Modernization of the Law of Risk-assuming: A Lesson from the Japan's Revision of the Law of Obligation

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Abstract

The provisions of our civil law on the existence of the obligation to perform if the debtor does not perform at all or does not perform in accordance with the original purpose of the contract can be divided into four parts: first, the general provisions of risk-assuming regarding the reciprocal contract (Article 266); second, Article 267 provides for the passing of risks when the impossibility of performance is attributable to the creditor; third, the provisions on the passing of risks on contract of sales and works; and fourth, the provisions on the assuming of risks on continuous contract. The provisions of Parts 1 and 2 draw on the essence of the German Civil Code of 1900 and Japanese Civil Code of 1896, and the third and fourth parts are the successors of the former. If non-fault on both sides of parties of a contract is no longer necessary for the effect of the statutory rights to terminate, owing to the fact that the termination of contract can lead to the absolve of the duty to perform, the general provisions of the risk-assuming are dispensable. During the revision process of the German and Japanese law of obligation, based on the theory that the attribution is unnecessary for the termination of contract, the existence and abolition of the general provisions on dangerous burdens has been thoroughly evaluated. In Taiwan, the reform of the law on breach of contract is in full swing. If the requirement of fault on the default party is going to abolish de lege ferenda, the general rules on the risk-assuming will be unnecessary. If we are going to retain this kind of rule anyway, it should be applied only when that impossibility of performance cannot be attributed to the parties.

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