

PARTIAL RESCISSION OF CONTRACTS^{*}

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Abstract

The principle of partial rescission of contracts allows the innocent party to partially rescind the contract. Since a contract is not rescinded as a whole, the performance that has already been performed before rescission will be unaffected.

According to the study, many countries, including European Contract Laws, have developed the principle of partial rescission of contracts. Principally, where obligations of the contract are divisible, and a counter-performance can be apportioned to a specific part which is to be rescinded, a contract may be partially rescinded.

According to the Thai Civil and Commercial Code, the general provisions of contract law do not expressly allow the innocent party to partially rescind a contract. Thus Thailand should introduce the principle of partial rescission of contracts by amending the Thai Civil and Commercial Code in order to encourage the continuity of commercial activities.

Keywords: Partial Rescission of Contracts, Partial Performance, Divisible Obligation

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1. Introduction

The principle of partial rescission of contracts has been developed in many countries, for example, England, the United State of America, Germany, and Netherland, and also stipulated in European Contract Laws, for example, the United Nations Convention on Contracts for the International Sale of Goods (CISG), the Principle of European Contract Law (PECL), the Common European Sales Law (CESL), and the Draft Common Frame of Reference (DCFR).

Under the Thai Civil and Commercial Code, there is no general provision that expressly prescribes a unilateral right of a party to partially rescind a contract. Therefore, generally in practical, when a party has the right to rescind a contract, rescission of contract as a whole shall be applied.

2. Partial Rescission of Contracts in the Thai Civil and Commercial Code

According to Section 386 paragraph one,¹ the innocent party may unilateral rescind the contract by two means. The first is rescission of contract by provisions of law. The second is rescission of contract by clauses of contract. In this regard, Section 386 does not indicate that rescission of contract must be in whole or in part.

2.1 The Possibility of Partial Rescission of Contracts according to the General Provisions of Contract Law

Principally in order to enable the right of partial rescission of contract, the obligation of the contract must be divisible.

In the Thai Civil and Commercial Code, the problem concerning divisible obligation is in the case that there are several debtors or several

¹ Thai Civil and Commercial Code, s 386 paragraph 1

creditors within the contract according to Section 290,² where the obligation is divisible, and there are several debtors or several creditors.³ Principally, the principle of divisible obligation does not apply to the general provisions for rescission of contract. If there is a ground for rescission of contract whether it is breach of contract or impossibility of performance, the innocent party may rescind the contract as a whole, so there is no need to consider whether the obligation of contract is divisible or not.

In order to comprehend the provisions of law for the purpose of applying such provisions to the fact, the provisions must be interpreted based on logic and righteous conscience.⁴ Such interpretation is subject to the principle of Juristic Method under Section 4 of the Thai Civil and Commercial Code. According to Section 4 paragraph one;⁵ the provision must be interpreted according to the wording used and the spirit of the provisions concurrently.

Section 387,⁶ Section 388⁷ and Section 389⁸ do not stipulate that the rescission must be in whole or in part. However, if we read these sections

² Ibid., s 290

³ จีต เศรษฐบุตร, *หลักกฎหมายแพ่งลักษณะนิติกรรมและสัญญา* (6th edn, โครงการตำราและเอกสารประกอบการสอน คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 2010) (Jeet Serttabud, (*Lak Khodmai Phaeng Laksana NitiKham Lae Sanya [Civil Principle of Juristic Acts and Contracts]* (6th edn, Duentula Printing House 2010)) 119

⁴ สมยศ เชื้อไทย, *ความรู้กฎหมายทั่วไป คำอธิบายวิชากฎหมายแพ่ง : หลักทั่วไป ความรู้พื้นฐานเกี่ยวกับกฎหมายและระบบกฎหมาย ความรู้พื้นฐานทางนิติศาสตร์* (21st edn, บริษัท สำนักพิมพ์วิญญูชน จำกัด 2015) (Somyos Cheuthai, *Khwanroo Khodmai Tuopai Kham Athibai Wicha Khodmai Phang : Lak Tuopai Khwanroo Puentan Kiewkub Khodmai Lae Rabob Khodmai Khwanroo Puentan Thang Ni Ti Sart [Knowledge of General Law, Explanation of Civil Law Subject : General Principle, Basic Knowledge concerning Law and Legal System, Basic Knowledge related to Legal Science]* (21st edn, Winyuchon Publication House 2015)) 168

⁵ Thai Civil and Commercial Code, s 4, paragraph 1

⁶ Ibid., s 387

⁷ Ibid., s 388

⁸ Ibid., s 389

thoroughly, it can be seen that the provision does not concern whether or not the ground for rescission is separated between the case of a part or a whole of contract. They only provide the principle that if there is a ground for rescission, the innocent party may rescind the contract. Thus, it can be said that the intention of these provisions proposes that rescission must be made against the whole contract although there is a ground for rescission for each part of contract or for the whole contract.

Furthermore, other than the meaning of the wording, we must also seek the meaning of the spirit of the provision concurrently. The spirit of the provision may be sought by considering the relating provisions because the provisions in the Code are linkable as a system.⁹ In this regard, we may consider the provision concerned with rescission of the specific contract.

According to Section 465¹⁰ and Section 466,¹¹ the buyer has the right to reject the property, or even rescind the contract under Section 466 paragraph two. The term ‘rejection’ and ‘rescission’ are different. ‘Rejection’ is not considered as the cessation of contract, the contract is not extinguished as consequences of rescission. The seller still has the duty to deliver the property in accordance to the contract agreed. Thus ‘rejection’ in these provisions only gives the right to the buyer to reject the property which is not accordance to the contract agreed. On the contrary, ‘rescission’ operates to cease the contract. The buyer has no duty to deliver the property anymore.¹² Thus, it means that these two sections do not allow the buyer to partially rescind the contract. If the buyer wants to rescind the contract, he has to rescind the whole contract, not in part.

⁹ Somyos Cheuthai (n 4) 183

¹⁰ Thai Civil and Commercial Code, s 465

¹¹ Ibid., s 466

¹² ศันนัทภรณ์ โสติพันธ์, คำอธิบาย ข้อย้าย แลกเปลี่ยน ให้ (6th edn, บริษัท สำนักพิมพ์วิญญูชน จำกัด 2013) (Sanunkorn Sotthibandhu, *Kham Athibai Suekai Lakpleaun Hai [Explanation of Law concerning Sale, Exchange and Gift]* (6th edn, Winyuchon Publication House 2013)) 164

These provisions show that rescission of contract under Thai contract law system tends to be rescission of contract as whole. So, the general provision for rescission of contract should be interpreted to be rescission of contract as a whole in accordance to this attitude.

Hence, since the wording and the spirit of Section 387, Section 388 and Section 389 indicate that the innocent party may rescind the contract as a whole and does not recognize partial rescission of contract. It may be concluded that there is no principle of partial rescission of contract under general provisions of contract. Thus, the innocent party may not choose to partially rescind the contract, he may only rescind the contracts as a whole.

As for the continuing contract, it is different. The continuing contract is a contract that has the continuing performance over a period of time such as the lease contract, the hire-purchased contract and the employment contract.¹³ The obligation of the continuing contract can be divided into several performances in consistence with the counter-performance in fixed rate of payment for each performance. Moreover, when the party has performed a part of his obligation, such performance shall be concluded and completed by itself and shall not affect to or be affected by the other parts of contract. When the innocent party rescinds the continuing contract, rescission operates prospectively. It does not affect the performance that has already completed before the rescission, because the performance that has already performed is completed.¹⁴ Thus for the continuing contract, it may be said that the law allows the innocent party to partially rescind the contract by the nature of the continuing contract.

¹³ ศนันท์กรณ โสทธิพันธ์, *คำอธิบายนิติกรรม-สัญญา* (19th edn, วิญญูชน 2015) (Sanunkorn Sotthibandhu, *Kham Athibai NitiKham-Sanya [Explanation of Juristic Acts and Contracts]* (19th edn, Winyuchon Publication House 2015)) 470

¹⁴ จิตติ ติงศภัทัย, *คำอธิบาย ประมวลกฎหมายแพ่งและพาณิชย์ เรียงมาตรา ว่าด้วยสัญญา* (โรงพิมพ์ เดือนตุลา 2009) (Jitti Tingsapat, *Kham Athibai Pramuan Khodmai Phaeng Lae Panich Reang Martra Waduy Sanya [Explanation of Civil and Commercial Code concerning Contracts]* (Duentula Printing House 2009)) 173

2.2 Possibility of Partial Rescission of Contracts according to Clauses of Contracts

According to Section 386 paragraph one,¹⁵ the parties may rescind a contract by a clause of the contract. This section expresses that rescission of contract is not the law concerning the public order or good moral according to Section 151.¹⁶ Thus the parties may agree to determine the right to rescind the contract differently from the provisions of law.¹⁷

Hence in the author's opinion, the parties may agree to stipulate the clause for partial rescission of contract and rescind the contract as such.

3. Conclusion

According to the Thai Civil and Commercial Code, the general provision of rescission of contract does not allow the innocent party to partially rescind the contract. As for the right of rescission according to the clauses of contract, the parties may agree to put a clause for partial rescission of contract in the contract and may legitimately use this clause to partially rescind the contract. However, in practice, many contracts do not have the clause for the partial rescission of contract, the innocent party has to rescind the contract by relying on the general provision of rescission of contract. So, he cannot rescind the contract in part, and only has the right to rescind the contract as a whole. Thus, the author proposes that the principle of partial rescission of contract should be developed in Thai law as well.

¹⁵ Thai Civil and Commercial Code, s 386 paragraph 1

¹⁶ Ibid., s 151

¹⁷ อัครวิทย์ สุมาวงศ์, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วย นิติกรรม สัญญา (5th edn, สำนักอบรมศึกษากฎหมายแห่งเนติบัณฑิตยสภา 2009) (Akarawit Sumawong, *Kham Athibai Pramuan Khodmai Phaeng Lae Panich Waduy NitiKham Sanya [The Explanation of Civil and Commercial Code concerning Juristic Acts and Contracts]* (5th edn, Thai Bar Association 2009)) 342

References

Books and Book Articles

- กมล สนธิเกษตริน, *ประมวลกฎหมายแพ่งและพาณิชย์ บรรพ 1-6 พร้อมคำแปลภาษาอังกฤษและอธิบาย* (นิติบรรณการ 2008) (Kamol Sandhikshetrin, *Pramuan Khodmai Phaeng Lae Panich Bab 1-6 Prompt Kham Plae Pha Sa Angklish Lae Apithan [Civil and Commercial Code Book 1-6 and Glossary]* (Nitibannagarn 2008))
- จิตติ ติงศัททย์, *คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ เรียงมาตรา ว่าด้วยสัญญา* (โรงพิมพ์เดือนตุลา 2009) (Jitti Tingsapat, *Kham Athibai Pramuan Khodmai Phaeng Lae Panich Reang Martra Waduay Sanya [Explanation of Civil and Commercial Code concerning Contracts]* (Duentula Printing House 2009))
- จิต เศรษฐบุตร, *หลักกฎหมายแพ่งลักษณะนิติกรรมและสัญญา* (6th edn, โครงการตำราและเอกสารประกอบการสอน คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 2010) (Jeet Serttabud, *(Lak Khodmai Phaeng Laksana NitiKham Lae Sanya [Civil Principle of Juristic Acts and Contracts]* (6th edn, Duentula Printing House 2010))
- สมยศ เชื้อไทย, *ความรู้กฎหมายทั่วไป คำอธิบายวิชากฎหมายแพ่ง : หลักทั่วไป ความรู้พื้นฐานเกี่ยวกับกฎหมายและระบบกฎหมาย ความรู้พื้นฐานทางนิติศาสตร์* (21st edn, บริษัท สำนักพิมพ์วิญญูชน จำกัด 2015) (Somyos Cheuthai, *Khvamroo Khodmai Tuopai Kham Athibai Wicha Khodmai Phang : Lak Tuopai Khvamroo Puentan Kiewkub Khodmai Lae Rabob Khodmai Khvamroo Puentan Thang Ni Ti Sart [Knowledge of General Law, Explanation of Civil Law Subject : General Principle, Basic Knowledge concerning Law and Legal System, Basic Knowledge related to Legal Science]* (21st edn, Winyuchon Publication House 2015))

ศนันท์กรณ โสทธิพันธุ์, คำอธิบาย ซื้อขาย แลกเปลี่ยน ให้ (6th edn, บริษัท สำนักพิมพ์
วิญญูชน จำกัด 2013) (Sanunkorn Sotthibandhu, *Kham Athibai Suekai
Lakpleaun Hai [Explanation of Law concerning Sale, Exchange and
Gift]* (6th edn, Winyuchon Publication House 2013))

ศนันท์กรณ โสทธิพันธุ์, คำอธิบายนิติกรรม-สัญญา (19th edn, วิญญูชน 2015)
(Sanunkorn Sotthibandhu, *Kham Athibai NitiKham-Sanya
[Explanation of Juristic Acts and Contracts]* (19th edn, Winyuchon
Publication House 2015))

อัศววิทย์ สุมาวงศ์, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วย นิติกรรม สัญญา
(5th edn, สำนักอบรมศึกษากฎหมายแห่งเนติบัณฑิตยสภา 2009) (Akarawit
Sumawong, *Kham Athibai Pramuan Khodmai Phaeng Lae Panich
Waduy NitiKham Sanya [The Explanation of Civil and Commercial
Code concerning Juristic Acts and Contracts]* (5th edn, Thai Bar
Association 2009))