at his option assume or decline the position of an involuntary principal.

unjustified benefits. Correspondingly, the voluntary agent is liable for wilful default or negligence in the same way as if he were acting under a contract involving the transaction of business for another.[126]

It is clear that, as far as the obligations of the manager of affairs without mandate are concerned, the relevant provisions relating to the contract of agency in the Civil and Commercial Code are *mutatis mutandis* applicable, especially after the principal's ratification of the manager's action.[127] Thus, the voluntary agent must, as soon as practicable, give notice of his intervention to the involuntary principal, and must, unless there is danger in delay, await the reply to such notice before proceeding any further. However, if the voluntary agent's intervention had for its object the prevention of an urgent danger threatening the involuntary principal, the voluntary agent is not liable for any default extending beyond wilful default and gross negligence (Section 398, Civil and Commercial Code).[128]

Furthermore, the voluntary agent has the obligation to conduct the principal's business in accordance with his actual or presumed will. If the voluntary agent's intervention was in opposition to the actual or presumable wishes of the involuntary principal, he is answerable for accidental damage (Section 396, Civil and Commercial Code).[129] Nevertheless, the fact that the voluntary agent's intervention is opposed to the involuntary principal's wishes is disregarded in any case in which failure to intervene would have prevented the performance at the proper time of a duty imposed on the principal in the public interest, or incumbent upon him with reference to the maintenance of any relative.

The fact that the voluntary agent is under a mistake as to the identity of the involuntary principal does not affect the mutual position of the parties. The person on whose behalf the intervention is made is entitled to the rights and subject to the duties of an involuntary principal, even if the voluntary agent intended to act for another person.

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[126]If the voluntary agent is under incapacity or restricted capacity he is not liable for any default on his part, except in so far as any liability arises under the rules as to unlawful acts or as to unjustified benefits.

[127]On this point see Prachoom which observes that the provisions of the Thai civil and Commercial Code about the management of affairs without mandate faithfully follow 'the practice of Roman law in intimately linking *negotiorum gestio* with the contract of *mandatum* especially after *gestio* had been ratified. Thus, by ratifying the *gestor*'s act, the *dominus* put himself in relation to the gestor in the same position as if he had given an antecedent mandate so as to give the *gestor action mandate contraria* and, after such ratification, the *dominus* was debarred from subsequently calling into question the usefulness of *gestio*'. Prachoom (2015, p. 370).

[128]As far as the standard of care is concerned, the voluntary agent has to exercise due care expected from a reasonable person and is therefore accountable for negligence. This duly reflects the Roman *exacta diligentia,* the care that a *bonus paterfamilias* habitually exhibited in his own affairs, the Roman *bonus paterfamilias* being the counterpart to the modern 'reasonable person'. However, since this is an emergency, he is in an exceptional situation: he is, as was the case with the Roman *gestor*, liable only for wilful default and gross negligence which could be subsumed under the broad heading of the Roman *dolus.* For a detailed analysis on this point, see Prachoom (2015, p. 372).

[129]On this point, see Sodpipan (2002, p. 76).

### 2.7.3 Unjustified Benefits

An 'unjustified benefit' (*laap mee quan daai*) is a benefit received without a sufficient legal ground (Section 406, Civil and Commercial Code). The expression 'legal ground' is the equivalent of the Roman *causa*, which has a more extensive meaning than the English term 'consideration' in its usual narrower sense. Thus, the *animus donandi* is a good legal ground, though it is not a 'valuable consideration'. Any person who receives a benefit at the expense of another without a sufficient legal ground must restore such benefit to the person at whose expense it was received.

Where the benefit was received on a sufficient legal ground, which has subsequently ceased to operate, or by virtue of a juristic act the purpose of which has not been accomplished, the person at whose expense such benefit was received has a right to the restoration of the *status quo ante* in the same way as if no sufficient legal ground had ever been in existence. If it was, however, known to him *ab initio* that the accomplishment of the purpose of the transaction was impossible, or if such accomplishment was prevented by any unfair conduct on his part, he forfeits his claim to restoration. To illustrate, suppose A makes a gift of a house to his son B. B is guilty of conduct entitling A to revoke the gift. Upon the exercise of such right A is entitled to claim the retransfer of the ownership by reason of the fact that the legal ground, on which such ownership was transferred to B, has ceased to operate. To take another example, suppose A pays B for the use of a window on a date on which the wedding procession is to pass it. The procession does not pass, owing to the groom's illness. A may recover the amount paid by him because the purpose of the hiring agreement under which it was paid was not accomplished. If A knew that the procession on the day in question could not possibly take place, he has no right to recover the amount paid by him.

The general rule as to unjustified benefits stated above is supplemented by some special rules which apply to the recovery of objects delivered in discharge of a non-existent obligation. Specifically, a person who pays money or delivers an object under the mistaken impression that he is discharging an obligation may, under the general rule stated above, recover such money or such object on finding that the assumed obligation was non-existent (Section 413, Civil and Commercial Code). He has the same right if, at the time of making the payment or delivery, he was in a position to resist a claim for the performance of the obligation intended to be discharged by means of any defence or set-off other than the plea of prescription.[130]

The mere fact that the performance of the obligation was not due at the time when the payment or delivery was made does not entitle the party making it to recover the money or object paid or delivered prematurely, or to demand interest for the intermediate period. The right to recover any money or object paid or

[130]This rule corresponds to the English rule as to the recovery of money paid under a mistake of fact, but under the Thai law other objects may be recovered as well as money, and no distinction is drawn between a mistake of fact and a mistake of law.

delivered for the purpose of discharging an obligation which in fact was non-existent or unenforceable is excluded if the payment or delivery was made with the knowledge of the invalidity of the obligation or of the existence of a valid defence, or in compliance with a moral duty.

Moreover, if a person makes a disposition of a thing or right which is binding upon the true owner, though unauthorized by him, such true owner is entitled to claim from the person making such unauthorized disposition any benefit received in consideration thereof or in connexion therewith.[131] However, in the case that the person by whom the unauthorized disposition was made did not himself receive any benefit in return therefor or in connexion therewith, any other person by whom a direct benefit was derived in consequence of such disposition is liable in his place. If any payment or delivery was made to a person who was not entitled thereto, but with the result that the person making such payment or delivery was duly discharged thereby the person who was entitled to such payment or delivery may claim from the person by whom it was received the surrender of all benefits derived therefrom.[132]

With regard to the claims for the return of payments and deliveries made in consideration of prohibited acts, Section 411 of the Civil and Commercial Code states that a person who has made an act of performance, the purpose of which is contrary to legal prohibition or good morals, cannot claim restitution. Thus, if the purpose of the transfer or delivery of any object to another is of such a nature as to constitute a prohibited act, or an act *contra bonos mores*, the party making the transfer or delivery has no right to recover such object. If any obligation is incurred for any purpose of the nature described, the party incurring such obligation may claim to be released therefrom, even if both parties were *in pari delicto*. An example will clarify this point. Suppose A receives 10,000 baht from B for the disclosure of a secret chemical process. The disclosure was a gross breach of confidence, and therefore *contra bonos mores*. In this case, B has no claim for a return of his payment. If instead of paying the 10,000 baht, he had promised to pay them at a future date, he might have refused such payment and claimed to be released therefrom in any event.

In the light of these considerations, it ought to be clear that the rules as to 'unjustified benefits' are intended to prevent the person concerned from reaping an unmerited advantage at the expense of another, but it is not their object to indemnify the claimant. For this reason, the person having to return the benefit is not *ab initio* bound to exercise any diligence as to the preservation of any object which he may be liable to return. If such object is destroyed before he becomes aware of

[131]If the disposition was in the nature of an unlawful act, the true owner is of course entitled to full compensation under the rules as to unlawful acts, but if the act was done in good faith and without negligence, nothing more can be claimed than the restitution of any benefit received by the transaction. For instance, if a public officer without any default on his part sells goods not belonging to the judgment debtor to a buyer, who in good faith acquires the ownership, the true owner has a claim against him only in so far as the proceeds of sale are in his hands.

[132]For a detailed analysis on this point, see Setabutr (2006, p. 192 ff).

his duty to return it, the loss falls on the claimant. The recipient has to return the object received by him, and all profits received therefrom, as well as any object received in its place or by way of compensation for its loss or destruction. In the case that the return of any object is impossible, its value must be paid to the claimant, in so far as the benefit of such value is still retained by the claimant.[133]

The restriction as to the recipient's liability ceases to operate after action brought. From that time the stricter liability brought about under the general rules as to the effect of *lis pendens* is imposed upon the recipient. In a number of circumstances, such stricter liability begins to operate at an earlier date. In particular, when the recipient, on the receipt of the benefit, is aware of the absence of a legal ground the stricter liability begins as from the receipt of the benefit. If he becomes aware of the absence of a legal ground at some later date, the stricter liability begins as from such later date. Similarly, where the acceptance of the benefit infringes a legal prohibition or is *contra bonos mores*, the stricter liability begins as from the time of such acceptance. In the case that the legal ground originally existing ceases to operate, or where the purpose of the act by which the benefit was conferred is not attained, the recipient comes under the more stringent liability as from such time.[134] In all these cases, interest cannot be claimed from a period anterior to the time at which the right to recover the benefit is established. The return of profits can be demanded in so far only as the recipient is still benefited thereby at such time.

If the recipient of a benefit transfers such benefit gratuitously to another, the transferee becomes liable in the place of the original recipient, in so far as the liability of the latter is excluded by reason of the transfer.[135]

The claim to recover any unjustified benefit, or to be released from an obligation incurred without a sufficient legal ground, is subject to the ordinary rules as to prescription, but the performance of an obligation incurred without a sufficient legal ground may be refused, notwithstanding the fact that the claim to be released from such obligation is barred by prescription.

### *2.7.4 Obligations Created by Estoppel*

The principle of 'estoppel', which plays a very important part in English law, is not known as such in Thailand, but certain classes of obligations recognized by

[133]If the recipient has consumed the value, he is deemed to have retained its benefit.

[134]This rule applies only if at the time of the receipt of the benefit the recipient was aware of the possibility of the termination of the legal ground, or of the uncertainty of the attainment of the purpose.

[135]If at the time of the transfer the original recipient was under the stricter liability, the remedy is available against him only; but as long as the stricter liability does not operate, the recipient ceases to be liable as soon as he transfers the object to another, except in so far as he receives any benefit by reason of the transfer or retains the benefit derived from the use of the object.

Thai law are based on principles similar to those of English law of estoppel, and may conveniently be classed together under that head. According to the English law, a person who induces another to act on the assumption that a certain state of facts is in existence must, in the cases to which the rules as to estoppel are applicable, allow the relations between him and such other person to be regulated by the 'conventional state of facts' thus created, and cannot, as between himself and such other person, derive any advantage from the circumstance that the real state of facts was different.

The Thai law in the cases in which the same principle is applied does not go quite so far, but it gives a right to the party who relies on the existence of a state of things, which does not in fact exist, to receive compensation from the party whose representation caused his mistaken assumption. Specifically, where a declaration of intention is void on the ground of not having been intended seriously, or is avoided on the ground of mistake, the party to whom the declaration was communicated is entitled to compensation for the damage suffered by him, owing to his reliance on the effectiveness of the declaration. If the declaration was one not required to be communicated to another party, any person suffering damage by relying on its effectiveness is entitled to compensation. By the same token, where a contract is void on the ground that it was is impossible *ab initio*, or on the ground of immorality or illegality, the party who at the time of the apparent formation of the agreement was aware of its nullity must compensate the other party for any damage suffered by his reliance on the validity of the agreement unless the nullity was, or ought to have been, known to such other party.

The damages recoverable in either case are damages for the 'negative interest' in the effectiveness of the declaration or the validity of the agreement.

### *2.7.5 Obligations and Rights of Finders of Lost Objects*

A person who finds an object lost by another and takes it into his possession is subject to the duties and entitled to the rights provided under the Civil and Commercial Code. In particular, the finder of an object must give immediate notice to the loser, or to any person entitled to receive the lost object. Where this cannot be done, notice must be given to the competent police authority (Section 1323 Civil and Commercial Code). In any case, the property found must be kept with reasonable care until delivery.[136] If, after the lapse of a year from the communication of the notice to the police authority, no claim has been lodged with such police authority, the identity of the loser or owner remaining unknown to the

[136]The finder must keep the object in his custody unless he prefers to deliver it to the competent police authority, or unless the police authority requires him to deliver it. The finder, however, is not liable for any damage to the found object caused otherwise than by his wilful default or gross negligence.

finder, the finder acquires the ownership of the found object or of its proceeds of sale, unless he waives his claim thereto.

In the case that the original owner subsequently claims the property, the finder is entitled to a reward. In this respect, Section 1324 of the Civil and Commercial Code states that 'a finder of lost property may claim from the person entitled to receive it a reward of ten per cent of the value of the property up to thirty thousand baht, and five per cent on the additional value'. However, if he delivers the property to the police or other competent official, two and a half per cent of the value of the property must be paid as a fee to the government in addition to the reward.[137]

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[137]On this point, see Pramod (1965, p. 298).

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