

Abstract

In principle, Thai law requires that the rescission can be done on the basis of two grounds: by contract clause or by the requirement (s) of applicable laws. However, in practice, both parties may rescind the contract upon their mutual agreement. Nonetheless, certain problems related to the rescission are revealed in this study as following:

(1) Degree of default

Material default will contribute to the right of rescission. However, one particular problem to be taken into account is that what degree of default will entitle other party the right of rescission or what default will be regarded material. Section 387 only stipulates that “if one party does not perform the obligation ...” There is no however requirement on material default or the degree of default. As a result, the consideration whether the default is significant and renders to the right of rescission is crucial. I views that, in order to have the right of rescission, following criteria should be met: 1. total default 2. failure to perform the obligation in significant amount (lack of performance in a large amount; perform an obligation by other means or the performance not benefiting the creditor) 3. great loss suffered by the debtor 4. traditionally-deemed significant damage and 5. Infringement of the doctrine of good faith.

(2) With respect to the rescission before the obligation becomes due, it may be attributable to two reasons: 1) debtor’s expression of intention not to perform or 2) the situation in which the debtor is not a position to make the performance. Its doctrine is found in British and German laws. For the former, it is admissible if the anticipatory breach causes breach of condition. Similarly, this is comparable to Section 323 (4) of German law in spite of a slight difference from the British counterpart. This means that German law has not requirement on breach of condition. The provision of Thai law in this regard is found in specific laws. There is no however general provision on the rescission before the obligation becomes due yet. The adoption of Section 387-389 or Section 192 (the advantage of a time is waived by the creditor.) or Section 193 (the debtor cannot take advantage of a time.) thus may not be viable because those Sections do not govern

the rescission. Also, it is still ambiguous if the adoption of Section 5 is possible. I recommend enacting the provision on the rescission before the obligation becomes due to reduce such ambiguity accordingly.

(3) Currently, there is no provision of Thai law governing the right to compensation in case of the rescission before the obligation becomes due; though, Section 391 requires that the exercise of the right of rescission does not affect a claim for damages. Principally, the emergence of right to compensation may be attributable to debtor's nonperformance (debtor's fault). Under Section 204, the debtor is in default if he/she does not perform after warning is given by the creditor. However, according to paragraph 2 of Sector 204, the debtor may also be in default without warning if he/she he does not perform within the fixed period for the performance. In order to reduce such difficulty, I then recommend stipulating the right to immediate compensation within Thai law.

(4) Under Section 387, a reasonable period may be fixed for the debtor to perform. Hence, if breach of contract prevails, the creditor can rescind the contract after he/she notifies the debtor to perform within such reasonable period except in case where Sections 388 and 389 may apply. However, British law allows immediate rescission if it becomes evident that, despite the notification of such reasonable period by the creditor, the debtor will not or is unable to perform (e.g. debtor's obvious behaviour or expression of intention not to perform). Nonetheless, immediate rescission is not found in Thai law. Moreover, the court ruling is also unclear whether the creditor may have the right of immediate rescission without prior warning if such circumstance prevails.

In conclusion, to solve problems of (2), (3) and (4), I recommend amending Section 387/1 as following **"when the obligation becomes due and the debtor fails to perform or he/she clearly expresses his/her intention not to perform, the creditor has the right of immediate rescission."**

The provision of foregoing paragraph will also be applicable to undue performance if the creditor exercises his/her right of rescission; he/she will have right to compensation.

(5) There is no provision in Thai law governing the rescission if the performance becomes impossible by a cause not attributable to the debtor. Section 389

requires that if performance becomes wholly or partly impossible by a cause attributable to the debtor, the creditor may rescind the contract. Section 219 stipulates that the debtor is relieved from his obligation if the performance becomes impossible in consequence of a circumstance, for which he is not responsible... However, the problem found is that how the reimbursement for any performance done before it becomes impossible can be made. Two possible practices for this are the adoption of: 1. Section 372 or 2. the doctrine of return of unjust enrichment. Nevertheless, Section 372 does not govern actually the return of property; meanwhile the doctrine of return of unjust enrichment may be unfair. Therefore, the question is whether the amendment of Section 389 will be appropriate. The study reveals however that such amendment will then affect Section 370 or other Sections. Hence, I recommend amending Section 372: "...if an obligation becomes impossible of performance by a cause not attributable to either party, the debtor has no right to receive the counter-performance. **If the performance has been made previously, it shall be returned. If such return is impossible, compensation should be made accordingly.**"

(6) The problem related to the contract with periodic performance is also found. The study unveils that, in light of most academic opinions, the rescission has not retrospective effect. Rather, it will end future legal relationship. However, currently there is no statute to support such opinion. Thus, I recommend amending Section 391/1: **"In case of periodic performance, the rescission shall end future legal relationship."**

(7) Unfair contract is another issue found in this study. The problem is occurred when both parties have made an agreement to waive of right of rescission e.g. waiver of right under Sections 573 and 605. Section 4 of Unfair Contract Terms Act B.E. 2540 (1997) has no provision on this particular matter. Therefore, the enactment of the clear legal requirement in this regard is essential. Despite the fact that it is not a law on security or public ethnics, its enforceability should still be on basis of fairness and mutual benefit for all parties bound by the contract. Hence, I recommend adding one sub-section to Section 4 for the purpose of clarity. This means that the initial part of Section 4 (3), which governs the rescission without sound grounds should become one separate sub-section. The new Sub-section (4) should then be incorporated in order to

specifically regulate mutual agreement on rescission. It should be “agreement to waive the right of rescission or the right to rescind the contract despite the fact that nonperformance by other party is insignificant or the right of rescission without sound grounds” shall be enforceable so far as it is fair and suitable to that particular circumstance.