



PARTIAL RESCISSION OF CONTRACTS

BY

MR. KITISAK SUKSUMRAN

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF
THE REQUIREMENTS FOR THE DEGREE OF
MASTER OF LAWS IN BUSINESS LAWS (ENGLISH PROGRAM)

FACULTY OF LAW

THAMMASAT UNIVERSITY

ACADEMIC YEAR 2017

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ENTITLED

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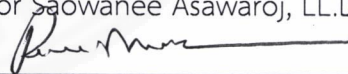
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Chairman



(Professor Saowanee Asawaroj, LL.D.)

Member and Advisor



(Associate Professor Pinai Nanakorn, Ph.D.)

Member



(Assistant Professor Munin Pongsapan, Ph.D.)

Member



(Panumas Sittivaekin, Docteur en droit)

Dean



(Professor Udom Rathamarit, Docteur en droit)

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Author	Mr. Kitisak Suksumran
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ABSTRACT

Rescission of contracts as a whole causes inconvenience for commercial transactions because when a contract is rescinded, the whole contract comes to an end, and the parties have to restore each other to the former condition at the time of the conclusion of contract. In consequence, the activities which have already been accomplished have to be restored. Thus, it causes the set back to commercial activities. 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 Since a contract is not rescinded as a whole, the performance that has already been performed before rescission will be unaffected. Hence, partial rescission of contract may be the key to resolve problems arising from rescission of a contract as a whole.

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of the contract are divisible, and a counter-performance can be apportioned to a specific part which is to be rescinded, a contract may be partially rescinded. Consequently, the rights and obligations of the parties related to the rescinded part are extinguished while the remaining parts of contract remain intact and valid. Thus, it does not hinder commercial activities.

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. In practice, rescission of contract is the rescission of contract as a whole. Considering the above-mentioned advantage to partial rescission of contracts, 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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CHAPTER 1

INTRODUCTION

1.1 Background

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). Each of, countries and continental European contract laws, has some different conditions. Mostly, the partial rescission shall be applied, where the obligation of contract is divisible and there has already performed the obligation in part of contract. In this regard, this thesis will analyse general concept of the principle of partial rescission of contracts in Chapter 2, and concentrates, in Chapter 3, on the principle of partial rescission of contracts in English law, German law, 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. According to Section 391 paragraph one,¹ when a contract has been rescinded, it has come to an end as from the beginning; each party has to restore the other party to his original condition, or *status quo ante*, similar to the condition at the time that the contract was made.²

¹ Thai Civil and Commercial Code, Section 391 paragraph one;

“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.”

² ศันนัทภกรณ 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)) 462-463

Additionally, according to Section 391 paragraph three,³ if by the nature of service rendered, the restitution cannot be done, it shall be made by paying the value of service rendered.⁴ However, there are many circumstances which rescission of contract as a whole is not appropriate and causes subsequent problems as follows:

a) The problem of maintenance and warranty clauses. Usually many contracts tend to have the maintenance and warranty clauses. When a contract is rescinded, the maintenance and warranty clauses are rescinded as well. The problem arose when the employer accepted partial performance as service rendered after rescission of contract. The maintenance and warranty clauses are discharged so the innocent party cannot demand the contractor to render his obligation or claim damages from the contractor for his liability according to maintenance and warranty clauses. In practice, if the innocent party want the maintenance and warranty clauses to be enforced, the breaching party may use this opportunity to raise the price, bargain the remedies, or even disagree to continue the clauses. The innocent party may find it hard to seek other contractor or seller to maintain or warrant the performed work of the breaching party because it is very risky to maintain or warrant the work that they did not do by themselves. Partial rescission shall allow the non-rescinded part to remain valid, so the rights and obligations of the maintenance and warranty clauses will still be intact and enforceable. Therefore, the innocent party may demand the breaching party to perform the obligation under the maintenance and warranty clauses.

b) The problem on commercial aspect. There are many circumstances which the innocent party does not want to rescind a contract as a whole, and then requests partial rescission of contract, because the problems in consequence of rescission of contract as a whole is greater than sustaining the contract. For example; in the contract of sale, the buyer buys 9 ships from the seller.

³ Thai Civil and Commercial Code, Section 391 paragraph three;

“For services rendered and for allowing the use of a thing the restitution shall be made by paying the value, or, if in the contract a counter-payment in money is stipulated for, this shall be paid.”

⁴ Sanunkorn Sotthibandhu, Explanation of Juristic Acts and Contracts (n 2) 465

They agree that the seller shall deliver all ships within 10 January 2010 and the buyer shall pay the price of 9 ships on the same day after receiving all 9 ships. Then on 10 January 2010, the seller delivers 9 ships to the buyer, but the buyer makes a payment only the price of 5 ships. The seller informs the buyer that the buyer has to pay the price of the 4 remaining ships within 13 January 2010; otherwise the seller will rescind this contract. On 14 January the buyer still does not pay the price of the remaining ships. In this case, if the seller chooses to rescind the contract, then according to Section 391 paragraph one, the buyer must return the received 9 ships to the seller and the seller must return the money received from the buyer. However, the seller may want to sell the 5 ships which is already delivered to the buyer and keep the money received because the seller can still take benefit from the 5 ships and keep the money received to carry on his business, thus, he may want to partially rescind the contract. However, according to the Thai Civil and Commercial Code, the seller must rescind the contract as a whole, which yields no benefit for the seller. In this case, if the Thai Civil and Commercial Code were to allow the seller to rescind only the part of the 4 remaining ships, the seller may be entitled to the payment of 5 ships that has already received and rescind the part of the remaining 4 ship which has not been paid. Therefore, it should be appropriate to allow the seller to partially rescind the contract which will give another solution for the seller other than rescission of contract as a whole.

c) Another problem occurs where the breaching party has already performed some part of the obligation under the contract but he breaches other part of the contract because of some technical problems, such as the lack of cash flow. However, despite the breaching party's attempt to amend the infringement as soon as he can, the innocent party may take this opportunity to rescind the contract as a whole. For example, in the case of a very big project, and there are several instalments of payments or obligations according to the contract. If there is a breach of one instalment or an obligation, the innocent party may rescind the contract even though the breaching party has already performed most parts of contract. This is quite unfair for the breaching party. Consequently, if the law does allow the innocent party to partially rescind the contract, as oppose to rescind the contract as

a whole, unless the breach is substantial to the whole contract, it will enhance the fairness to this problem.

These problems cause inconvenience and deterrence to the commercial transactions. Since both party of the contract must be restored to the original status at the time they entered into the contract. As a matter of fact, the contract itself is not only a legal instrument, but it is also the wheel which encourages and promotes the economic system. Hence, the law of contract should be appropriate and practicable for overall environment in order to encourage and promote the commercial transactions. Furthermore, under German law,⁵ the Principle of European Contract Law (PECL),⁶ the Common European Sales Law (CESL),⁷ and the

⁵ German Civil Code BGB 2002, Section 323, Revocation for non-performance or for performance not in conformity with the contract;

“(5) If the obligor has performed in part, the obligee may revoke the whole contract only if he has no interest in part performance. If the obligor has not performed in conformity with the contract, the obligee may not revoke the contract if the breach of duty is trivial.”

⁶ PECL, Article 9:302, Contract to be performed in parts;

“If the contract is to be performed in separate parts and in relation to a part to which a counter-performance can be apportioned, there is a fundamental non-performance, the aggrieved party may exercise its right to terminate under this Section in relation to the part concerned. It may terminate the contract as a whole only if the non-performance is fundamental to contract as a whole.”

⁷ CESL, Article 117, Scope of right to terminate, paragraph one;

“Where the seller’s obligation under the contract are to be performed in separate parts or are otherwise divisible, then if there is a ground for termination under this Section of a part which corresponds to a divisible part of the seller’s obligation, the buyer may terminate only in relative to that part.” ;and

Article 137, Scope of right to terminate, paragraph one;

“Where the buyer’s obligation under the contract are to be performed in separate parts or are otherwise divisible, then if there is a ground for termination under this Section of a part which corresponds to a divisible part of the seller’s obligation, the seller may terminate only in relative to that part.”

Draft Common Frame of Reference (DCFR),⁸ where the contract is divisible, and there is already partial performance, the rescission of contract as a whole is considered an exception, and only partial rescission as a whole in certain cases are allowed. With the aforementioned, it is undoubted that the principle of partial rescission of contracts should be introduced to the Thai Civil and Commercial Code.



⁸ DCFR, Article III.-3:506, Scope of right to terminate;

“(1) Where the debtor’s obligations under the contract are not divisible the creditor may only terminate the contractual relationship as a whole.

(2) Where the debtor’s obligations under the contract are to be performed in separate parts or are otherwise divisible, then:

(a) if there is a ground for termination under this Section of a part to which a counter-performance can be apportioned, the creditor may terminate the contractual relationship so far as it relates to that part;

(b) the creditor may terminate the contractual relationship as a whole only if the creditor cannot reasonably be expected to accept performance of the other parts or there is a ground for termination in relation to the contractual relationship as a whole.”

1.2 Hypothesis

The general principle of partial rescission of contracts may relieve the problems arising from rescission of contract as a whole.

1.3 Objective of Study

- 1) To study and analyse the general concept of partial rescission of contracts.
- 2) To study and analyse the general principle of partial rescission of contracts under German law, English law, the Common European Sales Law (CESL), and the Draft Common Frame of Reference (DCFR).
- 3) To study and analyse the possibility of general principle of partial rescission of contracts under the Thai Civil and Commercial Code.
- 4) To propose the principle of partial rescission of contracts, the potential amendment, for the Thai Civil and Commercial Code.

1.4 Scope of Study

- This thesis concentrates on the study of the general principle of partial rescission of contracts, in scope of a unilateral right of a party to partially rescind a contract in cases of breach of contract and the impossibility of performance, excluding automatic rescission, rescission of voidable contracts and rescission for anticipated breach.
- The major laws to be researched and analysed in this thesis are the law of contract under German law, English law, the Common European Sales Law (CESL), the Draft Common Frame of Reference (DCFR), and the Thai Civil and Commercial Code.

1.5 Study Methodology

This thesis is conducted based on documentary research including legal books, legal texts, domestic law, foreign law, continental European contract

laws, decision of the Supreme Court and other legal documents, along with information from the internet.

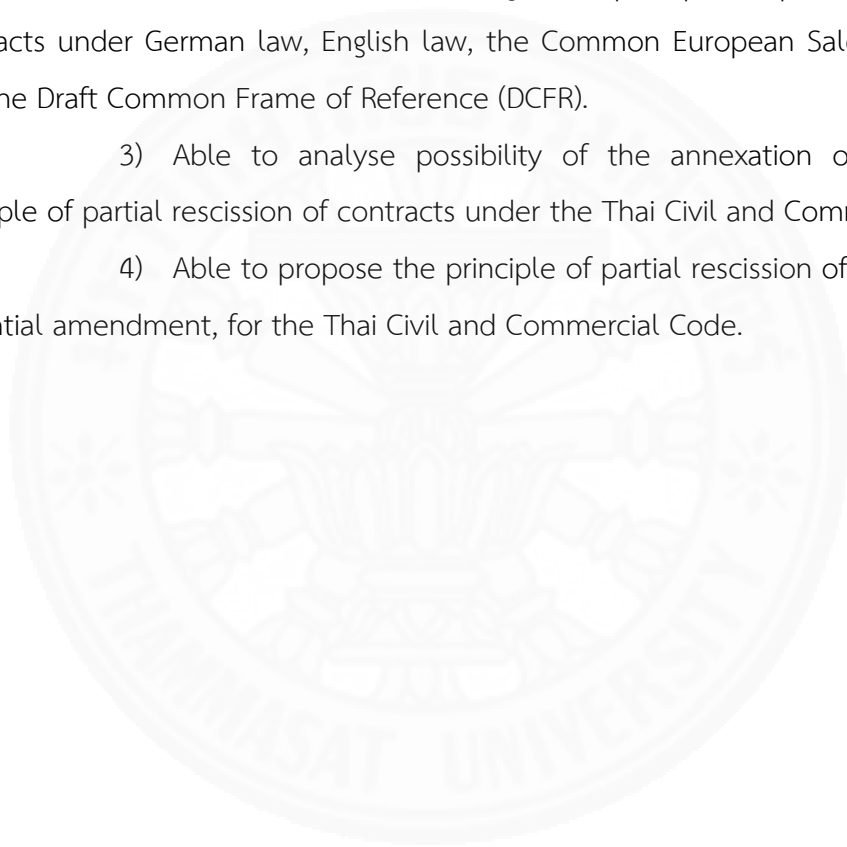
1.6 Anticipated Benefits

1) Able to understand the general concept of partial rescission of contracts.

2) Able to understand the general principle of partial rescission of contracts under German law, English law, the Common European Sales Law (CESL), and the Draft Common Frame of Reference (DCFR).

3) Able to analyse possibility of the annexation of the general principle of partial rescission of contracts under the Thai Civil and Commercial Code.

4) Able to propose the principle of partial rescission of contracts, the potential amendment, for the Thai Civil and Commercial Code.



CHAPTER 2

GENERAL NOTION OF PARTIAL RESCISSION OF CONTRACTS

In order to systematically comprehend and mutually understand partial rescission of contracts, this thesis establishes from the big picture of the general notion of partial rescission of contracts, including; (2.1) terminology of ‘rescission’ and ‘termination’; and as well as (2.2) the confusing ideal wording of ‘modification’ which may lead to the misunderstanding of partial rescission concept; and (2.3) common mutuality and different conditions of each law.

2.1 Terminology of ‘Rescission’ and ‘Termination’

The terms of ‘rescission’ and ‘termination’ are often used interchangeable in the common law system. Where there is any defect in the formation of the contract, arising by grounds of fraud, duress, undue influence, or other invalidating causes, the contract might be extinguished as from the beginning, or *ab initio*, in consequence of ‘rescission’. On the other hand, where there is a breach of contract such as late performance, non-performance, defective performance or frustration, the contract might be terminated only in respect of future rights and obligations, or *de futuro*, in consequence of ‘termination’.⁹

However, in the common law system, there are some different opinions. One opinion views that although the concept of ‘rescission’ and ‘termination’ is fundamentally different, it is considered to be more convenient to use such terms interchangeably than to distinguish the terms ‘rescission’ and ‘termination’ separately.¹⁰ Another opinion distinguishes these two terms separately, by reasoning that interchangeable using the term of ‘rescission’ and ‘termination’ tends to create confusion between rescission for the formation of contract and

⁹ Dominic O’Sullivan, Steven Elliott, Rafal Zakrzewski, *The law of rescission* (2nd edn, Oxford University Press 2014) 3

¹⁰ Guenter Heinz Treitel, *The law of contract* (10th edn, Sweet & Maxwell 1999) 703-704

rescission for breach. In the case of rescission for the formation of contract, the contract is set aside retrospectively. It aims to restore the parties, as far as possible, to the position which they were in before they entered into the contract, or *ab initio*. Differently, in the case of rescission for breach, a contract, which is rescinded for breach, is set aside prospectively, or *de futuro*, but not retrospectively. Thus it is preferable to avoid any confusion by referring to the right of the innocent party for the breach of contract as a right to terminate further performance rather than a right to rescind.¹¹ Furthermore, another opinion views that the term ‘termination’ is not synonymous with the term ‘rescission’ of the contract *ab initio*.¹² Hence, even though the terms of ‘rescission’ and ‘termination’ are often used interchangeable in the common law system, but it is preferable to use the term of ‘rescission’ in case of *ab initio* where the contract is voidable because there is a defect in the formation of contract. Whereas the term ‘termination’ is preferable to be used where there is a breach of contract by the causes such as late performance, defective performance, or frustration.

While under the civil law system like German law, the term ‘termination’ is distinguished from ‘rescission’. ‘Rescission’ is used to negate retroactively the validity of the contract; the parties are treated as if there had never been the contract between them. Since there is the absence of contract which is considered as *causa* of performance, any performance that has been exchanged must be reversed. Whereas the term ‘termination’ is used when there is a breach of contract. As for a consequence of ‘termination’, there is no retrospective effect so far as the validity of the contract is concerned. The effect of ‘termination’ is to bring the obligations of the parties to an end from the moment that the innocent party terminates the contract, and the party may refuse to perform any further performance.¹³

¹¹ Ewan McKendrick, Contract law (Palgrave law masters, 11th edn, Palgrave 2015) para 20.6

¹² Michael Furmston, The Law of contract (Butterworths common law series, 3rd edn, LexisNexis Butterworths 2007) para 7.1

¹³ Sir basil Markesinis, Hannes Unberath, Angus Johnston, The German law of contract (2nd edn, Hart Pub 2006) 419-420

In the Thai Civil and Commercial Code, since there is no official English language Code for the current law, thus it is quite problematic whether which term shall be used in this thesis, because many citations in this thesis use their own terms, for example, the term ‘revocable’ according to Section 323 of German Civil Code BGB 2002, ‘rescission’ and ‘termination’ according to English Law, ‘termination’ according to Article 117 paragraph one and Article 137 paragraph one of the Common European Sales Law (CESL), or ‘termination’ according to Section 3:506 of the Draft Common Frame of Reference (DCFR).

However according to the original English translation of the Thai Civil and Commercial Code edited by the Drafting Committee of the Siamese Codes of Law, the term ‘rescission’ is used for the general provision concerning rescission of contract, and the term of ‘termination’ is used for some provisions concerning rescission of contract in the part of specific contract.¹⁴ Furthermore, with regard to the concept of the terms, since the rescission of contract under the Thai Civil and Commercial Code operates retrospectively or *ab initio*, the contract, which is the source of obligation, has been destroyed and deemed to have no legal effect as from the beginning,¹⁵ it means that the contract which existed in the past has also been extinguished,¹⁶ and each party has to restore the other party to his original condition, or *status quo ante*, similar to the condition before the contract was entered into.¹⁷ This concept is different from ‘termination’ in German law, which does not affect the existence of the contract as from the beginning, and quite similar to the ‘rescission’ *ab initio*, in the common law system, which extinguishes the contract as from the

¹⁴ จตุพล หวังสุวรรณ, ผลของการเลิกสัญญาต่างตอบแทน (วิทยานิพนธ์ คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์, 2540) (Chatuphol Wangsuwattana, Pol Khong Karn Lek Sanya Tang Torp Tan [Consequences of Rescission of Reciprocal Contracts] (Master of Law Thesis, Thammasat University 1997)) 24-30

¹⁵ จีต เศรษฐบุตร์, 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)) 290

¹⁶ Sanunkorn Sotthibandhu, Explanation of Juristic Acts and Contracts (n 2) 476

¹⁷ *ibid* 462

beginning and aims to restore the parties, as far as possible, to the position which they were in before they entered into the contract. Therefore, since the term ‘rescission’ commonly means discharge the parties retrospectively, or *ab initio*, and the term ‘termination’ commonly means discharge the parties prospectively, or *de futuro*, the author considers that the term ‘rescission’ is more appropriate to be used in the general provisions for the discharge of parties from the rights and obligations of the contract under the Thai Civil and Commercial Code.

Nevertheless, for the mutual understanding and consistency in this thesis, the term of ‘rescission’ is to be referred in general for the Thai Civil and Commercial Code and other laws unless there is necessary to use any other specific legal terms for some certain laws.

2.2 Differences between Partial Rescission of Contracts and Modification of Contracts

Partial rescission of contracts may be considered as the modification of contracts in the sense that it cuts away a part of contract, and maintains the other parts of contract. However, these two terms are very different and cannot be used interchangeable. The term ‘rescission’ is applied when the contract has been rescinded; each party is discharged from the obligation of the contract and has to restore the other party to his original condition, or *status quo ante*. ‘Rescission’ does not affect a claim for damages, the parties who are entitled to the right to claim damages still have their right. Differently, the term ‘modification’ is not applied when the contract has been rescinded; for ‘modification’ the contract must still be enforced, and the parties to the contract are still bound to the contract and must perform their obligations. ‘Modification’ does not concern damages at all, and the parties have no right to claim for damages, since ‘modification’ must be arranged by the agreement of the parties.¹⁸ For this reason, partial rescission is considered as

¹⁸ รชฎ เจริญฉ่ำ, ข้อหาหรือที่ 25/2541 เลิกสัญญาที่ถือว่าแก้ไขเปลี่ยนแปลงสัญญา (1996) 249 วารสารอัยการ (Rachata Charoenchum, Khohareuthee 25/2541 Lerk Sanya Thee Theuwa Kakai Pleaunpleang

rescission of the contract in part. The part which has been rescinded has come to an end, and each party is discharged from their obligation of such part of contract and has to restore the other party to his original condition for such part. Hence partial rescission of contract is not the same as modification of contract, they are very different and cannot be used interchangeably.

2.3 General concept of partial rescission of contracts

The concept of partial rescission of contracts has been developed in the civil law system, the common law system, and continental European contract laws. Each of them has some different conditions but there are also some similar conditions. This part is related to an overall common concept of partial rescission of contracts, including the civil law system, the common law system, and continental European contract laws, in order to build some foundation before concentrating on details of partial rescission of the certain laws in Chapter 3 and Thai Civil and Commercial Code in chapter 4.

2.3.1 Nature of Contracts

- **Divisible Obligation**

Divisible obligation means that the object of obligation can be divided into several parts and performances.¹⁹ So the sale of goods contract, which has more than two goods to deliver or the goods has to be delivered in instalments, is considered to be divisible obligation contract because the object of obligation can be divided into several parts and performances. Where there is partial rescission of contract, it tends to mean that the obligation in the contract can be divided in

Sanya [Prosecutorial Discretion no.25/2541 The Rescission of Contract which is Considered as Modification of Contract] (1996) 249 Prosecutor Journal) 71

¹⁹ โสภณ รัตนากกร, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยหนี้: บทเบ็ดเสร็จทั่วไป (9th edn, นิติบรรณการ 2008) (Sopon Rattanakorn, Kham Athibai Pramuan Khodmai Phaeng Law Panich Waduay Ngee : Bod Betset Tuopai [Explanation of Civil and Commercial Code concerning Obligation : General Provisions] (9th edn, Nitibannagarn 2008)) 390

several parts, thus, many laws stipulate that divisible obligation is one of several conditions in order to entitle the innocent party to partially rescind the contract.

In the common law system, according to the Sale of Goods Act of England, Section 30(1),²⁰ in the case that the seller delivers to the buyer a quantity of goods less than he agreed to sell, the buyer may accept the delivered goods and pay for them at the contracted rate. Additionally, Section 35A(2)²¹ permits the buyer to accept only a part of non-conforming instalment and reject the rest.²² These two sections have different conditions but they imply that in order to partially rescind the contract, the contract must be divisible whether it is divided into instalments by the agreement of the parties or divisible by nature of contract. In the United State of America, the Uniform Commercial Code, Article 2, Sale 2002, Section 2-601,²³ stated

²⁰ Sale of Goods Act 1979, Section 30, Delivery wrong quantity;

“(1) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered, he must pay for them at the contract rate.”

²¹ Sale of Goods Act 1979, Section 35A, Right of partial rejection;

“(1) If the buyer

- (a) has the right to reject the goods by reason of a breach on the part of the seller that affects some or all of them, but
- (b) accepts some of the goods, including, where there are any goods unaffected by the breach, all such goods, he does not by accepting them lose his right to reject the rest.

(2) In the case of a buyer having right to reject an instalment of goods, subsection (1) above applies as if references to the goods were references to the goods comprised in the instalment.”

²² M.G. Bridge, *The sale of goods* (3rd edn, Oxford University Press 2014) 557

²³ Uniform Commercial Code, Article 2, Sale 2002, part 6, Breach, repudiation and excuse, Section 2-601, Buyer’s rights on improper delivery;

“Subject to the provisions of this Article on breach in installment contracts (Section 2-612) and unless otherwise agreed under the sections on contractual limitations of remedy (Section 2-718 and 2-719), if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may:

- (a) reject the whole; or

that where there is a breach in performing an instalment of contract, if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may accept any commercial units and reject the rest. This Section entitles the innocent party to partially rescind where the contract is divided into several instalments similar to Section 35A(2) of the Sale of Goods Act 1979 of England.

In the civil law system, according to the German Civil Code BGB 2002, Section 323(5),²⁴ where the performance under the contract can be divided and that dividing the performance into several parts does not violate the intention of the parties, the innocent party may partially rescind the contract.²⁵ This Section entitles the party to partially rescind the contract where the performance of contract can be divided without being in conflict with the intention of the parties. The divisible performance is considered to be the same as divisible obligation,²⁶ thus, this Section also entitles partial rescission of contract in the case of divisible obligation. Additionally, according to the Dutch Civil Code which is applied in Netherland, Article 6:265 paragraph one,²⁷ partial rescission of contract is entitled the innocent party to partially rescind the contract, provided that there is a failure in part of a party related to one performance or one of obligations. It means that if the object of obligation can be performed in several parts and one part of obligation is violated, then the innocent party may partially rescind the contract. So, this Article also entitles the innocent party to partially rescind the contract in the case that the obligations of the contract can be divisible.

(b) accept the whole; or

(c) accept any commercial unit or units and reject the rest.”

²⁴ German Civil Code BGB 2002, Section 323(5) (n 5)

²⁵ Sir basil Markesinis, Hannes Unberath, Angus Johnston (n 22) 428-429

²⁶ Sopon Rattanakorn (n 19) 391

²⁷ Dutch Civil Code, Article 6:265, Rescission of a mutual agreement for a breach of contract, paragraph one;

“1. Every failure of a party in the performance of one of his obligations, gives the opposite party the right to rescind the mutual agreement in full or in part, unless the failure, given its specific nature or minor importance, does not justify this rescission and its legal effects.”

In continental European contract laws, according to the United Nations Convention on Contracts for the International Sale of Goods (CISG), Article 51²⁸ in conjunction with Article 49 paragraph one,²⁹ the rescission of the non-conforming part of a delivery under the contract may be applied, provided that there has been a fundamental breach with respect to such non-conforming part.³⁰ Additionally, Article 73(1)³¹ entitles the innocent party to rescind the contract as to a single instalment if the other party commits a fundamental breach with respect to such instalment.³² These two articles have two different conditions for partial rescission, but they imply that in order to partially rescind the contract, the

²⁸ CISG, Article 51;

“(1) If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, articles 46 to 50 apply in respect of the part which is missing or which does not conform.

(2) The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of contract.”

²⁹ CISG, Article 49, paragraph one;

“(1) The buyer may declare the contract avoided;

(a) If the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or

(b) In the case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed.”

³⁰ United Nation Commission on International Trade Law, UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods (2016 edn) <http://www.uncitral.org/pdf/english/clout/CISG_Digest_2016.pdf> accessed 13 December 2016, 240-241

³¹ CISG, Article 73;

“(1) In the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach of contract with respect to that instalment, the other party may declare the contract avoided with respect to that instalment.”

³² United Nation Commission on International Trade Law (n 30) 327

obligation of contract must be divisible whether it is divided into instalments by agreement of the parties or it is divisible by nature of contract, similar to Section 35A(2) of the Sale of Goods Act 1979 of England. In the Principle of European Contract Law (PECL), Article 9:302,³³ stated that if the performance of contract is divisible, and the counter-performance can be apportioned, the innocent party is entitled to partially rescind a part which is considered to be the fundamental non-performance of the contract. In the Common European Sales Law (CESL), Article 117 paragraph one and 137 paragraph one,³⁴ if the contract is to be performed in separate parts or are otherwise divisible, the innocent party may rescind in relation to the non-performance part.³⁵ Furthermore, in the Draft Common Frame of Reference (DCFR), Section 3:506(2),³⁶ where the debtor's obligations under the contract are to be performed in separate parts or otherwise divisible, and counter-performance can be apportioned, the creditor may rescind the contractual relationship which relates to the breaching part.³⁷ This Section is as though appeared to be the combination of Article 9:302 of the Principle of European Contract Law (PECL) and Article 117 paragraph one and Article 137 paragraph one of the Common European Sales Law (CESL).

From the laws mentioned above, it may conclude that, generally, in order to entitle the innocent party to partially rescind the contract, the obligation of contract must be divisible.

However, there are two different types of divisible obligation; (1) there are instalments agreed by the parties; or (2) the nature of obligation of the contract is divisible. Furthermore, there are also some interesting conditions which differ from

³³ PECL Article 9:302 (n 6)

³⁴ CESL Article 117 paragraph one and 137 paragraph one (n 7)

³⁵ Reiner Schulze, *Common European sales law* (C.H. Beck 2012) 522-523, 593-595

³⁶ DCFR Section 3:506(2) (n 8)

³⁷ Christian von Bar and Eric Clive, *Principle, Definitions and Model Rules of European Private Law, draft Common Frame of Reference (DCFR), Full Edition, Volume 1* (Oxford University Press) 874-877

one another. The conditions are; (a) in the German Civil Code BGB, 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), the innocent party may be entitled only partially rescind the contract, the rescission of contract as a whole may be entitled only in the case that the breaching part is fundamental for the whole contract; or (b) in the Principle of European Contract Law (PECL) and the Draft Common Frame of Reference (DCFR), the counter-performance must be apportioned to the part which is to be rescinded; or (c) in the German Civil Code BGB, the divisibility of the obligation in the contract shall not stand in contrast with the intention of the parties.

2.3.2 Causes of Partial Rescission of Contracts

- Breach of Contracts

It has to be said that, mostly, the cause of partial rescission of contract is a breach of contract. A Breach of contract may be divided into four types; (1) late performance; (2) partial performance; (3) non-conforming performance; and (4) non-performance. In German law, partial performance is distinguished from non-conforming performance,³⁸ because there are different rules to be applied for establishing the ground of rescission.

In the common law system, according to the Sale of Goods Act 1979 of England, Section 30(1),³⁹ the buyer may partially rescind the contract where the seller delivers to the buyer a quantity of goods less than he agreed to sell. Additionally Section 35A(2),⁴⁰ the buyer may accept a part of instalment and partially rescind the instalments where the seller fail to deliver goods in conformity with the agreement.⁴¹ In the United State of America, the Uniform Commercial Code,

³⁸ Sir basil Markesinis, Hannes Unberath, Angus Johnston (n 13) 428

³⁹ Sale of Goods Act 1979, Section 30 (n 20)

⁴⁰ Sale of Goods Act 1979, Section 35A (n 21)

⁴¹ M.G. Bridge, *ibid* (n 22)

Article 2, Sale 2002, Section 2-601,⁴² the buyer may accept partial performance and partially rescind the contract where there is a breach in an instalment of contract. These provisions entitle the buyer to partially rescind the contract where there is a breach of contract, provided that there is partial performance.

In the civil law system, according to the German Civil Code BGB 2002, Section 323(1)⁴³ in conjunction with Section 323(5),⁴⁴ the innocent party may partially rescind the contract, and on the other hand, the innocent party may accept the other part of performance.⁴⁵ Additionally, according to the Dutch Civil Code which is applied in Netherland, Article 6:265 paragraph one,⁴⁶ the innocent party may accept partial performance and partially rescind the contract where there is a failure of another party related to one performance or one of obligations. These provisions entitle the innocent party to partially rescind the contract where there is a breach of contract and the performance is dividable.

In continental European contract laws, according to the United Nations Convention on Contracts for the International Sale of Goods (CISG), Article 51⁴⁷ in conjunction with Article 49 paragraph one,⁴⁸ the buyer may partially rescind the part of performance which does not conform to the contract agreed if such non-conforming part is a fundamental breach. The non-conforming performance includes

⁴² Uniform Commercial Code, Article 2, Sale 2002, part 6, Breach, repudiation and excuse, Section 2-601 (n 23)

⁴³ German Civil Code BGB 2002, Section 323, Revocation for nonperformance or for performance not in conformity with the contract;

“(1) If in the case of a reciprocal contract, the obligor does not render an act of performance which is due, or does not render it in conformity with the contract, then the obligee may revoke the contract, if he has specified, without result, an additional period for performance or cure.”

⁴⁴ German Civil Code BGB 2002, Section 323(5) (n 5)

⁴⁵ Sir basil Markesinis, Hannes Unberath, Angus Johnston (n 13) 429

⁴⁶ Dutch Civil Code, Article 6:265, Rescission of a mutual agreement for a breach of contract, paragraph one (n 27)

⁴⁷ CISG, Article 51 (n 28)

⁴⁸ CISG, Article 49 paragraph one (n 29)

breach of quality or quantity of the goods as well as late performance in the case that the buyer has already specified a fixed time for the late delivery and the seller still does not deliver within the fixed period of time.⁴⁹ Additionally, according to Article 73(1),⁵⁰ the innocent party may partially rescind the contract as to a single instalment where the other party fundamentally breach such instalment. The fundamental breach may be the case that the seller fails to deliver the goods according to the agreed contract, the delivered goods is defective, or the buyer fail to open the Letter of Credit, but not including the case that the buyer delays in paying the price for the instalment.⁵¹ In the Principle of European Contract Law (PECL), Article 9:302,⁵² the innocent party may partially rescind a part which is considered to be fundamental non-performance of the contract. The fundamental non-performance does not include the case of delay, because, according to Article 9:301,⁵³ the case of delay shall be rescinded under Article 8:106 which is not mentioned in this thesis. In the Common European Sales Law (CESL), according to Article 117 paragraph one and 137 paragraph one,⁵⁴ the innocent party may partially rescind the contract if there is a ground for such rescission.⁵⁵ The grounds for rescission of contract include the fundamental non-performance, the significant lack of conformity and the failure to perform within the fixed additional time in the case of delay (for more details refer to Chapter 3.3). In the Draft Common Frame of

⁴⁹ United Nation Commission on International Trade Law (n 30) 240-241

⁵⁰ CISG, Article 73 (n 31)

⁵¹ United Nation Commission on International Trade Law (n 30) 327

⁵² PECL Article 9:302 (n 6)

⁵³ PECL Article 9:301, Right to terminate the contract;

“(1) A party may terminate the contract if the other party’s non-performance is fundamental.

(2) In the case of delay the aggrieved party may also terminate the contract under Article 8:106”

⁵⁴ CESL Article 117 paragraph one and 137 paragraph one (n 7)

⁵⁵ Reiner Schulze (n 35) 522-523, 593-595

Reference (DCFR), according to Section 3:506(2),⁵⁶ similar to In the Common European Sales Law (CESL), the innocent party may partially rescind the contract if there is a ground for rescission of contract in parts. However the grounds for rescission of contract according to the Draft Common Frame of Reference have some different conditions from the Common European Sales Law (CESL). The grounds for rescission of contract In the Draft Common Frame of Reference (DCFR) include the fundamental non-performance and the failure to perform within the fixed additional time in the case of delay⁵⁷ (for more details refer to Chapter 3.4). These provisions entitle the innocent party to partially rescind the contract where there is a breach in a part of the contract. Additionally, a breach of contract in these provisions does not only limit to the case of partial performance, it also includes the other four types of breach mentioned above.

- Impossibility of Performance

Another cause of partial rescission of contract is the impossibility of performance. In the common law system, the rule of frustration is applied to the general principle of contract in England, which establishes that the contract shall be terminated automatically.⁵⁸ For the partial frustration of contract, if the obligation of the contract is divisible, and an obligation of the contract is so distinct from the remainder as to be, for all practical purposes, a separated contract, the contract may be partially terminated.⁵⁹ However, according to the Sale of Goods Act 1979, Section 7,⁶⁰ the partial frustration affects the whole contract to be terminated automatically.⁶¹ The rule of frustration differs from the rule of impossibility. In the

⁵⁶ DCFR Section 3:506(2) (n 8)

⁵⁷ Christian von Bar and Eric Clive (n 37) 851

⁵⁸ Michael Furmston (n 12) para 7.65

⁵⁹ Michael Furmston (n 12) para 7.66

⁶⁰ Sale of Goods Act 1979, Section 7, Goods perishing before sale but after agreement to sell;

“Where there is an agreement to sell specific goods and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is avoid.”

⁶¹ M.G. Bridge (n 22) para 4.51

civil law system, according to the German Civil Code BGB 2002, Section 326(5),⁶² which entitles the innocent party to rescind the contract by applying the rule of rescission with the necessary modifications where there is the impossibility of performance. Therefore, the principle of the partial rescission of contracts, according to Section 323(5)⁶³, is also applied mutatis mutandis to the case of impossibility of performance where the performance in part of the contract and some or all other parts of the contract are impossible.⁶⁴ In this regard, it can be said that the innocent party may partially rescind the contract where there is an impossible performance in part of the obligation under the contract. In the Dutch Civil Code, Article 6:265 paragraph one⁶⁵, entitles the innocent party to partially rescind the contract for every causes of failure of performance which includes the case of impossibility, thus, the innocent party may partially rescind the contract where there is an impossible performance in parts of obligation under the contract. Hence it can be said that these provisions allow the innocent party to partially rescind the contract in the case of impossible performance.

In continental European contract laws, according to the United Nations Convention on Contracts for the International Sale of Goods (CISG), Article 79 paragraph one,⁶⁶ where there is an impediment beyond reasonable control, the

⁶² German Civil Code BGB 2002, Section 326, Release from consideration and revocation where the duty of performance is excluded;

“(5) If, under section 275 (1) to (3), the obligor does not have to perform, the obligee may revoke; section 323 applies with the necessary modifications to the revocation, subject to the proviso that it is not necessary to specify a period time.”

⁶³ German Civil Code BGB 2002, Section 323(5) (n 5)

⁶⁴ Sir basil Markesinis, Hannes Unberath, Angus Johnston (n 13) 407

⁶⁵ Dutch Civil Code, Article 6:265, Rescission of a mutual agreement for a breach of contract, paragraph one (n 27)

⁶⁶ CISG, Article 79 paragraph one;

“(1) A party is not liable for a failure to perform any of its obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.”

breaching party is exempted from the liability for a failure to perform.⁶⁷ However the burden of proof is falling on the breaching party,⁶⁸ thus it does not change the fact that the breaching party fail to perform the obligation of the contract. Nonetheless, the innocent party is also entitled to the right to partially rescind the contract in the case of impossibility under the condition of Article 51⁶⁹ and Article 73(1).⁷⁰ In the Principle of European Contract Law (PECL), according to Article 1:301(4),⁷¹ the non-performance includes excused non-performance, which the excused non-performance, according to Article 8:108(1)⁷², is the case of impossible performance. Consequently, the non-performance on the ground of impossibility also entitles the innocent party to partially rescind the contract under the condition of Article 9:302.⁷³ In the Common European Sales Law (CESL), according to Article 87 paragraph one,⁷⁴

⁶⁷ United Nation Commission on International Trade Law (n 30) 374

⁶⁸ *ibid* 378

⁶⁹ CISG, Article 51 (n 28)

⁷⁰ CISG, Article 73(1) (n 31)

⁷¹ PECL, Article 1:301, Meaning of terms;

“(4) ‘non-performance’ denotes any failure to perform an obligation under the contract, whether or not excused, and includes delayed performance, defective performance and failure to co-operate in order to give full effect to the contract.”

⁷² PECL, Article 8:108, Excuse due to an impediment;

“(1) A party’s non-performance is excused if it proves that it is due to an impediment beyond its control and that could not reasonably have been expected to take the impediment into account at the time of the conclusion of the contract, or to have avoided or overcome the impediment or its consequences.”

⁷³ PECL Article 9:302 (n 6)

⁷⁴ CESL, Article 87, Non-performance and fundamental non-performance, paragraph one;

“1. Non-performance of an obligation is any failure to perform that obligation whether or not the failure is excused, and includes:

- (a) non-delivery or delayed delivery of the goods;
- (b) non-supply or delayed supply of the digital content;
- (c) delivery of goods which are not in conformity with the contract;
- (d) supply of digital content which is not in conformity with the contract;
- (e) non-payment of late payment of the price; and

the case of impossibility of performance is treated as non-performance⁷⁵, thus the innocent party may partially rescind the contract under the condition of Article 117 paragraph one and 137 paragraph one.⁷⁶ Additionally, the Draft Common Frame of Reference (DCFR), according to Article III.-1:102(3),⁷⁷ the case of impossible performance is similar to the Common European Sales Law (CESL). Where there is the impossibility of performance, it is considered as non-conforming performance and the innocent party is entitled to partially rescind the contract⁷⁸ under the condition of Section 3:506(2),⁷⁹

Hence it might be concluded that, mostly, the cause for partial rescission of contract is breach of contract, which there are some different types of breach in different law. Another cause is the impossibility of performance, which is established in the German Civil Code BGB 2002, the Dutch Civil Code and the continental European contract laws.

2.3.3 Consequences of Partial Rescission of Contracts

- General Consequences

Typically, in the civil law system, the common law system, and the continental European contract laws, when a contract is rescinded, the parties are discharged from the obligation to perform their contractual obligations, and there shall be a restitution. Partial rescission of contract is also one method of rescission of contract, where the consequences of partial rescission of contract discharges the

(f) any other purported performance which is not in conformity with the contract.”

⁷⁵ Reiner Schulze (n 35) 400

⁷⁶ CESL, Article 117 paragraph one and 137 paragraph one (n 7)

⁷⁷ DCFR, Article III.-1:102, Definitions;

“(3) Non-performance of an obligation is any failure to perform the obligation, whether or not excused, and includes delayed performance and any other performance which is not in accordance with the terms regulating the obligation.”

⁷⁸ Christian von Bar and Eric Clive (n 37) 49

⁷⁹ DCFR Section 3:506(2) (n 8)

parties from the rights and obligations of their contractual obligations, and the parties shall be restituted, for the part which has been rescinded. However, since the contract is severable, the part which has not been affected by the rescission shall still be intact and valid.

In the common law system, the contract is not rescinded from the beginning, it is rescinded *de future*, or for the future. The parties are discharged from the obligation to perform their obligation as from the time of rescission of contract. For that reason, rescission of contract leaves the rights and obligations which have accrued prior to rescission of the contract⁸⁰ intact. Additionally, the innocent party may claim the advance payment if the counter-performance of the consideration is a failure.⁸¹

In the civil law system, according to the German Civil Code BGB 2002, Section 346(1),⁸² the effect of rescission of contract is not retroactive to the validity of contract, it brings the obligation of the parties to an end from the moment of rescission of contract.⁸³ However the performance which has already been performed shall be pursuant to the rule of restitution.⁸⁴ In the Dutch Civil Code which is applied in Netherland, according to Article 6:269,⁸⁵ rescission of contract has

⁸⁰ Dominic O’Sullivan, Steven Elliott, Rafal Zakrzewski (N 9) 9

⁸¹ Guenter Heinz Treitel, Remedies for breach of contract; a comparative account (Clarendon Pr 1988) 386

⁸² German Civil Code BGB 2002, Section 346, Effect of revocation;

“(1) If one party to a contract has contractually reserved the right to revoke or if he has a statutory right of revocation, then, in the case of revocation, performance received and emoluments taken are to be returned.”

⁸³ Sir basil Markesinis, Hannes Unberath, Angus Johnston (n 13) 420

⁸⁴ *ibid* 432-433

⁸⁵ Dutch Civil Code, Article 6:269, Rescission has no retrospective effect;

“The rescission of a mutual agreement as meant in this Section has no retrospective effect, except that an offer of the debtor to perform his obligation, made at a moment that the creditor already had brought a right of action (legal claim) to court in order to rescind the mutual agreement, shall have no effect when the court afterwards decides to rescind that agreement.”

no retrospective effect. However, the performance which has already been performed shall be undone according to Article 6:271.⁸⁶ In this regard, it can be said that the consequences of the civil law system are quite similar to the common law system in the aspect of prospective effect. However, the aspect of restitution is quite different, because in the common law system, not every performed obligation shall be restored, while in the civil law system, every performed obligation shall be restored, otherwise, it must be compensated.

In the continental European contract laws, according to the United Nations Convention on Contracts for the International Sale of Goods (CISG), Article 81,⁸⁷ the parties are released from the rights and obligations of the contract at the moment of the rescission of contract. The performance which has already been performed shall be restored under the rule of restitution.⁸⁸ In the Principle of European Contract Law (PECL), according to Article 9:305,⁸⁹ the parties are released

⁸⁶ Dutch Civil Code, Article 6:271, Legal effects of a rescission;

“A rescission releases parties of the obligations affected by it (all obligations created by the rescinded mutual agreement). As far as these obligations have been performed already, the legal basis for performance remains effective, but the law imposes an obligation on parties to undo the performance they already have received by virtue of the rescinded agreement.”

⁸⁷ CISG, Article 81;

“(1) Avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due. Avoidance does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract.

(2) A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract. If the both parties are bound to make restitution, they must do so concurrently.”

⁸⁸ United Nation Commission on International Trade Law (n 30) 390-392

⁸⁹ PECL, Article 9:305, Effects of termination in general;

“(1) Termination of the contract releases both parties from their obligation to effect and to receive future performance, but, subject to Article 9:306 to 9:308, does not affect the rights and liabilities that have accrued up to the time of termination.

from the rights and obligations of the contract at the moment of rescission of contract. The rights and obligations, that have been accrued up to the time of rescission of contract, are still intact and valid. As mentioned previously, even though this principle is quite similar to the common law system, it still has some differences regarding some details. In the Common European Sales Law (CESL), it is different from other laws mentioned above because there is an Article which directly imposes the consequences of partial rescission of contract. According to Article 172,⁹⁰ paragraph one of this Article imposes that each party has to restore the other party to the status before the contract was entered into, or *status quo ante*.⁹¹ Paragraph three of this Article imposes that the rescission shall not affect the part or instalment which the obligations on both parties have been fully performed.⁹² Therefore, for the rescinded part, the parties have to restore each other under the rule of restitution, which is quite similar to the German Civil Code BGB 2002 and the Dutch Civil Code. Then for the non-rescinded part, the rights and obligations of this part are still intact and valid similar to other laws. In the Draft Common Frame of Reference (DCFR), according to Section III.-3:501,⁹³ rescission of contract does not affect to the contract

(2) Termination does not affect any provision of the contract for the settlement of disputes or any other provision which is to operate even after termination.”

⁹⁰ CESL, Article 172, Restitution on avoidance or termination;

“1. Where a contract is avoided or terminated by either party, each party is obliged to return what that party (‘the recipient’) has received from the other party.

2. The obligation to return what was received includes any natural and legal fruits derived from what was received.

3. On the termination of a contract for performance in instalments or parts, the return of what was received is not required in relation to any instalment or part where the obligations on both sides have been fully performed, or where the price for what has been done remains payable under Article 8(2), unless the nature of the contract is such that part performance is of no value to one of the parties.”

⁹¹ Reiner Schulze (n 35) 680

⁹² *ibid* 681

⁹³ DCFR, Section III.-3:501, Scope and definition;

itself, the contract has been fully binding and cannot be rescinded. In this regard, the contractual relationship has been rescinded, thus the obligations and the rights under the contract are rescinded. Moreover, in this Section, the word ‘termination’ is intentionally used in order to express that the effect of rescission is not retrospective but prospective, due to the differences of terminology between ‘rescission’ and ‘termination’,⁹⁴ which has already been mentioned in Chapter 2.1. Additionally, according to Section III.-3:501(2), if the obligation of the contract is divisible, and a part of contract is rescinded, the rescission of contract does not affect the rights and obligations of the remaining parts.⁹⁵ This Section directly imposes the consequence of partial rescission of contract similar to Article 172 paragraph three of the Common European Sales Law (CESL).

Hence it may be concluded that, generally, the consequences of partial rescission of contract discharge the parties from the rights and obligations for the part which has been rescinded. However, the concept of restitution, or the restoration of the parties, for the rescinded part depends on the rule of rescission of each law. Moreover, there are some laws which particularly prescribe the provision regarding the consequences of partial rescission of contract while the other laws do not.

2.3.4 Damages

Generally, the right to claim damages occurs when there is a breach of contract. Rescission of contract, whether it is partial rescission of contract or rescission of contract as a whole, does not constitute the right to claim damages nor it does not does it affect the right to claim damages. Therefore, when a contract is

“(1) This Section applies only to contractual obligations and contractual relationships.

(2) In this Section “termination” means the termination of the contractual relationship in whole or in part and “terminate” has a corresponding meaning.”

⁹⁴ Christian von Bar and Eric Clive (n 37) 851

⁹⁵ *ibid*

rescinded, the innocent party can claim damages according to the existing right to claim damages.

In the common law system, the breach of contract entitles the innocent party to claim damages and rescind the contract,⁹⁶ besides, rescission of contract does not affect to the right to claim damages.⁹⁷

In the civil law system, according to the German Civil Code BGB 2002, when there is a breach of contract, the innocent party may exercise his right to claim for damages.⁹⁸ Additionally, according to Section 346(4),⁹⁹ rescission of contract does not affect the right to claim damages. In the Dutch Civil Code which is applied in Netherland, according to Article 6:277 paragraph one,¹⁰⁰ the innocent party may rescind the contract and claim the damages on the ground of breach of contract.

In the continental European contract laws, according to the United Nations Convention on Contracts for the International Sale of Goods (CISG), Article 81,¹⁰¹ the liability for damages arising from a breach of contract is not affected by rescission of contract, the innocent party may rescind the contract and claim damages including penalty agreed in the contract concurrently.¹⁰² In the Principle of European Contract Law (PECL), according to Article 9:501 paragraph one,¹⁰³ the

⁹⁶ Ewan McKendrick, Contract law (n 11) para 20.3

⁹⁷ Michael Furmston (n 12) para 7.42

⁹⁸ Sir basil Markesinis, Hannes Unberath, Angus Johnston (n 13) 439-440

⁹⁹ German Civil Code BGB 2002, Section 325, Damages and revocation;

“The right to demand damages in the case of a reciprocal contract is not excluded by revocation.”

¹⁰⁰ PECL, Article 6:277, Compensation for damages besides a rescission, paragraph one;

“1. Where a mutual agreement has been rescinded in full or in part, the party whose failure to perform has cause the ground of rescission must compensate the damage which the opposite party suffers as a result of the fact that both parties have not complied with the agreement.”

¹⁰¹ CISG, Article 81 (n 87)

¹⁰² United Nation Commission on International Trade Law (n 30) 390

¹⁰³ PECL, Article 9:501, Right to damages, paragraph one;

innocent party may claim damages on the ground of a breach of contract. Additionally, according to Article 9:305,¹⁰⁴ rescission of contract does not affect the right to claim damages occurred before rescission of contract. In the Common European Sales Law (CESL), according to Article 106 paragraph sixth¹⁰⁵ and Article 131 paragraph fourth,¹⁰⁶ the right to claim damages is compatible with the right to rescind the contract,¹⁰⁷ thus the innocent party may rescind the contract and claim the claim the damages concurrently. In the Draft Common Frame of Reference (DCFR), according to Section III.-3:102,¹⁰⁸ the innocent party who rescind the contract may claim damages which have been incurred by the innocent party.¹⁰⁹ Additionally, according to Section III.-3:509(3),¹¹⁰ rescission of the contract does not affect the right to claim damages.¹¹¹ Therefore, in this aspect, the innocent party may rescind the contract and claim damages similar to other laws.

“(1) The aggrieved party is entitled to damages for loss caused by the other party’s non-performance which is not excused under Article 8:108.”

¹⁰⁴ PECL, Article 9:305 (n 89)

¹⁰⁵ CESL, Article 106, Overview of buyer’s remedies, paragraph six;

“6. Remedies which are not incompatible may be cumulated.”

¹⁰⁶ CESL, Article 131, Overview of seller’s remedies, paragraph four;

“4. Remedies which are not incompatible may be cumulated.”

¹⁰⁷ Reiner Schulze (n 35) 492

¹⁰⁸ DCFR, Section III.-3:102, Cumulation of remedies;

“Remedies which are not incompatible may be cumulated. In particular, a creditor is not deprived of the right to damages by resorting to any other remedy.”

¹⁰⁹ Christian von Bar and Eric Clive (n 37) 777

¹¹⁰ DCFR, Article III.-3:509, effect on obligations under the contract;

“(3) A creditor who terminates under this Section retains existing rights to damages or a stipulated payment for non-performance and in addition has the same right to damages or a stipulated payment for non-performance as the creditor would have had if there had been non-performance of the now extinguished obligations of the debtor. In relation to such extinguished obligations the creditor is not regarded as having caused or contributed to the loss merely by exercising the right to terminate.”

¹¹¹ Christian von Bar and Eric Clive (n 37) 888

Hence, from many laws above, it may be established that rescission of contract does not constitute the right to claim damages, nor does it affect the right to claim damages. Consequently, the innocent party may partially rescind the contract and claim damages for the breach of contract concurrently.

With the aforementioned in this Chapter, it may be concluded that the concept of partial rescission of contracts has been developed in many countries and also in the continental European Contract Laws. There are different conditions, but mostly, partial rescission of contracts can be applied where there is a breach or impossibility in part of divisible contract. The consequences affecting the part of contract which is rescinded are the same as the consequences of rescission of contract as a whole. The parties to the contract are discharged from the obligations of the contract, and both parties shall be restituted, for the rescinded part, while the remaining part is still intact and valid. In addition, partial rescission of contracts does not constitute the right to claim damages, nor does it affect the right to claim for damages.

CHAPTER 3

PARTIAL RESCISSION OF CONTRACTS IN FOREIGN LAWS AND CONTINENTAL EUROPEAN CONTRACT LAWS

In order to clearly understand the principle of partial rescission of contracts, this Chapter will analyse in detail of the principle of partial rescission of contracts in the civil law system, the common law system, and the continental European contract laws. There are many foreign laws, including the continental European contract laws, which have developed the principle of partial rescission of contracts. However, since German law has substantial influence on Thai Civil and Commercial Code,¹¹² and since English law is the origin of the common law system which still has influence on other countries' law, thus this Chapter's main focus is to concentrate on these two laws. In part of the continental European contract laws, the continental European contract laws as the international law may serve as the applicable law and govern the transaction of the parties, or provide a model for law reform at a national level regarding domestic law,¹¹³ thus it is appropriate to analyse the continental European contract laws in this Chapter. The continental European contract laws, which will be analysed further in this Chapter, are the Common European Sales Law (CESL) and the Draft Common Frame of Reference (DCFR), because these two laws has enormous potential to serve as model rules for law reform both at a supranational and a national level.¹¹⁴ Henceforth, these laws are to be analysed consecutively in this chapter.

¹¹² สุรพล ไตรเวทย์, การร่างประมวลกฎหมายในประเทศไทย (บริษัท สำนักพิมพ์วิญญูชน จำกัด 2007) (Surapol Traivet, Karn Rang Pramuan Khodmai Nai Pratet Sayam [The work of Codification in Siam] (Winyuchon Publication House 2007)) 96

¹¹³ Gerhard Dannemann, Stefan Vogenauer, The Common European sales law in context: interactions with English and German law (Oxford University Press 2013) 732

¹¹⁴ *ibid* 752

3.1 Partial Rescission of Contracts in German Civil Code BGB 2002

According German Civil Code BGB 2002, typically, rescission is a remedy for breach of contract.¹¹⁵ However, Section 326(5)¹¹⁶ in conjunction with Section 323(5) also entitles the innocent party to partially rescind the contract where there is the impossibility of performance.¹¹⁷ Additionally, according to section 349,¹¹⁸ rescission shall become effective by a declaration of will by the innocent party to the other party.¹¹⁹

For a consequence of rescission, the effect of rescission is to bring the obligations of the parties to an end from the moment the innocent party rescinds the contract, thus the parties may refuse any further performance and claim any compensation for the performance that may have already been performed according to the rule of restitution.¹²⁰ However, the validity of the contract is not retroactively affected by rescission, thus any performance already executed still has the contract as the ground of performance, hence, in this case, the rule of restitution is applied instead of the rule of unjustified enrichment.¹²¹

Since partial rescission of contracts is one type of rescission, principally, the causes and consequences of rescission of contract as a whole are also applied to the part of contract which is partially rescinded, while the other parts of contract are still intact and valid.

¹¹⁵ Sir basil Markesinis, Hannes Unberath, Angus Johnston (n 13) 420

¹¹⁶ German Civil Code BGB 2002, Section 326(5) (n 62)

¹¹⁷ Sir basil Markesinis, Hannes Unberath, Angus Johnston (n 13) 387-388

¹¹⁸ German Civil Code BGB 2002, Section 349, Declaration of revocation;

“Revocation is effected by declaration to the other party.”

¹¹⁹ Sir basil Markesinis, Hannes Unberath, Angus Johnston (n 13) 420

¹²⁰ *ibid*

¹²¹ *ibid* 433

3.1.1 Nature of Contracts

- Reciprocal Contracts

According to Section 323(1)¹²², rescission is confined to reciprocal contracts. The reciprocal contract means the contract concerning the promise of something that constitutes the reason for entering into the bargain, or consideration in the common law.¹²³ The principle of partial rescission in German Civil Code BGB 2002 lies in Section 323(5) which is a part of Section 323.¹²⁴ Hence partial rescission is also confined to reciprocal contracts.

- Divisible Obligation

According to Section 323(5),¹²⁵ where partial performance has already been performed, the innocent party may choose to partially rescind the contract.¹²⁶ This provision, regarding partial rescission of contract, imposes that the obligation of the contract must be divisible without violating the intention of the parties. It means that even though a separation of different parts of contract is possible, according to the facts, but if such separation contrasts with the intention of the parties, then the obligation cannot be divided. For example, in the case of sale of a computer together with the operating software, the computer cannot operate without the operating software. If the seller only delivers the computer without the operating software, the computer cannot operate which is against the intention of the parties, therefore, it is not considered as partial performance.¹²⁷ In such case, the buyer has

¹²² German Civil Code BGB 2002, Section 323, Revocation for non-performance or for performance not in conformity with the contract;

“(1) If, in the case of reciprocal contract, the obligor does not render an act of performance which is due, or does not render it in conformity with the contract, then the obligee may revoke the contract, if he has specified, without result, an additional period for performance or cure.”

¹²³ Sir basil Markesinis, Hannes Unberath, Angus Johnston (n 13) 419-420

¹²⁴ *ibid* 421-422

¹²⁵ German Civil Code BGB 2002, Section 323(5) (n 5)

¹²⁶ Sir basil Markesinis, Hannes Unberath, Angus Johnston (n 13) 421-422

¹²⁷ *ibid* 429

to rescind the whole contract. Additionally, even if the obligation of contract can be divided, the innocent party may not accept partial performance according to Section 266.¹²⁸ In this case, Section 323(5) shall not be applied because the breaching party is not entitled to perform in parts. However, if the innocent party has already accepted partial performance, the innocent party may only partially rescind the contract but unable to rescind the contract as a whole, unless the innocent party can prove that he has no interest in partial performance.¹²⁹

Hence according to German Civil Code BGB 2002, Section 323(5), there are two conditions of the nature of contract which entitle the innocent party to partially rescind the contract; (1) the contract must be a reciprocal contract; and (2) the performance or obligation of the contract can be divided, and that dividing performance or obligation into several parts does not violate the intention of the parties. Furthermore, if the innocent party has already accepted partial performance, he can only partially rescind the contract.

3.1.2 Causes of Partial Rescission of Contracts

According to German Civil Code BGB 2002, rescission of contract does not concern the fault of the breaching party with respect to a breach of contract or the impossibility of performance.¹³⁰ If there is a breach of contract or an impossibility of performance on the part of contract and the innocent party has already accepted partial performance, then he may partially rescind the contract according to Section 323(5), as mentioned above.

- Breach of Contracts

According to Section 323(1),¹³¹ the contract may be partially rescinded when the innocent party has already accepted the performance in part, and the

¹²⁸ German Civil Code BGB 2002, Section 266, Part performance;

“The obligor is not entitled to render part performance.”

¹²⁹ Sir basil Markesinis, Hannes Unberath, Angus Johnston (n 13) 429

¹³⁰ *ibid* 420

¹³¹ German Civil Code BGB 2002, Section 323(1) (n 43)

breaching party does not perform the rest of his duties.¹³² Partial performance is distinguished from non-conforming performance which the innocent party may request a price reduction.¹³³ Thus it may be said that breach of contract is a cause of partial rescission of contract.

- Impossibility of Performance

According to Section 326(5),¹³⁴ the contract may be rescinded, according to the rule of rescission of Section 323 with necessary modification,¹³⁵ where the obligor is unable to perform the obligation in the case of impossibility of performance under Section 275.¹³⁶ Thus, the impossibility of performance is also a cause of rescission, whether it is rescission of contract as a whole or partial rescission of contract.¹³⁷

Hence according to German Civil Code BGB, Section 323(5) and Section 326(5) in conjunction with Section 323(5), on the grounds of breach of

¹³² Sir basil Markesinis, Hannes Unberath, Angus Johnston (n 13) 428-429

¹³³ *ibid* 427

¹³⁴ German Civil Code BGB 2002, Section 326(5) (n 62)

¹³⁵ Sir basil Markesinis, Hannes Unberath, Angus Johnston (n 13) 430

¹³⁶ German Civil Code BGB 2002, Section 275, Exclusion of duty of performance;

“(1) A claim for performance is excluded to the extent that performance is impossible for the obligor or for any other person.

(2) The obligor may refuse performance to the extent that performance requires expense and effort which, taking into account the subject matter of the obligation and the requirements of good faith, is grossly disproportionate to the interest in performance of the obligee. When it is determined what efforts may reasonably be required of the obligor, it must also be taken into account whether he is responsible for the obstacle to performance.

(3) In addition, the obligor may refuse performance if he is to render the performance in person and, when the obstacle to the performance of the obligor is weighed against the interest of the obligee in performance, performance cannot be reasonably required of the obligor.

(4) The rights of the obligee are governed by section 280, 283 to 285, 311a and 326.”

¹³⁷ Sir basil Markesinis, Hannes Unberath, Angus Johnston (n 13) 407

contract or impossibility of performance, the innocent party may partially rescind the contract.

3.1.3 Consequences of Partial Rescission of Contracts.

In German law, when a contract is rescinded, there are two main consequences; (1) the duties of performance of the parties come to an end; and (2) according to the rule of restitution, both parties have to restore another party as far as possible back into the position in which they were before the contract was entered into.¹³⁸ In German law, the rescission does not dissolve the contract. The contract is still the cause of performance, however, when the contract is rescinded, the rule of restitution is applied rather than the rule of unjustified enrichment, because the validity of the contract which is the ground of the performed performance is not retroactively affected.¹³⁹ Therefore, when the innocent party partially rescind the contract, the rights and obligations of remaining parts are still intact and valid. For the rescinded part, the rights and obligations of the parties are discharged, and each party has to restore other party to the condition before the performance was begun.

However, in the case of the continuing contracts, the rule of restitution is not applied. The continuing contracts are the contracts which are not fulfilled by single act of performance on each side of the parties, but the obligation of the contracts require continuing acts of performance over a period of time, such as the lease contract or the employment contract. Since the acts of performance on each side of the parties in the past are performed within the framework of a functioning legal relationship, hence in the case of the continuing contracts, the rescission simply brings an end to the duties of performance from the moment of rescission onwards and each party does not have the obligation to restore the status quo ante. Furthermore, the performance of contract which is due, but has not yet

¹³⁸ *ibid* 432-433

¹³⁹ *ibid* 433

been performed, must still be made.¹⁴⁰ Hence in the author's opinion, the rescission of the continuing contracts, if there is already partial performance, is always partial rescission of contracts, because the rights and obligations of the parties are discharged from the moment of the rescission onwards, and the performed obligations in the past, including the performance which is due but has not yet been performed, are still intact and valid.

- Restitution

According to German Civil Code BGB 2002, Section 346,¹⁴¹ there are three steps regarding restitution; (1) restoration of the performance which has already

¹⁴⁰ ibid 436-437

¹⁴¹ German Civil Code BGB 2002, Section 346, Effect of revocation;

“(1) If the party to a contract has contractually reserved the right to revoke or if he has a statutory right of revocation, then, in the case of revocation, performance received and emoluments taken are to be returned.

(2) In lieu of restitution or return, the obligor must provide compensation for value, to the extent that

1. restitution or return is excluded by the nature of what has been obtain,
2. he has used up, disposed of, encumbered, processed or redesigned the object received,
3. the object received has deteriorated or has been destroyed; but deterioration that is caused by the object being used in accordance with its intended use is not taken into account.

If the consideration is specified in the contract, then this is to be used as a basis when the compensation for value is calculated; if compensation for value for the benefit of use a loan is to be paid, it can be shown that the value of the benefit of use was lower.

(3) The duty to compensate for value does not apply

1. if the defect justify revocation only became apparent during processing or transformation of the object.
2. to the extent that the obligee is responsible for the deterioration or destruction or that the damage would also have occurred if the object had remained with the obligee.

been performed; (2) If the restitution is impossible, the party who has already performed the obligation must be compensated; and (3) Exceptions,¹⁴² as follows;

(1) Restoration of the performance which has already been performed: In this regard, each party has to return the specific performance which they received from other party.¹⁴³ For example, if the seller of a mobile has already delivered the mobile phone to the buyer, the buyer must hand over the mobile back to the seller. The obligation of the seller in delivering the mobile and the obligation of the buyer in making a payment are thereby reversed. Moreover, according to Section 346(1) in conjunction with Section 100,¹⁴⁴ the parties have to return the fruit resulting from the received performance which was obtained prior to the rescission of the contract.¹⁴⁵ In the example mentioned above, if the buyer has already paid the price to the seller, the seller must return the money as well as the fruit of the money to the buyer; and

(2) If the restitution is impossible, the performed obligation must be compensated. The compensation shall be monetary compensation. The impossibility of restitution may be caused by the nature of the received performance.¹⁴⁶ For example, in the case of the use of mobile phone, it is impossible to return the data usage or cellular usage to the seller or the mobile network operator, thus the buyer must compensate the value of the data or cellular usage alternatively. The impossibility of the restitution may be due to the received performance has been

3. if in case of statutory revocation the deterioration or destruction occurred with the person entitled, although the latter showed the care that he customarily exercises in his own affairs.

Any remaining enrichment must be returned.”

¹⁴² Sir basil Markesinis, Hannes Unberath, Angus Johnston (n 13) 433

¹⁴³ *ibid*

¹⁴⁴ German Civil code BGB, Section 280;

“Emoluments are the fruits of a thing or of a right and the benefits that the use of the thing or the right affords.”

¹⁴⁵ Sir basil Markesinis, Hannes Unberath, Angus Johnston (n 13) 432-433

¹⁴⁶ *ibid*

consumed, transferred, deteriorated or destroyed.¹⁴⁷ In the example mentioned above, if the mobile has been destroyed because of the buyer's fault, the buyer has to compensate the value of the mobile to the seller; and

(3) Exception: With regard to the restitution, the risk of accidental property destruction falls upon the breaching party.¹⁴⁸ For example, if the buyer of a mobile phone rescinds the contract by reason of a breach arising from the seller's fault and the mobile has been destroyed by accident, the buyer does not have to pay the price of the mobile phone and the destruction of the mobile phone does not affect the right of the buyer to claim for the money paid to the seller. Moreover, even though the destruction of the object occurs because of the slight negligence of the innocent party, if the innocent party's ordinary use of his own affair the object is in accordance with common practice, the innocent party shall be released from the obligation to compensate the seller of such destruction of property.¹⁴⁹ In the example mentioned above, if the mobile phone was damaged due to the buyer's clumsiness or slight negligence, then the buyer does not have to pay for the mobile phone, and the destruction of the mobile phone also does not affect the right of the buyer to claim the money paid to the seller as well.

Respecting the consequences of partial rescission of contracts under German Civil Code BGB 2002, while the remaining part of contract still is enforceable, the part of contract which is rescinded comes to end from the moment of rescission of contract, thus the rights and obligations of the parties under the rescinded part are discharged from the moment of rescission of contract. In this regard, under the rule of restitution, the parties have to restore each other as far as possible to their former condition before the performance has been performed.

Furthermore, in the case of the rescission of continuing contracts, according to the author's opinion, the consequences of rescission of contracts is considered to be partial rescission of contract because the contracts come to an end

¹⁴⁷ *ibid* 434

¹⁴⁸ *ibid*

¹⁴⁹ *ibid* 434-435

from the moment of the rescission. Additionally, the performed obligations prior to the rescission of contract, including the performance which is due but has not yet been performed, are still intact and valid on the ground of the contract itself.

3.1.4 Damages

According to German Civil Code BGB 2002, Section 325,¹⁵⁰ rescission of contract, whether it is partial rescission of contracts or rescission of contracts as a whole, does not affect the rights to claim damages.

Under German Civil Code BGB 2002, the innocent party can claim the damages according to Section 280.¹⁵¹ In German law, the fault of the breaching party has to be established in order to entitle the innocent party to claim the damages, however, there is no need to establish the fault of the breaching party to entitle the innocent party the right to rescind the contract.¹⁵² The fault of breaching party may originate on the ground of the intentional conduct and negligence.¹⁵³ Thus, it is not every time that the innocent party has the right to claim damages in the case of rescission of contract, it needs to consider whether or not there is a fault of the breaching party. Furthermore, in the case of partial rescission of contract, where the contract has already been performed in parts, according to Section 323(5) in

¹⁵⁰ German Civil Code BGB, Section 325 Damages and revocation;

The right to demand damages in the case of a reciprocal contract is not excluded by revocation.

¹⁵¹ German Civil code BGB, Section 280;

“(1) If the obligor breaches a duty arising from the obligation, the obligee may demand damages for the damage cause thereby. This does not apply if the obligor is not responsible for breach of duty.

(2) Damages for delay in performance may be demanded by the obligee only subject to the additional requirement of section 286.

(3) Damages in lieu of performance may be demanded by the obligee only subject to the additional requirements of section 281, 282 or 283.”

¹⁵² Sir basil Markesinis, Hannes Unberath, Angus Johnston (n 13) 444

¹⁵³ *ibid* 446

conjunction with Section 281(1),¹⁵⁴ if the innocent party has any interest in the performed performance, the innocent party may claim damages only in the part of contract which has been rescinded. Anyway, if the innocent party has no interest in the performed performance, the innocent party may claim damages for the whole contract¹⁵⁵

Principally, there are three measures for damages in German law. The first measure is that damages are based on the actual loss of the innocent party and must not exceed that loss. The second measure is that damages are calculated by reference to the loss of the innocent party and not by looking at what the breaching party gain from the breach of contract. The third measure is that damages are not awarded to penalise the breaching party.¹⁵⁶

Hence according to German Civil Code BGB 2002, the rescission does not affect to the rights to claim damages. The innocent party may claim damages if the breaching party is in fault. Furthermore, in the case of partial rescission, the innocent party may claim damages only for the rescinded party if he has an interest in the performed performance. However, if the innocent party has no interest in the performed performance, he can claim the damages for the whole contract

With regard to the aforementioned, German Civil Code BGB 2002 allows the innocent party to partially rescind the contract in case such contract is the reciprocal contract and the obligation of the contract is divisible. The innocent

¹⁵⁴ German Civil Code BGB, Section 281;

“(1) To the extent that the obligor does not render performance when it is due or does not render performance as owed, the obligee may, subject to the requirements of section 280(1), demand damages in lieu of performance, if he has without result set a reasonable period for the obligor for performance or cure. If the obligor has performed only in part, the obligee may demand damages in lieu of complete performance only if he has no interest in the part performance. If the obligor has not rendered performance as owed, the obligee may not demand damages in lieu of performance if the breach of duty is immaterial.”

¹⁵⁵ Sir basil Markesinis, Hannes Unberath, Angus Johnston (n 13) 454

¹⁵⁶ *ibid* 443

party may partially rescind the contract on the ground of a breach of contract and the impossibility of the performance. Furthermore, the rescission of contract does not affect the rights of the innocent party to claim damages. Therefore, the innocent party may claim damages only if the breaching party is in fault.

3.2 Partial Rescission of Contracts in English Law

The common law is justifiably seen as a jewel in the crown of English law.¹⁵⁷ Moreover, the common law is firstly developed in England.¹⁵⁸ Hence the author has chosen English law to be analysed in this Chapter as one of aspect in the common law system.

English law can be considered as the origin of the common law system. The main source of law in the common law system came from the decision of the court or the precedent.¹⁵⁹ The Sale of Goods Act 1979, which recognizes partial rescission of contract, also has been developed based on the stable principle of the general law of contract excerpt from many cases under English law.¹⁶⁰ Hence, the author has taken the case law and the Sale of Goods Act 1979 as tools for the analysis in this Chapter.

Furthermore, since English law contains the rule of frustration, which differs from the rule of the impossibility of the performance, thus in this part the author shall mention about the partial frustration of contract merely sufficient to fulfil the understanding of partial rescission of contracts in English law.

¹⁵⁷ Michael Furmston (n 12), Andrew Grubb, Series Preface

¹⁵⁸ Surepol Traivet (n 112) 53

¹⁵⁹ *ibid* 54-55

¹⁶⁰ M.G. Bridge (n 22) 5

3.2.1 Nature of Contracts

- Divisible Obligation

In English law, the contract with divisible obligation means the contract that divides the due date of the payment from time to time pursuant to the specific obligation performed.¹⁶¹ In other words, the payment of the contract can be made in proportion to the extent of the performance,¹⁶² or the obligations to pay for divisible the part of performance are independent from the performance in the other parts of the contract.¹⁶³ For example, the employee agrees to serve the employer for six months at a fixed rate of remuneration per month, if the employee has already worked for three months and then dies, his heir can claim the remuneration for his work of three months. On the contrary, in the case of *Appleby v. Myers (1867)*,¹⁶⁴ by performance of the plaintiffs according to the contract agreed, the material of the plaintiffs had become unalterably fixed to the defendant's premises, then, the material had been destroyed by the accidental fire before the whole work of contract was completed. The court held that the plaintiffs agreed to complete the whole work, and to be paid when the whole work is done. Since the premise was destroyed by the fire, the plaintiffs could not recover anything because the whole work was not completed. Hence the plaintiffs are not entitled to any compensation for the work he had done. Blackburn J., which is the judge in this case, said that "Brick built into a wall become part of the house; thread stitched into a coat which is under repair, or planks and nails and pitch worked into a ship under repair, become part of the coat or the ship; and therefore, generally and in the absence of something to show a contrary intention, the bricklayer, or tailor or shipwright is to be paid for the work and materials he has done and provided, although the whole work

¹⁶¹ Guenter Heinz Treitel, *The law of contract* (n 10) 727

¹⁶² Chitty, Joseph, *Chitty on contract*. Vol. I, General Principle. (The common law library, 27th edn, Sweet & Maxwell/Thoms on Reuters (Legal) 2008) para 21-029

¹⁶³ *ibid*

¹⁶⁴ LawTeacher <<https://www.lawteacher.net/free-law-essays/contract-law/appleby-v-myers-contract-law-essay.php>> accessed 30 November 2017

is not complete...”¹⁶⁵ However he said that in this case the contract must be completed due to the intention of the parties. “The case is in principle like that of a ship-owner who has been excused from the performance of his contract to carry goods to their destination, because his ship has been disabled by one of the excepted perils, but who is not therefore entitled to any payment on account of the part-performance of the voyage, unless there is something to justify the conclusion that there has been a fresh contract to pay freight pro rata.”¹⁶⁶ Hence in this case, even though the work of the contract can be divided into several parts, but there is no clear agreement by the parties, thus, the obligation of the contract is not considered as divisible. By learning from this case, the divisible obligation of contract means that the contract is agreed so clear in dividing the payment for each part of the performance such as the employment contract which the employer agrees to pay employee salary for each month of working.

Another example case is the case of *Cutter v. Powell (1795)*.¹⁶⁷ Mr. Cutter was hired for a voyage and was given a promissory note from his employment. The promissory note read as follows: “Ten days after the ship Governor Parry, myself master, arrives at Liverpool, I promise to pay Mr. T. Cutter the sum of thirty guineas, provided he proceeds, continues and does his duty as second mate in the said ship from hence to the port of Liverpool. Kingston, July 31st, 1793.”¹⁶⁸ Mr. Cutter performed his duty as second mate and died before the ship arrived at the port of Liverpool. Mr. Cutter’s wife brought an action for a proportionate part of the wages for work and labour done by Mr. Cutter. The court held that the contract between the parties expressly provide that the payment was conditional upon the completion of the voyage and only payable after the ship’s arrival. Thus, under the expressed terms of the contract, the Mr. Cutter was entitled to receive the payment if the whole duty of the contract was performed, but was

¹⁶⁵ *ibid*

¹⁶⁶ *ibid*

¹⁶⁷ LawTeacher <<https://www.lawteacher.net/cases/cutter-v-powell.php>> accessed 13 January 2018

¹⁶⁸ Wikipedia <https://en.wikipedia.org/wiki/Cutter_v_Powell> accessed 13 January 2018

not entitled to receive any payment if the contract was only partially performed.¹⁶⁹ In this case, there is no terms stipulated that the payment is divided, thus the written contract is an entire contract. Contrasting to this case, the obligation of the contract would be divisible, if Mr. Cutter agreed to serve at the fixed rate per day. In this case, his wife shall have the right to recover his pay for each completed day, although he failed to complete the whole contract.¹⁷⁰

Furthermore, in the case of *Ritchie v. Atkinson (1808)*,¹⁷¹ the master and the freighter of a vessel of 400 tons manually agreed in writing that the ship shall deliver a complete cargo of hemp and iron in order to get paid for the delivery of the hemp and iron per ton, however, the master delivers only part of the cargo. The court held that the delivery of a complete cargo was not a condition precedent; but that the master might demand payment the delivered cargo at the stipulated rates per ton; the freighter may claim for damages concerning the undelivered goods.¹⁷² It means that the master is entitled to recover a corresponding proportion of the freight.¹⁷³ According to this case, the court decides that the contract does not impose the complete cargo as the entire obligation. The obligation of contract is divided by payment for each ton of goods delivered.

According to these cases above, the obligation of contract is divisible where there is an expressed agreement by the parties that the payments of the contract is divided pursuant to the performance of the specific parts of contract.

¹⁶⁹ LawTeacher (n 167)

¹⁷⁰ Guenter Heinz Treitel, *The law of contract* (n 10) 727

¹⁷¹ LawTeacher < <https://www.lawteacher.net/free-law-essays/contract-law/case-study-of-breach-of-contract-contract-law-essay.php>> accessed 13 January 2018

¹⁷² Law and Sea

<http://www.lawandsea.net/List_of_Cases/R/Ritchie_v_Atkinson_1808_10_East_295.html> accessed 1 December 2017

¹⁷³ Guenter Heinz Treitel, *The law of contract* (n 10) 728

In English law, the innocent party may partially rescind the contract where the obligation of the contract is divisible, and the contract has been partially performed.¹⁷⁴

Hence it can be concluded that in English law, where the payment is divided in proportion to the performance by an expressed agreement of the parties, the obligation of the contract is considered as divisible obligation. If the breaching party has completely performed in some parts of the contract, the innocent party may partially rescind the remaining part of the contract.

3.2.2 Causes of Partial Rescission of Contracts

- Breach of Contracts

Typically, in English law, it does not mean that only a breach of contract alone or every breach of condition of a contractual term entitles the innocent party to rescind the contract. The contract must be construed as a whole to find the intention of the parties as expressed in the contract and to consider whether there is a breach or not.¹⁷⁵ However, for the case of partial rescission of the contract, the breach of contract must not be the substantial breach for the whole contract.¹⁷⁶ If breach of contract is substantial for the whole contract, the innocent party cannot partially rescind the contract and has to rescind the whole contract.¹⁷⁷ For the cases of partial rescission of contracts, the breaching party may already performed the performance in part, which is valid, and later breach the rest of the contract, so the innocent party may partially rescind the contract.¹⁷⁸ In the case of sale of goods, according to the Sale of Goods Act 1979, if the seller only partly delivers goods of the contract description; the buyer is entitled to partially rescind the contract with respect to the goods which are not of the contract

¹⁷⁴ Treitel, Guenter Heinz (n 81) 378

¹⁷⁵ Michael Furmston (n 12) para 7.9

¹⁷⁶ Guenter Heinz Treitel, Remedies for breach of contract; a comparative account (n 81) 378

¹⁷⁷ *ibid* 375

¹⁷⁸ *ibid*

description.¹⁷⁹ Moreover, the buyer may also partially rescind the contract by rejecting a breaching instalment of contract in the case of instalment contract.¹⁸⁰

Hence it may be said that a breach of contract is a ground for partial rescission of contracts.

- Frustration

English law does not apply the rule of impossibility of performance but apply the rule of frustration instead. When the contract is frustrated, the contract is discharged or terminated automatically.¹⁸¹ Both parties are then released from their obligations and contractual duties to perform under the contract after the date of discharge.¹⁸² Unlike the rule of impossibility in German law,¹⁸³ if the performance of contract is impossible to perform, the debtor is automatically released from the obligation under certain condition according to German Civil Code BGB Section 275.¹⁸⁴ The creditor is automatically released from the obligation to pay the price and is entitled to rescind the contract.¹⁸⁵ Thus, according to German law, the contract is not terminated automatically.

Typically, the contract is terminated as a whole where there is frustration. However, provided that it is appeared that a part of contract can properly be separated from the remaining part of the contract, and such part is validly performed before the time of the termination of contract, it shall be treated as if it was a separate contract which has not been frustrated.¹⁸⁶ It can be said that if the contract is divisible, and a part of the contract is so distinct from the remaining part,

¹⁷⁹ *ibid*

¹⁸⁰ M.G. Bridge (n 22) 566-567

¹⁸¹ Michael Furmston (n 12) para 7.65

¹⁸² Ewan Mckendrick, *Contract Law: Text, Cases, and Materials* (edn 2nd, Oxford University Press 2005) 902

¹⁸³ Marsh, P.D.V., *Comparative contract law: England, France, Germany* (Aldershot, Hampshire, England: Gower 1994) 346

¹⁸⁴ Sir basil Markesinis, Hannes Unberath, Angus Johnston (n 13) 408-418

¹⁸⁵ *ibid* 430

¹⁸⁶ Ewan Mckendrick, *Contract Law: Text, Cases, and Materials* (n 182) 906

for all practical purposes, the contract may be partially terminated.¹⁸⁷ For frustration, it is an automatic termination of the contract, and not a unilateral right of the innocent party to partially terminate the contract, thus the author prefers to use the word ‘termination’ instead of ‘rescission’.

Hence it may be said that in English law, where the obligation of the contract is divisible, if there is a breach of a part of contract which is not considered as the substantial breach for the whole contract, the innocent party may partially rescind the contract. Furthermore, in the case of the partial frustration of contract, the contract may be partially terminated if the frustrated part can be separated and is so distinct from the rest of contract to the extent that it may be treated as a separate contract.

3.2.3 Consequences of Partial Rescission of Contracts

In English law, after the rescission of contract, the contract is not rescinded from the beginning, it is rescinded *de future*, or for the future,¹⁸⁸ as a result, the parties are discharged from the obligation to perform their respective contractual duties as from the time of rescission.¹⁸⁹ Rescission of contract also leaves the rights which the parties have accrued prior to rescission of the contract intact.¹⁹⁰ This principle is explained by Dixon J, the judge in the case of *Mcdonald v Dennys Las celles Ltd. (1933)* as follows;

“When a party to a simple contract upon a breach by the contracting party of a condition of the contract, elects to treat the contract as no longer binding upon him, the contract is not rescinded as from the beginning. Both parties are discharged from the further performance of the contract, but rights are not divested or discharged which have already been unconditionally acquired. Rights and obligations which arise from the partial execution of the contract and

¹⁸⁷ Michael Furmston (n 12) para 7.66

¹⁸⁸ Dominic O’Sullivan, Steven Elliott, Rafal Zakrzewski (N 18) 4

¹⁸⁹ Michael Furmston (n 12) para 7.38

¹⁹⁰ Ewan Mckendrick, Contract Law: Text, Cases, and Materials (n 182) 991

*causes of action which have accrued from its breach alike continue unaffected. When a contract is rescinded because of matters which affect its formation, as in the case of fraud, the parties are to be rehabilitated and restored, so far as may be, the position they occupied before the contract was made. But when a contract, which is not void or voidable at law, or liable to be set aside in equity, is dissolved at the election of one party because the other has not observed as essential condition or has committed a breach going to its root, the contract is determined so far as it is executor only and the party in default is liable for damages for its breach.”*¹⁹¹

In English law, there are two types of rights (and obligations) which may survive rescission: the right to claim damages and the right to recover sums due under the contract.¹⁹² The right to claim damages will be explained in next part (clause 3.2.4). This part will concentrate on the right to recover sums due under the contract. In English law, if the payment is a divisible payment due under a divisible obligation, such as a contract for sale of goods which divided the payment in instalments, where there is partial performance, which in return, require some payment to be made before rescission of contract, then such due payment may be claimed. For example, in the case of hire or hire-purchase contracts which the payment is divided into several payments for the use of goods per month, the hirer is liable for the due payment before rescission of contract.¹⁹³ In the case of *Canas Property Co. Ltd. v. KL Television Services Ltd.* (1970), the lease contract comes to an end, and the lessor wants to claim the rent which is due. Lord Denning MR which is the judge in this case said that “The lease is determined as from the date on which the writ is served. The rent is payable up to the date of service.”¹⁹⁴ It means that the lessee’s liability to pay rent which is due prior to rescission survives the lessor’s

¹⁹¹ Michael Furmston (n 12) para 7.39

¹⁹² *ibid* para 7.39

¹⁹³ *ibid* para 7.45

¹⁹⁴ *Swarb.Co.Uk* <<http://swarb.co.uk/canas-property-co-v-k-l-television-services-ca-1970/>> accessed 14 January 2018

rescission of the lease contract.¹⁹⁵ According to this case, it can be said that the due payment prior to the rescission of contract is unaffected and still valid.

The rule of divisible payment as mentioned above is similar to the rule of divisible obligation. Hence in this regard, it can be said that, if the obligation of contract is divisible and there is already a completed partial performance of contract, and then the contract is rescinded, partial performance and the due payment apportioned to that partial performance is valid and unaffected.

Therefore, we can conclude that the consequences of partial rescission of contracts, the rights and obligations which have accrued before the time of rescission are still intact and valid. For the other parts of contract which have been rescinded, the parties are discharge from obligation to perform their duties according to the contract.

- Restitution

In English law, principally, when the contract is rescinded, if either party has performed in part or in whole of his obligations under the contract, but has not received the agreed counter-performance, he may be entitled to be restored in respect of his performance. If it is a monetary payment, the payer may claim the money back. If it is other benefits, the performer may claim for the recompense or *quantum meruit* in respect of it.¹⁹⁶

In the case of the indivisible obligation, a breach is considered as breaching the whole contract. Thus, even if there is partial performance, it is not considered as the valid performance according to the contract. The payer may claim back the money paid under the contract,¹⁹⁷ however, the performer may not be able to recover anything except the other party voluntarily accept partial performance.¹⁹⁸ In contrast, if the contract has divisible obligation, the payer cannot recover back a proportionate part of the money paid which is due in respect of the completed

¹⁹⁵ Michael Furmston (n 12) para 7.45

¹⁹⁶ Guenter Heinz Treitel, The law of contract (N 10) 976

¹⁹⁷ *ibid* 977

¹⁹⁸ *ibid* 989-990

partial performance before the rescission,¹⁹⁹ and the performer may claim the remuneration or *quantum meruit* for the completed partial performance.²⁰⁰

Hence in part of the restitution for the case of partial rescission of contracts, since the contracts have divisible obligation, the performer may claim for the completed partial performance and the payer cannot recover back the money paid for such completed partial performance.

For the consequence of partial rescission of contract, it can be concluded that partial rescission of contract does not affect the rights and obligations which have been accrued before the time of rescission, and the parties may claim for the remuneration of the work that has been completely performed before the time of rescission.

3.2.4 Damages

When there is breach of contract, the innocent party can claim damages as a remedy.²⁰¹ Damages are considered as a secondary obligation of contract. Rescission of contract does not affect the right to claim damages, it remains enforceable and is governed by the contract.²⁰² As said by Dixon J in the case of *Mcdonald v Dennys Las celles Ltd.*²⁰³ mentioned above, the party in breach is liable for damages due to his breaches without being affected by rescission. Principally, the innocent party can claim damages even though he has not suffered any loss.²⁰⁴ In English law, there are three measures of damages. The first measure is loss of bargain; the damages that is awarded to the innocent party considering the position which the innocent party would have been in, if the contract has been performed. The second measure is the tortious measure of damages, which is the damages that

¹⁹⁹ *ibid* 977-978

²⁰⁰ *ibid* 988

²⁰¹ Michael Furmston (n 12) para 8.1

²⁰² *ibid* para 7.42

²⁰³ Michael Furmston (n 12) para 7.39

²⁰⁴ Guenter Heinz Treitel, *The law of contract* (N 10) 864

restore the innocent party to the position he was in before the breach occurred. The third measure is the damages that is based on the possibility that the breaching party has been unjustly enriched by the breach, therefore, the breaching party should be forced to pay a sum of money to the innocent party in respect of that gain.²⁰⁵ Thus whether it is rescission of contracts as a whole or partial rescission of contracts, the damages is arouse and measured with regard to the breach of contract.

Hence partial rescission of contracts does not affect the right to claim damages. The innocent party may still claim damages for a breach of contract.

With regard to the aforementioned, English law allows the innocent party to partially rescind the contract if the obligation of the contract is divisible. The innocent party may partially rescind the contract on the ground of a breach of contract. Furthermore, the partial frustration is possible where the frustrated part is separated from the remaining part of contract to the extent that it can be considered as a separate contract. In addition, rescission of contract does not affect the rights of the innocent party to claim damages. The innocent party may claim damages based on the breach of contract.

3.3 Partial Rescission of Contracts in the Common European Sales Law (CESL)

The Common European Sales Law (CESL) is one of the continental European contract laws; it aims to overcome the differences in contract law between Member States of European Union, which hinder traders and consumers who want to engage a commercial transaction in a cross-border trade within the internal market.²⁰⁶ Thus, mostly, the rule in the Common European Sales Law (CESL) seems to compromise and avoid the extremities of German law and English law, however it

²⁰⁵ Michael Furmston (n 12) para 8.4

²⁰⁶ Gerhard Dannemann, Stefan Vogenauer (n 113) 708

leans closer to German law.²⁰⁷ Furthermore, the Common European Sales Law (CESL) also provides principle of partial rescission of contracts.

3.3.1 The Applicable Contracts under the Common European Sales Law (CESL)

According to Article 5,²⁰⁸ the Common European Sales Law (CESL) may be applied for the sales contract, the sales contracts for the supply of digital content, and the related service contracts including any service related to goods or digital content under the sales contracts or a separate related service contract concluded at the same time as the sales contracts.²⁰⁹ In this regard according to the rules in the Common European Sales Law (CESL), the principle of partial rescission of contracts for non-performance of sales contracts is also applied to a separate related service contract,²¹⁰ according to Article 155 paragraph one and Article 157 paragraph one.²¹¹ Hence for the benefit of understanding this thesis, unless mentioned

²⁰⁷ *ibid* 723-725

²⁰⁸ CESL, Article 5, Contracts for which the Common European Sales Law can be used;

“The Common European Sales Law may be used for:

(a) Sales contracts;
 (b) Contracts for the supply of digital content whether or not supplied on a tangible medium which can be stored, processed or accessed, and re-used by the user, irrespective of whether the digital content is supplied in exchange for the payment of a price.

(c) Related service contracts, irrespective of whether a separate price was agreed for the related service.”

²⁰⁹ Reiner Schulze (n 35) 40-49

²¹⁰ *ibid* 629-633

²¹¹ CESL, Article 155, Remedies of the customer, paragraph one;

“1. In the case of non-performance of an obligation by the service provider, the customer has, with the adaptations set out in this Article, the same remedies as are provided for the buyer in Chapter 11, Namely:

- (a) to require specific performance;
- (b) to withhold the customer’s own performance;
- (c) to terminate the contract;

otherwise, hereinafter in the part of the Common European Sales Law (CESL), the principle of partial rescission of contract for the sales contract(s) and the contract(s) for the supply of digital content shall be referred to as same as in the case of the related service contracts.

3.3.2 Nature of Contracts

- Divisible Obligations

According to Article 117 paragraph one and Article 137 paragraph one,²¹² if the contractual obligations are divisible, and there is a ground for rescission of a part which a counter-performance can be apportioned, the innocent party can only rescind this part of contract.²¹³ Therefore, even though the obligations of the contract are divisible, the innocent party may partially rescind the contract, only provided that the part to be rescinded can be apportioned for counter-performance.

Furthermore, under Article 117 paragraph one and Article 137 paragraph one, where the innocent party is entitled to partially rescind the contract, the innocent party cannot rescind the contract as a whole,²¹⁴ except in the two cases; (a) if the buyers has an interest in the performance of the whole contract, or the parts that are affected by the non-performance concerning the underlying sense

-
- (d) to reduce the price; and
 - (e) to claim damages.”

Article 157, Remedies of the service provider, paragraph one;

“1. In the case of non-performance by the customer, the service provider has, with the adaptations set out in paragraph 2, the same remedies as are provided for the seller in Chapter 13 namely:

- (a) to require performance;
- (b) to withhold the service provider’s own performance;
- (c) to terminate the contract; and
- (d) to claim the interest on the price or damages.”

²¹² CESL, Article 117 paragraph one and Article 137 paragraph one (n 7)

²¹³ Gerhard Dannemann, Stefan Vogenauer (n 113) 648-649

²¹⁴ Reiner Schulze (n 35) 523, 596

of the contract,²¹⁵ according to Article 117 paragraph two,²¹⁶ the buyer may rescind contract as a whole; and (b) if the non-performance of a separate or divisible obligation contradicts the intention of the parties (such as the seller wants to sell the package of four item, but both parties knew that the buyer makes a contract in order to acquire only one of these item, the non-performance related to this item would justify the termination of the contract as a whole)²¹⁷ or amounts to a fundamental breach for the entire contract,²¹⁸ according to Article 137 paragraph two,²¹⁹ the innocent party may rescind the contract as a whole.

In consequence, there are three conditions for partial rescission on contracts; (1) the contractual obligations must be divisible; (2) the part being rescinded must be able to be apportioned for counter-performance; and (3) the breach of contract must not contradicts the intention of the parties or amounts to a fundamental breach for the entire contract.

3.3.3 Causes of Partial Rescission of Contracts

The rescission of contracts is considered as one of remedies under the Common European Sales Law (CESL). According to Article 106 paragraph one and Article 131 paragraph one,²²⁰ where there is a non-performance of contracts, the innocent party may rescind the contract under the certain conditions in each case.

²¹⁵ *ibid* 523

²¹⁶ CESL, Article 117, Scope of right to terminate, paragraph two;

“2. Paragraph 1 does not apply if the buyer cannot be expected to accept performance of the other parts or the non-performance is such as to justify termination of the contract as a whole.”

²¹⁷ Reiner Schulze (n 35) 523

²¹⁸ Reiner Schulze (n 35) 596

²¹⁹ CESL, Article 137, Scope of right to terminate, paragraph two;

“2. Paragraph 1 does not apply if the non-performance is fundamental in relation to the contract as a whole.”

²²⁰ CESL, Article 106, Overview of buyer’s remedies, paragraph one;

In this regard, according to Article 117 paragraph one and Article 137 paragraph one, if there is a ground for rescission, the innocent party may partially rescind the contract.²²¹ Under the Common European Sales Law (CESL), the ground for rescission is non-performance consisting of some certain conditions whether it is fundamentality of non-performance, significant lack of conformity in the performance under the contract or the failure to perform within the fixed additional time in the case of delay in delivery. According to Article 87 paragraph one,²²² non-performance

“1. In the case of non-performance of an obligation by the seller, the buyer may do any of the following;

- (a) require performance, which includes specific performance, repair or replacement of the goods or digital content, under Section 3 of this Chapter;
- (b) withhold the buyer’s own performance under Section 4 of this Chapter;
- (c) terminate the contract under Section 5 of this Chapter and claim the return of any price under Section 6 of this Chapter; and
- (d) reduce the price under section 6 of this Chapter; and
- (e) claim damages under Chapter 16.”

Article 131, Overview of seller’s remedies

“1. In the case of a non-performance of an obligation by the buyer, the seller may do any of the following;

- (a) require performance under Section 2 of this Chapter;
- (b) withhold the seller’s own performance under Section 3 of this Chapter;
- (c) terminate the contract under Section 4 of this Chapter; and
- (d) claim interest on the price or damages under Chapter 16.”

²²¹ Reiner Schulze (n 35) 522-524, 593-596

²²² CESL, Article 87, Non-performance and fundamental non-performance, paragraph one;

“1. Non-performance of an obligation is any failure to perform that obligation, whether or not the failure is excused, and includes:

- (a) non-delivery or delayed delivery of the goods;
- (b) non-supply or delayed supply of the digital content;
- (c) delivery of goods which are not in conformity with the contract;
- (d) supply of digital content which is not in conformity with the contract;

includes any failure to perform the obligations of the contract which are all and various kind of breach of contract; i.e., (1) late performance; and (2) partial performance; and (3) non-conforming performance; and (4) non-performance. Furthermore, it also includes the failure to perform in the case of impossibility. Thus, non-performance in the sense of the CESL includes the breach of contracts and impossibility of performance. However, since in the previous content of this thesis have been divided into the breach of contracts and impossibility of performance, therefore, this part is to be analysed in the same structure for the benefit of understanding.

- Breach of Contracts

There are three types of breach entitling the innocent party to partially rescind the contract as follows:

(1) Fundamental Non-performance

According to Article 87 paragraph two,²²³ the non-performance is fundamental if the non-performance does not allow the intended objective of the contract to be reached, or the non-performance expresses that the behaviour of the debtor will undermine the relationship between the parties in the future.²²⁴

In the case of sales contracts and the contracts for supply of digital content, which are not the consumer contracts, according to Article 114 paragraph

(e) non-payment or late payment of the price; and

(f) any other purported performance which is not in conformity with the

contract.”

²²³ CESL, Article 87, Non-performance and fundamental non-performance, paragraph two;

“2. Non-performance of an obligation by one party is fundamental if:

(a) It substantially deprives the other party of what that party was entitled to expect under the contract, unless at the time of conclusion of the contract the non-performing party did not foresee and could not be expected to have foreseen that result; or

(b) It is of such a nature as to make it clear that the non-performing party’s future performance cannot be relied on.”

²²⁴ Reiner Schulze (n 35) 404-407

one,²²⁵ if there is a fundamental non-performance, the buyer may rescind the contract.²²⁶ In addition, the seller may rescind the sales contracts provided that the non-performance is a fundamental non-performance²²⁷ according to Article 134.²²⁸ Thus, in the cases of fundamental non-performance, the innocent party may partially rescind the contracts.

(2) Significant Lack of Conformity

In the Common European Sales Law (CESL), consumer means any natural person who is acting for purposes which are outside that person's trade, business, craft or profession.²²⁹ Where the seller is a trader and the buyer is a consumer, the contract is called the consumer sales contract. This term may apply to the contract for the supply of digital content where the supplier is a trader and the user is a consumer²³⁰. In this regard, for benefit of conciseness, the author will use the wording of consumer contract as referred to both sale of contracts and contracts for the supply of digital content where a buyer or a user is a consumer.

The rule of significant lack of conformity does apply only in the case of consumer contracts. The significant lack of conformity means the lack of conformity which does influence the utility of the goods and digital content and also diminish the aesthetic values of the goods.²³¹ According to Article 114 paragraph two,²³² when it comes to the consumer contracts, the consumers only have to prove

²²⁵ CESL, Article 114, Termination for non-performance, paragraph one;

“1. A buyer may terminate the contract within the meaning of Article 8 if the seller's non-performance under the contract is fundamental within the meaning of Article 87(2).”

²²⁶ Reiner Schulze (n 35) 516-517

²²⁷ *ibid* 586-587

²²⁸ CESL, Article 134, Termination for fundamental non-performance

“A seller may terminate the contract within the meaning of Article 8 if the buyer's non-performance under the contract is fundamental within the meaning of Article 87(2).”

²²⁹ Reiner Schulze (n 35) 20

²³⁰ *ibid* 22

²³¹ *ibid* 408

²³² CESL, Article 114, Termination for non-performance, paragraph two;

that the significant lack of conformity, which is not difficult to prove, is fundamental.²³³ Thus, for the consumer contracts, the consumers may partially rescind the contracts provided that there is a significant lack of conformity. However, the consumer may also partially rescind the contract if there is a fundamental non-performance.²³⁴

(3) The Failure to Perform within the Fixed Additional Time in the Case of Delay

For the sales contracts, the contracts for supply digital content and the consumer contracts, other than the fundamental non-performance and the significant lack of conformity, the innocent party may partially rescind the contract in the case of delay.²³⁵ According to Article 115 paragraph one and Article 135 paragraph one,²³⁶ the innocent party may partially rescind the contract even though the non-performance is insignificant or not fundamental if the breaching party does not accomplish the performance within the period of time given in the notice fixing additional period. In this regard, if the performance has been rendered within the

“2. In a consumer sales contract and a contract for the supply of digital content between a trader and a consumer, where there is a non-performance because the goods do not conform to the contract, the consumer may terminate the contract unless the lack of conformity is insignificant.”

²³³ Reiner Schulze (n 35) 516-518

²³⁴ *ibid* 518

²³⁵ *ibid*

²³⁶ CESL, Article 115, Termination for delay in delivery after notice fixing additional time for performance, paragraph one;

“1. A buyer may terminate the contract in a case of delay in delivery which is not in itself fundamental if the buyer gives notice fixing an additional period of time of reasonable length for performance and the seller does not perform within that period.”
Article 135, Termination for delay after notice fixing additional time for performance, paragraph one;

“1. A seller may terminate in a case of delay in performance which is not in itself fundamental if the seller gives a notice fixing an additional period of time of reasonable length for performance and the buyer does not perform within period.”

additional period of time, a right to rescind the contract for the reason of delay is extinguished. Nonetheless, if the delay is considered as a fundamental non-performance or a significant lack of conformity, the innocent party or the consumer may partially rescind the contract immediately according to Article 114, without considering the delay regarding notice fixing the additional time.²³⁷

Hence for the sales contracts and contracts for supply of digital content, there are two grounds of breach of contracts; i.e., (1) fundamental non-performance; and (2) the failure to perform within the fixed additional time in the case of delay. In part of the consumer contracts, there are three grounds of breach of contracts with regard to partial rescission of contracts; i.e., (1) fundamental non-performance; (2) significant lack of conformity; and (3) the failure to perform within the fixed additional time in the case of delay.

- Impossibility of Performance

In the Common European Sales Law (CESL), principally, the impossibility of performance is not treated as the usual case of the non-performance under Article 87,²³⁸ but it is considered as the excused non-performance.²³⁹ According to Article 88,²⁴⁰ there are three requirements for the excused non-performance. First

²³⁷ Reiner Schulze (n 35) 518-520

²³⁸ *ibid* 400

²³⁹ *ibid* 409

²⁴⁰ CESL, Article 88, Excused non-performance;

“1. A party’s non-performance of an obligation is excused if it is due to an impediment beyond that party’s control and if that party could not be expected to have taken the impediment into account at the time of the conclusion of the contract, or to have avoided or overcome the impediment or its consequences.

2. Where the impediment is only temporary the non-performance is excused for the period during which the impediment exists. However, if the delay amounts to a fundamental non-performance, the other party may treat it as such.

3. The party who is unable to perform has a duty to ensure that notice of the impediment and of its effect on the ability to perform reached the other party without undue delay after the first party becomes, or could be expected to have become, aware of these

requirement is that non-performance can be proved that it has been caused by an impediment beyond the control of the debtor. The second requirement is that the breaching party could not expect to have taken the impediment into account at the time of the conclusion of contract. The final requirement is that the debtor could not have overcome or avoid the impediment or its consequences.²⁴¹ If the non-performance is excused, the innocent party may resort to any remedies referred to in Article 116 paragraph one and Article 131 paragraph one, except requiring performance and damages,²⁴² according to Article 116 paragraph four and Article 131 paragraph two.²⁴³ Thus, where there is an impossibility of performance, it is considered as the non-performance and the innocent party may partially rescind the contract under the same conditions as in the cases of breach of contracts.

Hence the non-performance, which include of breach of contract and impossibility of performance, under the certain conditions, is the cause of partial rescission of contracts in the Common European Sales Law (CESL).

3.3.4 Consequences of Partial Rescission of Contracts

According to Article 172,²⁴⁴ typically, where there is rescission of contracts, each party has an obligation to return to the other what received from the

circumstances. The other party is entitled to damages for any loss resulting from the breach of this duty.”

²⁴¹ Reiner Schulze (n 35) 411-412

²⁴² *ibid* 409

²⁴³ CESL, Article 116, Overview of buyer’s remedies, paragraph four;

“4. If the seller’s non-performance is excused, the buyer may resort to any of the remedies referred to in paragraph 1 except requiring performance and damages.”

Article 131, Overview of seller’s remedies, paragraph two;

“2. If the buyer’s non-performance is excused, the seller may resort to any of the remedies referred to in paragraph 1 except requiring performance and damages.”

²⁴⁴ CESL, Article 172, Restitution on avoidance or termination;

“1. Where a contract is avoided or terminated by either party, each party is obliged to return what that party (‘the recipient’) has received from the other party.

other. Thus, it means that in the Common European Sales Law (CESL), the consequences of rescission of contract are retrospective and each party has to be restored to their condition before the contract was entered into, *status quo ante*. Furthermore, the obligation to return what has been received also encompasses any fruits that have been derived from the other party's performance²⁴⁵

In case of partial rescission of contracts, according to Article 172 paragraph three, a completed performance in part or in instalment in the past remains untouched by a subsequent rescission of the contract.²⁴⁶ In addition, the Article 172 paragraph three does not only happen in the case of partial rescission of contracts, they can be applied in the case of rescission of contracts as a whole, because Article 172 paragraph three does not need the obligations of the contract to be divisible.²⁴⁷ Under Article 8 paragraph two,²⁴⁸ there are two conditions for applying Article 172 paragraph three; (1) a part of contract has been fully performed by both parties; or (2) the return-payment for the performance, which has been done, remains payable, provided that the time of payment is due before the rescission.²⁴⁹

2. The obligation to return what was received includes any natural and legal fruits derived from what was received.

3. On the termination of a contract for performance instalments or parts, the return of what was received is not required in relation to any instalment or part where the obligations on both sides have been fully performed, or where the price for what has been done remains payable under Article 8(2), unless the nature of the contract is such that part performance is of no value to one of the parties.”

²⁴⁵ Reiner Schulze (n 35) 680

²⁴⁶ *ibid* 681

²⁴⁷ *ibid* 688

²⁴⁸ CESL, Article 8, Agreement on the use of the Common European Sales Law;

“2. In relations between a trader and a consumer the agreement on the use of the Common European Sales Law shall be valid only if the consumer's consent is given by an explicit statement which is separate from the statement indicating the agreement to conclude a contract. The trader shall provide the consumer with a confirmation of that agreement on a durable medium.

²⁴⁹ Reiner Schulze (n 35) 689

However, if partial performance has no value to one of the parties according to the nature of contract, Article 172 paragraph one shall be applied, and each party must be restored to their condition before the contract was entered into.²⁵⁰ It means that each party is obliged to return what that party has received from the other party.²⁵¹

- Restitution

There are two cases of obligation to return each other to the original condition prior to the contract according to Article 172. The first case is that each party has to return what has been received. If the possession of goods has been obtained, the goods must be returned. If the ownership of goods has been obtained, it has to be retransferred. If the money has been obtained, it has to be returned as well.²⁵² The second case is that each party also has to return natural fruits and legal fruits. Natural fruit are products that are derived naturally from what has been received, such as the calves of a cow or the eggs of a hen. Legal fruit are benefits that are derived from the received through the operation of law, such as the interest received arising from the money that was lent.²⁵³ Furthermore, if there is the case that it is impossible to return such benefit which was received, each party has to return its monetary value according to Article 173 paragraph one.²⁵⁴ Whether they are goods or fruits, if they are impossible to return, the recipient has to pay for its monetary value.²⁵⁵ Other than the case of impossibility to return, if the return is possible, but it would cause unreasonable effort or expense to the recipient, the

²⁵⁰ *ibid*

²⁵¹ *ibid* 684

²⁵² *ibid* 684-687

²⁵³ *ibid* 687-688

²⁵⁴ CESL, Article 173, Payment for monetary value;

“1. Where what was received, including fruits where relevant, cannot be returned, or, in a case of digital content whether or not it was supplied on a tangible medium, the recipient must pay its monetary value. Where the return is possible but would cause unreasonable effort or expense, the recipient may choose to pay the monetary value, provided that this would not harm the other party’s proprietary interests.”

²⁵⁵ Reiner Schulze (n 35) 695-696

recipient may choose to pay the monetary value, except such choice is harmful to the other party's proprietary interests. For example, in the case that the goods received is unique or is not normally available on the market, where the supplier has an affectionate interest in it, or where he has an opportunity to sell it on very favourable terms, the recipient cannot choose to pay for its monetary value but have to return the goods received.²⁵⁶

As for the case of digital content, the recipient must always pay for its monetary value, independently of the ability to restore the content. For example, a DVD, which, in principle, can be returned to the other party, the recipient still has to pay for its monetary value.²⁵⁷

Hence according to Article 172 paragraph one of the Common European Sales Law (CESL), where the contract has been partially rescinded, the part of contract which has been rescinded shall come to an end from the beginning. In addition, for the rescinded part of contract, each party must restore the other party to the condition before the contract was entered into. Each party has to return what has been received including fruits where relevant. If the return is possible, the recipient has to pay for its monetary value. As for the case of digital content, the recipient has to always pay for its monetary value.

3.3.5 Damages

According to Article 159,²⁵⁸ in case of the breach of contract, the innocent party may claim damages, including future loss which the innocent party could expect to occur, and for loss from non-performance, unless the non-

²⁵⁶ *ibid* 696-697

²⁵⁷ *ibid* 696

²⁵⁸ CESL, Article 159, Right to damages;

“1. A creditor is entitled to damages for loss caused by the non-performance of an obligation by the debtor, unless the non-performance is excused.

2. The loss for which damages are recoverable includes future loss which the debtor could expect occur.”

performance is excused. In the case of impossibility of performance, the innocent party may partially rescind the contracts as in the case of breach of contracts, but the innocent party may not claim damages for loss²⁵⁹ under the conditions of Article 88.²⁶⁰ In this regard, like in other legal system, the rescission under the Common European Sales Law (CESL) does not affect the right to claim damages.²⁶¹

There are three measures of damages according to Article 160.²⁶² The first measure is loss of bargain. It aims to recover the benefit of bargain of the innocent party, which commonly referred to as expectation interest. It also covers the indemnity interest to the innocent party as well. The second measure is reliance loss. It is the expenditures made in reliance on the existence of the contract. For example, the innocent party has built a warehouse for the goods he contracted for. Then because of the non-performance by the breaching party, these expenditures were wasted. The innocent party may claim for these expenditures based on reliance loss. The third measure is the damages that aims to recover the innocent party for loss or benefit that he has been deprived because of the non-performance.²⁶³

Hence in the case of partial rescission of contracts, the innocent party may claim damages for loss from non-performance, except in the case of the partial rescission on the ground of impossibility of performance, the innocent party may not claim damages under the certain conditions.

²⁵⁹ Reiner Schulze (n 35) 637

²⁶⁰ CESL, Article 88 (n 240)

²⁶¹ Reiner Schulze (n 35) 492, 577

²⁶² CESL, Article 160, General measure of damages;

“The general measure of damages for loss caused by non-performance of an obligation is such sum as will put the creditor into the position in which the creditor would have been if the obligation had been duly performed, or, where that is not possible, as nearly as possible. Such damages cover loss which the creditor has suffered and gain of which the creditor has been deprived.”

²⁶³ Reiner Schulze (n 35) 639-645

With regard to the aforementioned, the Common European Sales Law (CESL) allows the innocent party to partially rescind the contract if the obligation of the contract is divisible. The innocent party may partially rescind the contract on the ground of non-performance, including the breach of contract and the impossibility of performance. Furthermore, the rescission of contract does not affect the rights of the innocent party to claim damages. The innocent party may claim damages for the non-performance, unless the non-performance is excused.

3.4 Partial Rescission of Contracts in the Draft Common Frame of Reference (DCFR)

The Draft Common Frame of Reference (DCFR) is the model for law reform.²⁶⁴ It serves for three main purposes. The first purpose is a possible for an actual or political Common Frame of Reference (CFR).²⁶⁵ The Common Frame of Reference (CFR) is the optional instrument created by the European Commission for improving the quality of the EC acquis in the area of contract law.²⁶⁶ It aims to deal with rules for cross-border sales and services contracts but would also cover the general contract law.²⁶⁷ The second purpose is to encourage legal science, research and education. There is the essential intention that the DCFR was established to promote knowledge of private law in jurisdictions of the European Union. The third purpose is a possible source of inspiration from suitable solution for private law dilemma.²⁶⁸

Similar to the Common European Sales Law (CESL), The Draft Common Frame of Reference (DCFR) has served as models for law reform in European Union. It has been frequently used as model law and has enormous

²⁶⁴ Gerhard Dannemann, Stefan Vogenauer (n 113) 732

²⁶⁵ Christian von Bar and Eric Clive (n 37) 2

²⁶⁶ EUR-Lex <<http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:52003DC0068>> accessed 22 January 2018

²⁶⁷ Gerhard Dannemann, Stefan Vogenauer (n 113) 6

²⁶⁸ Christian von Bar and Eric Clive (n 37) 3-4

potential to be used as the sources of inspiration.²⁶⁹ Moreover, it also provides the principle of partial rescission of contracts, thus The Draft Common Frame of Reference (DCFR) is a good instrument to analyse and research partial rescission of contracts similar to the Common European Sales Law (CESL).

Please note that the Draft Common Frame of Reference (DCFR) is quite broad and more like a code of contract law. There are general provisions which mention about general rules, and furthermore, there are provisions specified about specific contract. In this regard, this thesis will concentrate on the general principle of partial rescission of contracts.

3.4.1 The Applicable Contracts under The Draft Common Frame of Reference (DCFR)

The Draft Common Frame of Reference (DCFR), according to Article I.-1:101(1),²⁷⁰ is set out to apply to the contract and other juristic acts, contractual and non-contractual rights and obligations and related property matters.²⁷¹ In this regard, according to Article II.-1:101(1),²⁷² the contract includes any contract which gives legal relationship as well as the contract which gives other legal effect. For example, the contract amending the terms of an existing contract, or to rescind an existing legal relationship between the parties, is considered as the contract which gives other legal effect. Thus, the Draft Common Frame of Reference (DCFR) may be applied for

²⁶⁹ Gerhard Dannemann, Stefan Vogenauer (n 113) 735

²⁷⁰ DCFR, Article I.-1:101, Intention field of application;

“(1) These rules are intended to be used primarily in relation to contracts and other juridical acts, contractual and non-contractual rights and obligations and related property matters.”

²⁷¹ Christian von Bar and Eric Clive (n 37) 86

²⁷² DCFR, Article II.-1:101, Meaning of “contract” and “judicial act”

“(1) A contract is an agreement which is intended to give rise to a binding legal relationship or to have some other legal effect. It is a bilateral or multilateral juridical act.

the contract which creates rights and obligations as well as the contract which gives some other legal effect.²⁷³

3.4.2 Nature of Contracts

- Divisible Obligations

According to Article III.-3:506,²⁷⁴ where the obligation of the contract is divisible, and the counter-performance of the divisible part can be apportioned, the innocent party may partially rescind the contract. Under this Article, there are two types of divisible obligation. The first type is the case which the obligation is to be performed in separate parts or instalments. The second type is the case which the performance of the obligation is divisible as to content but not necessarily as to time.²⁷⁵ For example, if a farmer agrees to buy two tractors and one of them is considered as a fundamental non-performance to the contract while the other one is in conformity with the contract. In this case, the obligation of the contract is considered as divisible, and the farmer may partially rescind the contract.

Principally, where the contract indicates a series of performance which will be performed by one party, and each performance matches the counter-performance, such as a specific price for each performance, the obligation of the contract may be seen as divisible into separate parts. Furthermore, the apportioned counter-performance needs not to be expressly specified in the contract, even if the performance is not broken down into separate parts, the obligation of the contract may be divisible as well by apportioning payment on a daily or weekly basis.²⁷⁶

Furthermore, if the innocent party can partially rescind the contract, he cannot rescind the contract as a whole, with the exception of two situations. The first situation is where the innocent party cannot reasonably be expected to accept the remaining performance. For example, a farmer has ordered two harvest

²⁷³ Christian von Bar and Eric Clive (n 37) 125

²⁷⁴ DCFR, Article III.-3:506 (n 8)

²⁷⁵ Christian von Bar and Eric Clive (n 37) 875

²⁷⁶ *ibid* 875

machineries which are to be delivered in two parts with a separate price for each. The supplier delivers one part within due time, however, he cannot deliver the second part until after the harvest time. In this case, the farmer has no use for the second part and may rescind the contract as a whole.²⁷⁷ The second situation is where there is a ground for rescission of contract as a whole. Typically, it is the case of anticipated non-performance of the remaining part. For example, in the contract for providing cleaning service for the office on Saturday of each week for a fixed price per week, the contractor did not complete the cleaning work on the first week because of the lack of employee. If the contractor refuses to use more employees, the innocent party may rescind the contract as a whole.²⁷⁸

Hence if the obligation of the contract is divisible, it is possible to partially rescind the contract. Principally, there are two conditions of divisible obligation. The first condition is that there is a series of performance. The second condition is that there is the counter-performance for each separate performance.

3.4.3 Causes of Partial Rescission of Contracts

According to Article III.-3:506, If there is a ground for partial rescission of contract, then the innocent party may partially rescind the contract in relation to that part. For example, in the case of the contract for service and the breaching party fails to perform one part of contract. The non-performance is fundamental in relation to the relevant part but not fundamental in relation to the whole. The innocent party may rescind the contractual relationship of the non-performance part, leaving the rest of contract untouched.²⁷⁹ Similar to the Common European Sales Law (CESL), the ground for rescission of contracts in the Draft Common Frame of Reference (DCFR) is non-performance. In addition, according to Article III.-1:102,²⁸⁰ the

²⁷⁷ *ibid* 876

²⁷⁸ *ibid* 876-877

²⁷⁹ *ibid*

²⁸⁰ DCFR, Article III.-1:102(3), Definitions;

term non-performance is referred to any non-performance whether it is excused or not,²⁸¹ thus both the breach of contracts and the impossibility of performance are considered as non-performance. Since in the previous parts of the Common European Sales Law (CESL), the causes of partial rescission of contract have been divided into the breach of contracts and the impossibility of performance, thus this part will be analysed in the same structure for the benefit of understanding.

- Breach of Contracts

According to the Draft Common Frame of Reference (DCFR), there are two types of breach entitling the innocent party to partially rescind the contract as follows:

(1) Fundamental Non-performance

If the non-performance is fundamental, the innocent party may rescind the contract,²⁸² under the condition of Article III.-3:502.²⁸³ There are two types of fundamental non-performance according to this Article.

The first type is, according to Article III.-3:502(2)(a), where the effect of non-performance is substantially to deprive the innocent party of what he was

“(3) Non-performance of an obligation is any failure to perform the obligation, whether or not excused, and includes delayed performance and any other performance which is not in accordance with the terms regulating the obligation.

²⁸¹ Christian von Bar and Eric Clive (n 37) 679

²⁸² *ibid* 852

²⁸³ DCFR, Article III.-3:502, Termination for fundamental non-performance;

“(1) A creditor may terminate if the debtor’s non-performance of a contractual obligation is fundamental.

(2) A non-performance of a contractual obligation is fundamental if:

(a) it substantially deprives the creditor of what the creditor was entitled to expect under the contract, as applied to the whole or relevant part of the performance, unless at the time of conclusion of the contract the debtor did not foresee and could not reasonably be expected to have foreseen that result; or

(b) it is intentional or reckless and gives the creditor reason to believe that the debtor’s future performance cannot be relied on.”

entitled to receive under the contract, whether it is the whole contract or only in the relevant part of the performance, then the non-performance is fundamental. However, if the breaching party did not foresee and could not reasonably be expected to have foreseen the consequences, the non-performance is not considered as fundamental. For example, the contractor agrees to install a temperature control system in the employer's wine cellar which will ensure that the wine is not adversely affected by substantial temperature fluctuation. Owing to a defect in the installation, the control system proves ineffective, with the result that the stock of wine is made undrinkable, thus the employer, regarding to the wine, has been substantially deprived of what he was entitled to expect under the contract. In addition, the contractor was aware, or could reasonably be expected to have been aware, of the likely consequences. In this regard, the non-performance of the contractor is fundamental. Contrasting to this case, if the contractor did not aware or could not reasonably be expected to have been aware, of the wine's condition, the non-performance of the contractor is not fundamental.²⁸⁴

The second type is, according to Article III.-3:502(2)(b), even if the non-performance of an obligation does not substantially deprive the innocent party of what he could have expected to receive, if the non-performance is intentional or reckless and gives the innocent party the reason to believe that the breaching party's future performance cannot be relied on, the non-performance is considered as the fundamental non-performance. For example, the agent, who is entitled to reimburse for his expense for the work done from the principal, intentionally or recklessly submits false vouchers to the principal. Although the amount claimed are insignificant, the principal may treat the agent's behaviour as a fundamental non-performance because the agent's future performance cannot be relied on.²⁸⁵

²⁸⁴ Christian von Bar and Eric Clive (n 37) 853-854

²⁸⁵ *ibid* 855

(2) The Failure to Perform within the Fixed Additional Time in the Case of Delay

In the case of delayed performance, even if the delayed performance is not yet fundamental, the innocent party may rescind the contract, provided that the innocent party has given the notice fixing an additional period of time of reasonable length for performance and the debtor has not performed within that period,²⁸⁶ under the condition of Article III.-3:503.²⁸⁷ For example, the employer hires the contractor to decorate the interior of an empty apartment owned by the employer. The employer fails to give the contractor a key of the apartment by the date on which it was agreed that the contractor should start working. The contractor may fix a reasonable time for the employer to give the key. If the employer fails to give the key within the time fixed, the contractor may rescind the contract.

Hence in the case of breach of contract, there are two grounds for partial rescission of contracts; i.e., (1) fundamental non-performance; and (2) the failure to perform within the fixed additional time in the case of delay.

- Impossibility of Performance

Under the Draft Common Frame of Reference (DCFR), the impossibility of performance is considered as the non-performance which is excused according to Article III.-1:102. Additionally, according to Article III.-3:101,²⁸⁸ similar to the case of

²⁸⁶ *ibid* 862

²⁸⁷ DCFR, Article III.-3:503, Termination after notice fixing additional time for performance;

“(1) A creditor may terminate in a case of delay in performance of a contractual obligation which is not in itself fundamental if the creditor gives a notice fixing an additional period of time of reasonable length for performance and the debtor does not perform within that period.

(2) If the period fixed is unreasonably short, the creditor may terminate only after a reasonable period from the time of the notice.”

²⁸⁸ DCFR, Article III.3-101, Remedies available;

“(1) If an obligation is not performed by the debtor and the non-performance is not excused, the creditor may resort to any of the remedies set out in this Chapter.

(2) If the debtor’s non-performance is excused, the creditor may resort to any of those remedies except enforcing specific performance and damages.

breach of contract, partial rescission of contracts is also permitted to the innocent party in the case of the excused non-performance. However, the innocent party cannot enforce the specific performance or claim damages. For example, the landowner has let his land to the tenant for ten years with condition that the tenant has undertaken to grow vines on the land. The tenant plants the vines with care, but the vines die from disease. The tenant's failure of growing vines is an excused non-performance. In this regard, the landowner cannot claim damages, but he can rescind the contract.²⁸⁹ Thus, the innocent party may partially rescind the contract in the cases of impossibility of performance under the same conditions as in the case of breach of contracts.

According to Article III.-3:104,²⁹⁰ there are three requirements for establishing the excused non-performance. The first requirement is that the

(3) The creditor may not resort to any of those remedies to the extent that the creditor caused the debtor's non-performance."

²⁸⁹ Christian von Bar and Eric Clive (n 37) 772

²⁹⁰ DCFR, Article III.-3:104, Excuse due to impediment;

"(1) A debtor's non-performance of an obligation is excused if it is due to an impediment beyond the debtor's control and if the debtor could not reasonably be expected to have avoided or overcome the impediment or its consequences.

(2) Where the obligation arose out of a contract or other juridical act, non-performance is not excused if the debtor could reasonably be expected to have taken the impediment into account at the time when the obligation was incurred.

(3) Where the excusing impediment is only temporary the excuse has effect for the period during which the impediment exist. However, if the delay amounts to a fundamental non-performance, the creditor may treat it as such.

(4) Where the excusing impediment is permanent the obligation is extinguished. Any reciprocal obligation is also extinguished. In the case of contractual obligations any restitutionary effects of extinction are regulated by the rules in Chapter 3, Section 5, Sub-section 4 (Restitution) with appropriate adaptations.

(5) The debtor has a duty to ensure that notice of the impediment and of its effect on the ability to perform reaches the creditor within a reasonable time after the debtor knew or could reasonably be expected to have known of these circumstances. The creditor is entitled to damages for any loss resulting from the non-receipt of such notice."

impediment must be outside the breaching party's control. The second requirement is that the impediment could not have been taken into account by the breaching party at the time the obligation was incurred. The final requirement is that the impediment must be insurmountable or irresistible.²⁹¹

Hence similar to the Common European Sales Law (CESL), except that in the Draft Common Frame of Reference (DCFR) there is no condition of significant lack of conformity in the general principle, the non-performance is the cause of partial rescission of contracts under certain conditions. Provided that, the non-performance can be divided into breach of contracts and the impossibility of performance, thus it can be said that breach of contracts and the impossibility of performance are the causes of partial rescission of contracts.

3.4.4 Consequences of Partial Rescission of Contracts

According to Article III.-3:501,²⁹² where the contractual relationship has been rescinded, the obligations and the rights under the contract are dissolved. It uses the wording 'contractual obligations and contractual relationships' because it intends to express that the principle of rescission does not apply to the non-contractual obligations.²⁹³ Moreover this Article uses the term 'termination' intentionally in order to express that the effect of rescission is not retrospective but it is prospective, because of the different terminology between 'rescission' and 'termination',²⁹⁴ which the author has already mentioned in Chapter 2.1.

²⁹¹ Christian von Bar and Eric Clive (n 37) 789

²⁹² DCFR, Article III.-3:501, Scope and definition;

“(1) This Section applies only to contractual obligations and contractual relationships.

(2) In this Section “termination” means the termination of the contractual relationship in whole or in part and “terminate” has a corresponding meaning.”

²⁹³ Christian von Bar and Eric Clive (n 37) 850

²⁹⁴ *ibid* 851

Article III.-3:509(1)²⁹⁵ uses the word ‘the outstanding obligation’ as an obligation that has not been fully performed, whether due or not.²⁹⁶ Thus, in this regard, the outstanding obligation is the non-performance. Furthermore, where the contract is rescinded, the outstanding obligations or relevant part of the outstanding obligations come to an end; it means that rescission has no retrospective effect and operates prospectively. The obligations of the contract have existed but are now extinguished for the future. For example, the contractor is employed to clean an employer’s office for 50 weeks at a fixed rate per week. In the 25th week, the contractor stops working and the employer justifiably rescind the contract. The first 24th week’s works have already been paid for, therefore, the payments and performed work are not affected by rescission.²⁹⁷ In addition, Article III.-3:509(2)²⁹⁸ is also applied to the case of partial rescission of contract. Where the obligation of contract is divisible, rescission does not affect the provision which will be operated after rescission.²⁹⁹

For the relevant part of the outstanding obligation, according to Article III.-3:506(2)(a), other than a part which is the non-performance or the outstanding obligation, the innocent party may partially rescind the contract so far as it relates to the non-performance part. In this case, it does not mean that the innocent party can rescind all contractual relationship; the extent is that the other parts are affected by the non-performance part.³⁰⁰

²⁹⁵ DCFR, Article III.-3:509(1), Effect on obligations under the contract;

“(1) On termination under this Section, the outstanding obligations or relevant part of the outstanding obligations of the party under the contract come to an end.”

²⁹⁶ Christian von Bar and Eric Clive (n 37) 886

²⁹⁷ *ibid* 887

²⁹⁸ DCFR, Article III.-3:509, Effect on obligations under the contract;

“(2) Termination does not, however, affect any provision of the contract for the settlement of disputes or other provision which is to operate even after termination”

²⁹⁹ Christian von Bar and Eric Clive (n 37) p 886

³⁰⁰ *ibid* 875

- Restitution

According to Article III.-3:510,³⁰¹ under a contractual relationship or a part of contract which has been rescinded, each party is obliged to return any benefit received arising from the other party's performance.³⁰² There are four steps of restitution. The first step is where the performance was monetary; the recipient has to return the money paid.³⁰³ The second step is where the performance is transferable property other than money, and such obligation can be restored; the property must be re-transferred. However, if the re-transferred causes unreasonable effort or expense, the recipient may restore the performance by paying the value of the property.³⁰⁴ The third step is where the performance is not transferable; it must be restored by paying the value of the performance.³⁰⁵ The fourth step is where there is any natural or legal fruits incurred from the performance, which is in

³⁰¹ DCFR, Article III.-3:510, Restitution of benefits received by performance;

“(1) On termination under this Section a party (the recipient) who has received any benefit by the other's performance of obligations under the terminated contractual relationship or terminated part of the contractual relationship is obliged to return it. Where both parties have obligations to return, the obligations are reciprocal.

(2) If the performance was a payment of money, the amount received is to be repaid.

(3) To the extent that the benefit (not being money) is transferable, it is to be returned by transferring it. However, if a transfer would cause unreasonable effort or expense, the benefit may be returned by paying its value.

(4) To the extent that the benefit is not transferable it is to be returned by paying its value in accordance with III.-3:512 (Payment of value of benefit).

(5) The obligation to return a benefit extends to any natural or legal fruits received from the benefit.”

³⁰² Christian von Bar and Eric Clive (n 37) 892-893

³⁰³ *ibid* 893

³⁰⁴ *ibid* 894

³⁰⁵ *ibid* 895

possession of the recipient; the recipient has to hand over the fruits along with the return of performance.³⁰⁶

Hence in the Draft Common Frame of Reference (DCFR), the effect of rescission is not retrospective but prospective, the impending obligations and rights of the parties will come to an end, and each party has to return any benefit received from the other party' performance under the contractual relationship which has been rescinded. Moreover, in the case of partial rescission of contracts, the relevant parts of the outstanding obligations which are related to the rescinded part will also come to an end.

3.4.5 Damages

Unlike other laws, in the Draft Common Frame of Reference (DCFR), the right to claim damages is not affected by rescission. This principle is provided in Article III.-3:102;³⁰⁷ a party who rescinds the contract may also claim for damages.³⁰⁸ In addition, according to Article III.-3:509(3),³⁰⁹ the innocent party who rescinds the contract, retains existing rights to damages.³¹⁰ Furthermore, if the innocent party rescinds the contract as a whole because of the fundamental non-performance, the innocent party may claim the damages for the fundamental non-performance. In

³⁰⁶ *ibid*

³⁰⁷ DCFR, Article III.-3:102, Cumulation of remedies

“Remedies which are not incompatible may be cumulated. In particular, a creditor is not deprived of the right to damages by resorting to any other remedy.”

³⁰⁸ Christian von Bar and Eric Clive (n 37) 777

³⁰⁹ DCFR, Article III.-3:509(3), Effect on obligations under the contract;

“(3) A creditor who terminates under this Section retains existing rights to damages or a stipulated payment for non-performance and in addition has the same right to damages or a stipulated payment as the creditor would have had if there had been non-performance of the now extinguished obligations of the debtor. In relation to such extinguishes the creditor is not regarded as having caused or contributed to the loss merely by exercising the right to terminate.”

³¹⁰ Christian von Bar and Eric Clive (n 37) 888

addition, he may also claim damages for the now extinguished impending performance because of rescission of contract, as if it is the actual non-performance. For example, the innocent party rescinds the contract on the ground of fundamental non-performance of the breaching party. The innocent party is entitled to claim damages caused, not only by the part of non-performance, but also for damages caused by the non-performance of the rest of the contractual obligations. The breaching party cannot argue that he cannot perform because of rescission of contract.³¹¹

According to Article III.-3:701,³¹² damages can be claim if there is a loss caused by the breaching party's non-performance.³¹³ The breaching party is liable for damages arising from his non-performance, even if it is not his fault. He can only prove that the non-performance is excused so that he is not liable for such damages.³¹⁴ In addition, the loss includes economic loss, non-economic loss and future loss.³¹⁵

There are two measures regarding damages in the Draft Common Frame of Reference (DCFR) according to Article III.-3:702.³¹⁶ The first measure is the

³¹¹ *ibid* 888-889

³¹² DCFR, Article III.-3:701, Right to damages;

“(1) The creditor is entitled to damages for loss caused by the debtor’s non-performance of an obligation, unless the non-performance is excused.

(2) The loss for which damages are recoverable includes future loss which is reasonably likely to occur.

(3) “loss” includes economic and non-economic loss. “Economic loss” includes loss of income or profit, burdens incurred and a reduction in the value of property. “Non-economic loss” includes pain and suffering and impairment of the quality of life.”

³¹³ Christian von Bar and Eric Clive (n 37) 915

³¹⁴ *ibid* 916

³¹⁵ *ibid* 916-918

³¹⁶ DCFR, Article III.-3:702, General measure of damages;

“The general measure of damages for loss caused by non-performance of an obligation is such sum as will out the creditor as nearly as possible into the position in which the

damages of the value of the expectation of the innocent party. It includes expenditure incurred and benefit lost. The second measure is damages that can be recovered for the foreseeable loss resulting from the particular circumstances or consequential loss.³¹⁷

In the cases of rescission for the excused non-performance which includes the impossibility of performance, the innocent party may not claim damages,³¹⁸ according to Article III.-3:101(2) and Article III.-701(1).

Hence in the Draft Common Frame of Reference (DCFR), the existing right to claim damages is not affected by partial rescission of contract. The innocent party may claim damages for loss caused by the non-performance of the breaching party, except that the non-performance is excused.

With regard to the aforementioned, the Draft Common Frame of Reference (DCFR) allows the innocent party to partially rescind the contract, if the obligation of the contract is divisible and the counter-performance of the divisible part can be apportioned. The innocent party may partially rescind the contract on the ground of non-performance including breach of contract and impossibility of performance. Furthermore, partial rescission of contract does not affect the right of the innocent party to claim damages. The innocent party may claim damages for the non-performance unless the non-performance is excused.

It may be concluded that the principle of partial rescission of contract has been developed in many countries and model laws. The conditions and consequences of partial rescission of contract may be different in each law. However, there are some conditions and consequences which are the same; i.e., (1) the obligation of the contract must be divisible obligation; (2) the innocent party may

creditor would have been if the obligation had been duly performed. Such damages cover loss which the creditor has suffered and gain of which the creditor has been deprived.”

³¹⁷ Christian von Bar and Eric Clive (n 37) 924

³¹⁸ *ibid* 776

partially rescind the contract on the ground of breach of contract, impossibility of performance or frustration; (3) the remaining part of contract is not affected, even though a part of the contract is rescinded; and (4) partial rescission of contract does not affect the right to claim damages.



CHAPTER 4
PARTIAL RESCISSION OF CONTRACTS IN THE THAI
CIVIL AND COMMERCIAL CODE

Since Thai legal system is the civil law system,³¹⁹ thus the source of law is the provisions in the Code. Thai law does not separate the Code into Civil Code and Commercial Code, but instead, combines civil law and commercial law into the Thai Civil and Commercial Code.³²⁰ Hence the general principle of contract law may be sought in the Thai Civil and Commercial Code.

According to Section 386 paragraph one,³²¹ the innocent party may unilateral rescind the contract by two means. The first is rescission of contract by provisions of law which may be classified into the general provisions and the specific provisions. The general provisions are Section 387, Section 388 and Section 389. The specific provisions are the provision concerned regarding specific contract such as the lease contract, the hire-purchased contract, the employment contract, the hire of work contract and the loan contract. The second is rescission of contract by clauses of contract. The parties may agree to put a clause for rescission in the contract. The innocent party may rescind the contract based on such clause.³²² In this regard, Section 386 does not indicate that rescission of contract must be in whole or in part.

Typically, in practice, when the innocent party rescinds the contract, rescission of the whole contract shall be applied, and the consequences of rescission of contract shall be pursuant to Section 391. The obligations and the rights of contract shall be extinguished, and the parties shall restore each other to the former condition at the time that the contract was made. However, in the case of continuing

³¹⁹ Surepol Traivet (n 113) 46-47

³²⁰ *ibid* 96-97

³²¹ Thai Civil and Commercial Code, Section 386 paragraph one;

“If by contract or by the provision of law one party has the right of rescission, such rescission is made by a declaration of intention to the other party.”

³²² Sanunkorn Sotthibandhu, Explanation of Juristic Acts and Contracts (n 2) 444-458

contract like lease contract, hire-purchase contract or employment contract which the payment is divided into fixed rate for each period of a separate specific performance. When the innocent party rescinds the contract, the whole contract may not be destroyed. The part of contract which has already been performed is not affected, only the part which has not been performed is rescinded.³²³ In this aspect, the consequences of rescission of contract for the continuing contract tend to be partial rescission of contract. Furthermore, the possibility of partial rescission of contract may be sought in the case of partial impossibility. Where the debtor is liable for partial impossibility, if the debtor has already performed his duties in part and his performance does not uselessly for the creditor, the creditor has to accept partial performance.³²⁴

It is possible for the parties to put a clause for partial rescission in the contract, provided that the clause does not contrast with the provision of law or public policy according to the principle of the private autonomy and the freedom of contract.³²⁵ In this regard, Section 386 indicates that the parties may rescind the contract by the clause of contract, thus it is legitimate for the parties to put the clause for partial rescission in the contract

4.1 The possibility of Partial Rescission of Contracts according to the General Provisions of Contract Law

As previously described in the former chapters, mostly in order to enable the right of partial rescission of contract, the obligation of the contract must be divisible. The innocent party may rely on the ground of breach of contract or impossibility of contract to partially rescind the contract. The consequent rights and

³²³ Chatuphol Wangsuwattana (n 14) 76-78

³²⁴ Sopon Rattanakorn (n 19) 476

³²⁵ อัครวิทย์ สุมาวงศ์, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วย นิติกรรม สัญญา (5th edn, สำนักอบรมศึกษากฎหมายแห่งเนติบัณฑิตยสภา 2009) (Akarawit Sumawong, Kham Athibai Pramuan Khodmai Phaeng Lae Panich Waduay NitiKham Sanya [The Explanation of Civil and Commercial Code concerning Juristic Acts and Contracts] (5th edn, Thai Bar Association 2009)) 342

obligations of the rescinded part will be extinguished, while partial performance, which has already due and validly performed before the time of rescission, is unaffected. Thus, the author will analyse the principle of partial rescission in Thai Civil and Commercial Code based on the same structure as the former chapter.

4.1.1 Nature of Contracts

- Divisible Obligation

In the Thai Civil and Commercial Code, the problem concerning divisible obligation is in the case that there are several debtors or several creditors within the contract according to Section 290.³²⁶ Where the obligation is divisible, and there are several debtors or several creditors, for the avoidance of doubt, each debtor is equally liable, and each creditor is entitled to an equal share.³²⁷ In this regard, the divisible obligation means that the obligation can be divided even if the obligation is not explicitly divided.³²⁸ However, the dividing of the obligation must not contrast with the intention of the parties.³²⁹ 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 this regard, it can be said that, principally, the general provisions of contract law do not entitle the innocent party to partially rescind the contract

- Interpretation of Provisions

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

³²⁶ Thai Civil and Commercial Code, Section 290;

“If several persons owe a divisible performance, or if a divisible performance is owed to several persons, each debtor is, in case of doubt liable only for an equal share, and each creditor is entitled to an equal share.”

³²⁷ Jeet Serttabud (n 15) 119

³²⁸ Sopon Rattanakorn (n 19) 389

³²⁹ *ibid* 391

logic and righteous conscience.³³⁰ 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;³³¹ the provision must be interpreted according to the wording used and the spirit of the provisions concurrently. However, the meaning of the provision must be confined by the wording of the provision. It means that the meaning of the provision must not be out of reach as stated in line with the wording, however the meaning of the wording used can be broadly interpreted in many ways.³³²

According to Section 387,³³³ Section 388³³⁴ and Section 389³³⁵, the term ‘rescission’ is used. These sections do not stipulate that the rescission must be

³³⁰ สมยศ เชื้อไทย, ความรู้กฎหมายทั่วไป คำอธิบายวิชากฎหมายแพ่ง : หลักทั่วไป ความรู้พื้นฐานเกี่ยวกับกฎหมาย และระบบกฎหมาย ความรู้พื้นฐานทางนิติศาสตร์ (21st edn, บริษัท สำนักพิมพ์วิญญูชน จำกัด 2015) (Somyos Cheuthai, Khwamroo Khodmai Tuopai Kham Athibai Wicha Khodmai Phang : Lak Tuopai Khwamroo Puentan Kiewkub Khodmai Lae Rabob Khodmai Khwamroo 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

³³¹ Thai Civil and Commercial Code, Section 4, paragraph one;

“The law must be applied in all cases which come within the letter and spirit of any of its provisions.”

³³² Somyos Cheuthai (n 330) 169-171

³³³ Thai Civil and Commercial Code, Section 387;

“If one party does not perform the obligation, the other party may fix a reasonable period and notify him to perform within that period. If he does not perform within that period, the other party may rescind the contract.”

³³⁴ Thai Civil and Commercial Code, Section 388;

“If the object of a contract according to its nature or to an intention declared by the parties can be accomplished only by performance at a fixed time or within a fixed period, and such time or period has passed without one of the parties having performed, the other party may rescind the contract without the notification mentioned in the foregoing section.”

³³⁵ Thai Civil and Commercial Code, section 389;

“If performance becomes wholly or partly impossible by a cause attribute to the debtor, the creditor may rescind the contract.”

in whole or in part. However, if we read these sections 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.³³⁶ In this regard, we may consider the provision concerned with rescission of the specific contract.

According to Section 465³³⁷ and Section 466,³³⁸ the buyer has the right to reject the property, or even rescind the contract under Section 466 paragraph

³³⁶ Somyos Cheuthai (n 330) 183

³³⁷ Thai Civil and Commercial Code, Section 465;

“In a sale of Movable property:

(1) Where the seller delivers the property less than he contracted for, the buyer may reject it; but if the buyer accepts it, he must pay the proportionate price.

(2) Where the seller delivers the property more than he contracted for, the buyer may accept the property according to the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the property so delivered, he must pay the proportionate price.

(3) Where the seller delivers the property he contracted for mixed with the property of a different description not included in the contract, the buyer may accept the property according to the contract and reject the rest, or he may reject the whole.”

³³⁸ Thai Civil and Commercial Code, Section 466;

“In a sale of immovable property where the total area is specified and the seller delivers the property less or more than he contracted for, the buyer has the option either to reject or accept it, and then pay the proportionate price.

If the deficiency or excess does not exceed five percent of the total area so specified the buyer is bound to accept it and pay the proportionate price, provided that the

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.³³⁹ Moreover, in the case that the seller delivers the property less than agreed quantity in the contract, the buyer may accept and pay remuneration proportionately. This case is not considered as rescission of contract as well. With the similar reasoning, the provisions only give the right to the buyer to accept partial performance but does not extinguish the duty of the seller regarding the performance of his duties according to the contract. 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. Therefore, it may be deduced that the word ‘rescission’ in the general provision was used with the intention of providing the innocent party with the right to rescind the whole contract.

Under Section 605,³⁴⁰ the employer may rescind the contract even if the contractor does not breach the contract, provided that the employer has to pay damages resulting from rescission. Rescission according to this provision is rescission of contract as a whole. The provision only imposes that the employer has to pay the

buyer can rescind the contract if the deficiency or excess is such that has he known of it he would not have entered into the contract.”

³³⁹ ศันันท์กรณ โสทธิพันธุ์, คำอธิบาย ซื้อขาย 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

³⁴⁰ Thai Civil and Commercial Code, Section 605;

“As long as the work is not finished, the employer can terminate the contract on making compensation to the contract for any injury resulting from the termination of the contract.”

contractor damages for the cost of time, labour and expected benefit.³⁴¹ According to the Decision of Supreme Court no.1182/2545,³⁴² the employer rescinded the contract without default of the contractor. The court held that the employer may rescind the contract, but he has to pay the damages resulting from rescission. In this case the contractor had already performed his duties in part. The court held that partial performance has to be paid as damages. Thus, according to this decision, rescission under Section 605 is rescission of contract as a whole, and if there is partial performance, it has to be paid as damages.

In addition, according to Section 606,³⁴³ the contract is automatically ceased, if the personal qualification of the contractor is the essence of the contract and the contractor dies or becomes incapable to carry on the work without his fault. However, if there is partial performance that has already been done by the contractor, the employer has to accept and pay for partial performance provided that it is useful to him. This section imposes that, in the case of rescission of contract, the contract will cease as a whole, but if there is partial performance which is useful to the employer, he must accept and pay for it.³⁴⁴ According to the Decision of Supreme Court no.3463/2528,³⁴⁵ the lawyer died without his fault before he had done all his work. The contract was ceased, and the client had to pay for partial performance which is useful to him. Therefore, according to this decision, the

³⁴¹ ไพฑูริย์ เอกจริยกร, คำอธิบาย จ้างแรงงาน จ้างทำของ รับขน (12th edn, บริษัท สำนักพิมพ์วิญญูชน จำกัด 2015) (Pathaichit Eagjariyakorn, Kham Athibai Chang Rangngan Chang Thamchong Rubchon [Explanation of Law concerning Hire of Service, Hire of Work and Carriage] (12th edn, Winyuchon Publication House 2015)) 164

³⁴² Decision of Supreme Court no.1182/2545

³⁴³ Thai Civil and Commercial Code, Section 606;

“If the knowledge and capability of the contractor is of the essence of the contract and the contractor dies, or without his fault becomes incapable to carry on the work the contract comes to an end.

If any part of the work already done is useful to the employer, he is bound to accept it and pay a reasonable remuneration.”

³⁴⁴ Pathaichit Eagjariyakorn (n 341) 216

³⁴⁵ Decision of Supreme Court no.3463/2528

rescission by Section 606 is rescission of contract as a whole as well, and the employer has to pay for partial performance which is useful to him.

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. Moreover, if we consider Section 320, in the case that the creditor accepts partial performance, the debtor still has the obligation to perform the rest of his duties. If the debtor does not perform the rest of his duties, the creditor may rescind the contract by Section 387, Section 388 or Section 389 depending on the cases. Then the contract shall be rescinded as a whole.³⁴⁶ Additionally, the illustration of the Thai Civil and Commercial Code, Law Drafting Department edition,³⁴⁷ does not mention about partial rescission of contract at all, it only mentions about rescission of the contract as a whole in Section 387, Section 388 and Section 389.

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.

- The Continuing Contract

The continuing contract is a contract that has the continuing performance over a period of time such as the lease contract, the hire-purchased

³⁴⁶ จิตติ ดิงศภัทย์, คำอธิบาย ประมวลกฎหมายแพ่งและพาณิชย์ เรื่องมาตรา 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)) 172

³⁴⁷ อุทธรณ์สำหรับประมวลกฎหมายแพ่งและพาณิชย์ บรรพ ๑-๒ ฉบับกรร่างกฎหมาย (Uthahorn Sumrub Pramuan Khodmai Phaeng Lae Panich [Illustration for Civil and Commercial Code Book 1-2 Law Drafting Department edition]) 139-140

contract and the employment contract.³⁴⁸ 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.³⁴⁹ 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.

4.1.2 Causes of Partial Rescission of Contracts

In the Thai Civil and Commercial Code, there are two causes for the rescission of contract, i.e., breach of contract and the impossibility of performance. However, as aforementioned in part 4.1.1, the general provisions of contract law do not allow the innocent party to partially rescind the contract, thus, principally, the innocent party cannot rely on breach of contract or the impossibility of contract to partially rescind the contract. As for the continuing contract, since it is possible to partially rescind the contract by nature of the continuing contract, so the innocent party may rely on the same causes as rescission of contract as a whole such as breach of contract and the impossibility of performance to partially rescind the contract.

In addition, there is a case which the impossibility of performance in part of contract is the consequence of the fault of the debtor, if there is partial performance which is useful to the creditor, he may accept and pay remuneration

³⁴⁸ Sanunkorn Sotthibandhu, Explanation of Juristic Acts and Contracts (n 2) 470

³⁴⁹ Jitti Tingsapat (n 346) 173

for it.³⁵⁰ According to Section 218,³⁵¹ the debtor shall be discharged from a specific performance, however, he has to pay damages.³⁵² The consequences in this case are similar to the consequences of partial rescission of contract, where partial performance is unaffected, but the part of contract which is the impossible performance is discharged, and the creditor may claim damages for the fault of the debtor. For example, the buyer buys two specific horses from the seller. The seller kills one of the two horses before delivering to the buyer. The buyer may accept the remaining horse if it is useful to him and pay for its remuneration as well as claim damages for the fault of the seller in the case of the other horse. In this case the obligation of the seller to deliver the dead horse to the buyer is extinguished because of the impossibility due to his fault, but he still has the duty to deliver the remaining horse and claim for its remuneration. Thus, the consequences in this case are similar to the consequences of the partial rescission of contract. Hence it may be said the creditor may partially rescind the contract in the case of the partial impossibility because of the fault of the debtor.

Moreover, in the case that there is a partial impossibility without the debtor's fault according to Section 219,³⁵³ the debtor is discharged from the duty to

³⁵⁰ ศนันท์กรรณ์ โสทธิพันธ์, คำอธิบายกฎหมาย ลักษณะหนี้ (ผลแห่งหนี้) (2nd edn, บริษัท สำนักพิมพ์วิญญูชน จำกัด 2014) (Sanunkorn Sotthibandhu, Kham Athibai Khodmai Laksana Ngee (Pol Hang Ngee) [Explanation of Law concerning Obligation (Effects of Obligation)] (2th edn, Winyuchon Publication House 2014)) 263-264

³⁵¹ Thai Civil and Commercial Code, Section 218;

“When the performance becomes impossible in consequences of a circumstance for which the debtor is responsible, the debtor shall compensate the creditor for any damage arising from the non-performance.

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.”

³⁵² Jitti Tingsapat (n 346) 254-255

³⁵³ Thai Civil and Commercial Code, Section 219;

perform such impossible part. In this case if the creditor is not liable for the partial impossibility, he is also discharged from the duty to pay for such impossibility. This case does not concern Section 389, in the author's opinion, since it is considered as the automatic partial rescission of contract. Thus, it is not in the scope of this thesis, so the author mentions merely in order to comprehend the overview of partial rescission of contract.

Hence by considering the causes of partial rescission of contracts, other than partial rescission of contracts in the case of the continuing contract, the innocent party may partially rescind the contract in the case of partial impossibility.

4.1.3 Consequences of Partial Rescission of Contracts

According to Section 391 paragraph one,³⁵⁴ when a contract has been rescinded, each party has to restore the other party to the former condition at the time that the contract was made.³⁵⁵ Thus the parties have the obligations to return the other party what he had received. However, according to Section 391 paragraph three,³⁵⁶ provided that what the parties had received are services or the authorized use of property, the parties have to pay the value of what he had received.³⁵⁷ In this case, the contract is still considered to be rescinded as a whole. The provision imposes as such because the nature of the services or the use of property cannot be

“The debtor is relieved from his obligation to perform if the performance becomes impossible in consequence of a circumstance, for which he is not responsible, occurring after the creation of the obligation

If the debtor, after the creation of the obligation, becomes unable to perform, it is equivalent to a circumstance rendering the performance impossible.”

³⁵⁴ Thai Civil and Commercial Code, Section 391 paragraph one (n 1)

³⁵⁵ Jitti Tingsapat (n 346) 200

³⁵⁶ Thai Civil and Commercial Code, Section 391 paragraph three;

“For services rendered and for allowing the use of a thing the restitution shall be made by paying the value, or, if in the contract a counter-payment in money is stipulated for, this shall be paid.”

³⁵⁷ Sanunkorn Sotthibandhu, Explanation of Juristic Acts and Contracts (n 2) 465

returned,³⁵⁸ as well as for the fairness.³⁵⁹ It is not considered as partial rescission of contract because this section does not require the divisible obligation of the contract. The parties have to pay the value of the service rendered regardless of the divisible obligation. Since the performed performance is concluded and completed prior to rescission, it has to be paid if the performance is useful to the receiving party.³⁶⁰ Moreover, since the contract was extinguished by the consequence of rescission of contract as a whole, the maintenance and warranty clauses are extinguished too. It varies from the consequence of partial rescission of contract where the breaching part has been rescinded, but it does not affect to the remaining part of contract. Thus, the consequences of Section 391 paragraph three are not considered as partial rescission of contract.

As for the consequence of partial rescission of contracts in the case of the continuing contract and the case of the partial impossibility under Section 218, it does not concern the provisions under Section 391.

- **Consequences of Partial Rescission of Contracts under Section 218**

Partial rescission of contracts according to Section 218 is not rescission of contract according to Section 389. Moreover, the consequence of this section is the consequence resulting from the impossible performance, so the debtor is discharged from the obligation to perform the impossible part.³⁶¹ In the part of the creditor, due to the nature of the reciprocal contract, the creditor has the right to

³⁵⁸ Jitti Tingsapat (n 346) 201-202

³⁵⁹ รชฎ เจริญฉ่ำ, ข้อหาหรือที่ 113/2539 ข้อตกลงไม่ต้องใช้ค่าการทำงาน เมื่อเลิกสัญญา (1996) 225 วารสารอัยการ (Rachata Charoenchum, Khohareu Thee 113/2539 Khotoklong Maitong Chai Kha Karnngan Mheau Lek Sanya [Prosecutorial Discretion no.113/2539 The Non-compensation Agreement for Service Rendered regarding to Rescission of Contract] (1996) 225 Prosecutor Journal) 51

³⁶⁰ รชฎ เจริญฉ่ำ, ข้อหาหรือที่ 75/2538 งานที่ได้ทำไปแล้ว เมื่อเลิกสัญญา (1997) 235 วารสารอัยการ (Rachata Charoenchum, Khohareu Thee 75/2538 Ngan Thee Dai Tham Pailao Mheau Lerk Sanya [Prosecutorial Discretion no.75/2538 The Performed Performance prior to Rescission of Contract] (1997) 235 Prosecutor Journal) 152

³⁶¹ Sapon Rattanakorn (n 19) 157

deny the obligation on his part according to Section 369.³⁶² Since the debtor cannot perform his duty, the creditor has the right to reject to pay for the impossible part.³⁶³ Thus obligations of the parties to perform their duties of the impossible part are discharged, however, the rest of contract are still intact and unaffected.

- Consequences of Partial Rescission of Contracts in the case of the Continuing Contracts

The consequence of rescission of the continuing contracts is not retrospective, so the performance which has been performed is valid and unaffected. For the breaching parts and the rest of the contract which has been rescinded, the obligations and the rights of the parties are discharged and extinguished. In this case, Section 391 is not applied and there is no provision determining in particular regarding to such case. However, by the nature of the continuing contracts, it can be understood that rescission in this case operates prospectively.³⁶⁴

In the author's opinion, even though, by the nature of continuing contract, rescission of continuing contracts has no retrospective effect. Nonetheless, it should be understood that the obligation of the continuing contract is divisible, and the part of contract which is not affected by rescission is the part which has already been performed wholly. Thus, if there is a part of partial performance which has not been completely performed, it should be restored by paying the value of the services or the use of the property proportionately. For example, in the case of rescission of the lease contract, if the lessee agrees to pay the rental in fixed rate for using the property each month, and the lessee has already used the property for four and a half months. For the first four months, the lessor has performed his obligation completely by letting the lessee use his property, but as for the remaining half month, the lessor has let the lessee use his property only for half a month

³⁶² Thai Civil and Commercial Code, Section 369;

“A party to a reciprocal contract may refuse to perform his obligation until the other party performs or tenders performance of his obligation. But this does not apply, if the other party's obligation is not yet due.”

³⁶³ Sanunkorn Sotthibandhu, Explanation of Juristic Acts and Contracts (n 2) 353-354

³⁶⁴ Jitti Tingsapat (n 346) 172-173

which is not completed because the obligation of contract is divided per month. So, for the fairness the lessee should pay the value for using the property for a period of half a month proportionately. In this case, Section 391 should be applied. Thus, in my opinion, it should not mean that Section 391 does not apply to the case of rescission of the continuing contract entirely. It should apply Section 391 by interpreting the intention under the principle of Juristic Method.

Hence for the consequences of partial rescission of contracts in the case of Section 218 and the continuing contract, the rights and the obligations of parties for the rescinded part is discharged and extinguished, on the other hand, the partial performance which has already been performed is valid and unaffected.

4.1.4 Damages

As aforementioned, partial rescission of contracts in the case of Section 218 and the continuing contract is not subject to Section 391, thus it has to be considered for each case.

- Damages in the Case of Partial Rescission of Contracts under Section 218

According to Section 218, since the part of performance is impossible by the debtor's fault, thus the debtor is liable to compensate damages for the impossible part of performance.³⁶⁵

- Damages in the Case of Partial Rescission of the Continuing Contracts

In the author's opinion, since partial rescission of the continuing contracts has no specific provision which determines about damages, it should be considered pursuant to the general principle. Thus Section 391 paragraph four should be applied, and consequently partial rescission of contracts does not affect the right

³⁶⁵ Sanunkorn Sotthibandhu, Explanation of Law concerning Obligation (Effects of Obligation) (n 350) 263-264

to claim damages. According to Section 215,³⁶⁶ the damages has been aroused when the debtor breaches the contract. The notion of damages aims to compensate the innocent party to be able to come to the condition as if there is completed performance according to the contract as far as possible.³⁶⁷ Thus it can be said that the innocent party may claim damages in the case of partial rescission of the continuing contracts.

Hence from the aforementioned, it may be concluded that the general provision for the rescission of contracts under the Thai Civil and Commercial Code does not allow the innocent party to partially rescind the contract. However, the innocent party may partially rescind the contract in the case of the partial impossibility of performance according to Section 218 and the case of the continuing contract. Consequently, the rights and the obligations of the parties are discharged and extinguished for the rescinded part. As for the performance which has already been performed, it is valid and unaffected. In addition, the innocent party may claim damages for the impossible part in the case of partial impossible or for the breach of contract in the case of the continuing contracts.

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

According to Section 386 paragraph one,³⁶⁸ 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 151.³⁶⁹

³⁶⁶ Thai Civil and Commercial Code, Section 215;

“When the debtor does not perform the obligation in according with the true intent and purpose of the same, the creditor may claim compensation for any damage cause thereby.”

³⁶⁷ Sanunkorn Sotthibandhu, Explanation of Law concerning Obligation (Effects of Obligation) (n 350) 322

³⁶⁸ Thai Civil and Commercial Code, Section 386 paragraph one (n 321)

³⁶⁹ Thai Civil and Commercial Code, Section 151;

Thus the parties may agree to determine the right to rescind the contract differently from the provisions of law.³⁷⁰ In the Decision of Supreme Court no.2182/2526,³⁷¹ the contract to sell a land stipulates that if the buyer does not pay the price within the fixed period of time, it is considered as breaching the contract. The seller may confiscate all of the paid money, and the contract shall come to an end. The court held that it is considered as the seller has the right to rescind the contract according to the clause of contract.

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.

4.3 The problems of rescission of contract as a whole under the Thai Civil and Commercial Code

4.3.1 The problem regarding maintenance and warranty clauses

In many cases, the employers or consumers usually do not have knowledge relating to mechanical process, manufacturing or maintenance of the product or work received, so they may not notice the defects of the products or work received and cannot maintain or repair well. Thus, the parties may agree to put the maintenance and warranty clauses in the contracts. However, when the contracts have been rescinded, the maintenance and warranty clauses have been rescinded as well. Therefore, where the employers or consumers have accepted partial performance as service rendered according to Section 391 paragraph three,³⁷² they cannot demand the contractor to render his obligation or claim damages from the contractor for his liability according to the maintenance and warranty clauses

“An act is not void on account of its differing from a provision of any law if such law does not relate to public order or good moral.”

³⁷⁰ Akarawit Sumawong (n 325) 342

³⁷¹ Decision of Supreme Court no.2182/2526

³⁷² Thai Civil and Commercial Code, Section 391 paragraph three (n 3)

because those clauses have already been rescinded and discharged. For example; the contractor agrees to construct a house and a garage for the employer. The contractor has already completed the part of the house, but he has been in breach in the part of the garage. Then the employer rescinds the contract, so the contract has been rescinded as a whole. According to Section 391 paragraph three, the employer has to accept the house as service rendered and pay for it. In this case, the maintenance and warranty clauses have been rescinded along with the contract, so if there is a defect in the part of the house or the house needs to be maintained, the employer cannot demand the contractor to render his obligation or claim damages from the contractor party for his liability under the maintenance and warranty clauses.

If this case is under German law, according to German Civil Code BGB 2002, Section 323(5),³⁷³ the employer may not rescind the contract as a whole because the obligation of contract can be divided into two parts which are the part of the house and the part of the garage. The part of house has already been performed wholly, therefore, the employer may rescind the contract in the part of the garage. As for English law, if the payment of this contract is clearly specified and divided into two parts for the part of the house and the part of the garage, the employer may rescind the contract without affecting the part of the house which has already been performed. The Common European Sales Law (CESL) may not be applied to this case because it is the hire of work contract. However, if it is the case of sale contract that the buyer agrees to buy a house and a garage from the seller, the Common European Sales Law (CESL) could be applied. According to Article 117 paragraph one and Article 137 paragraph one,³⁷⁴ since the obligation of the contract is divisible, the buyer may rescind the contract for the part of the garage. As for the Draft Common Frame of Reference (DCFR), it can be applied to any contract which gives legal relationship, so it can be applied to the hire of work contract as well. In this case, if the payment can be apportioned for the part of the house and the part

³⁷³ German Civil Code BGB 2002, Section 323(5) (n 5)

³⁷⁴ CESL, Article 117 paragraph one and Article 137 paragraph one (n 7)

of the garage, the employer may rescind the contract only for the part of the garage according to Article III.-3:506.³⁷⁵

As aforementioned, many laws allow the innocent party to partially rescind the contract. As in this case, the problem occurs because the contract has been rescinded as a whole, despite the fact that there is a completed partial performance by one party. Thus, partial rescission of contracts can solve this problem, because it allows the innocent party to rescind the contract only the breaching part and keep the rest of the contract intact and valid. So, the maintenance and warranty clauses are not rescinded, and the employer may demand the contractor to render his obligation or claim damages from the contractor for his liability according to the maintenance and warranty clauses. In the previous case, provided that the employer rescinds the contract only in the part of the house, the rest of contract shall be intact and valid, so if there is a defect appeared after rescission of contract, the employer could claim damages from the breaching party for his liability according to the maintenance and warranty clauses.

4.3.2 The problem on commercial aspect

As aforementioned in Chapter 1, there are some circumstances which the innocent party does not want to rescind a contract as a whole because the problems in consequence of rescission of contract as a whole are greater than sustaining the contract. For example; in the contract of sale, the buyer agreed to buy 9 ships from the seller. On the due date, the seller delivered 9 ships to the buyer, but the buyer made a payment to the seller only in the price of 5 ships. In this case, if the seller chooses to rescind the contract. Then according to Section 391 paragraph one,³⁷⁶ the buyer has to return the received 9 ships to the seller and the seller has to return the money received to the buyer. In this regard, it brings the commercial transaction to the beginning. Their business has been deterred and need to be negotiated again. Thus, the seller may not want to rescind the contract as a

³⁷⁵ DCFR, Article III.-3:506 (n 8)

³⁷⁶ Thai Civil and Commercial Code, Section 391 paragraph one (n 1)

whole because he wants to keep the received money and sell the 5 ships he has already delivered. Thus, it is better to entitle the seller to partially rescind the contract.

Similar to the first problem, if this case is under German law, English law, the Common European Sales Law (CESL) and the Draft Common Frame of Reference (DCFR), the innocent party would partially rescind the contract. The rescinded part is rescinded, while the rest of the contract is still intact and valid. In this case, the seller may rescind the part of 4 ships which was not paid within the due date and keep the part of 5 ships intact and valid. So, both the seller and the buyer do not need to restore each other and start their business from the beginning and may continue to carry on their business onward. Thus, partial rescission may fix this problem properly.

4.3.3 The problem where the breach of contract is the immaterial part of contract

Where a contract has many obligations or many instalments, it is possible for either party to breach one of the obligations or instalments. Thus, it is unfair and inflexible if one party has already performed many parts of the obligations or instalments, but he breaches one or small part of obligations or instalments, and the innocent party takes this opportunity to rescind the contract. According to the Thai Civil and Commercial Code, Section 391 paragraph one, the whole contract shall be rescinded and restored back to the time it was made, so both parties has to return what they received to each other. These consequences waste cost and time. For example, the buyer agrees to buy 4,000 pieces of battery. The seller agrees to deliver 4 instalments of 1,000 pieces of battery for each instalment. Each instalment shall be paid in the equal amount after the buyer accepts each instalment. If the seller has already delivered 3 instalments, however, the last instalment was delayed, the buyer may give a notice to the seller and rescind the contract according to Section 387. In this case, if the contract is rescinded, the buyer shall return the received 3,000 pieces of battery and the seller shall return the money received. This is unfair for the seller because he has already performed the most part of contract

and the breach in the last part is only the small part of the contract. The seller should pay damages for the breach of contract but it is not necessary to return all the performance. There is cost of management, depreciation of battery and also the wasted time. These consequences of rescission of the contract as a whole are too inflexible in this case.

In German law, according to German Civil Code BGB 2002, Section 323(5), if there is partial performance, the innocent party may not rescind the contract as a whole unless he has no interest in such partial performance. So, in this case, under German law, the seller may not rescind the whole contract; he may rescind the contract only in the part of the last instalment which is in breach. As for English law, it does not prohibit the innocent party from rescinding the whole contract. However, where the contract has several instalments of payment; and the performance of the contract can be apportioned as the counter-performance for each payment. If there is a completed partial performance, even though the contract is rescinded, partial performance would be unaffected and valid, while the rest of the contract is rescinded. So, in English law, even though the law does not prohibit the innocent party from rescinding the whole contract but the consequences of rescission of contract shall be the same as partial rescission of contract. Thus, in this case, where the seller rescinds the contract, the part of the 3,000 pieces of battery that the buyer has already accepted is unaffected and valid. According to the Common European Sales Law (CESL), Section 117 paragraph two,³⁷⁷ the buyer may not rescind the whole contract unless he has an interest only in the performance of the whole contract or the parts that are affected by the non-performance concerning the underlying sense of the contract. In addition, according to Section 137 paragraph two,³⁷⁸ the seller may not rescind the whole contract unless the non-performance is in contrast with the intention of the parties or amounts to a fundamental breach for the entire contract. It could be seen that the Common European Sales Law (CESL) prohibits the innocent party from partially rescinding the contract with the exception

³⁷⁷ CESL, Article 117 paragraph two (n 216)

³⁷⁸ CESL, Article 137 paragraph two (n 219)

in some certain conditions. As for the Draft Common Frame of Reference (DCFR), according to Article III.-3:506, the innocent party may rescind the contract as a whole only if he cannot reasonably be expected to accept the performance of the other parts or there is a ground for rescission of the contract as a whole. So, in this case the seller may not rescind the whole contract unless he has no reasonable expectation to accept only the 3,000 pieces of battery or he has a ground for rescission of contract as a whole.

Therefore, in the case that the breach of contract is the immaterial part of the contract and there is partial performance already performed, if the Thai Civil and Commercial Code prohibits the innocent party from rescinding the contract as a whole, and allows the innocent party to rescind the contract only for the breaching part or the part in relation to the breaching part, partial performance does not need to be restored to the beginning when the contract was made. This method, unlike rescission of contract as a whole, does not waste the time and cost for the restitution, and also encourage fairness for the breaching party who has completely performed in part.

Hence from the author's opinion, the rescission of contract as a whole causes many problems, because in many cases, the breaching party has already performed his duties in the most parts. Where the innocent party has accepted the partial performance as service rendered, if there is a defect appeared or there is a need to maintenance for the part accepted, the innocent party could not demand the breaching party to render his obligation or claim damages from the breaching party for his liability according to the maintenance and warranty clauses, because the clauses have already been rescinded along with the whole contract. Another problem happens where the innocent party in the hire of work contract or the seller in sale contract does not want to rescind the contract as a whole because it proves to be a disadvantage, but he wants to rescind the contract in part because he can accept the part of money or work to continue carry on his business instead of restoring each other position to the beginning according to the consequences of rescission of contract as a whole. Moreover, in the case that the contract has several obligations or several instalments, rescission of contract as a whole is unfair to the

breaching party that has already performed the most parts of his obligations in the contract, but he is in breach for the small and immaterial part of contract. The principle of partial rescission of contracts shall settle these problems by allowing the innocent party to partially rescind the contract, and prohibiting the innocent party from rescinding the contract as a whole where there is partial performance.

With respect to the aforementioned in this Chapter, it can be concluded that the general provisions of the Thai civil and Commercial Code concerning rescission of contract does not allow the innocent party to partially rescind the contract. The innocent party may only rescind the contract as a whole. However, the innocent party may partially rescind the contract in the case of partial impossibility of performance because of the debtor's fault according to Section 281, and in the case of the continuing contract. Moreover, according to Section 386, the parties may partially rescind the contract by the agreed clause in the contract.

In practice, the contracts may not have the clause for partial rescission of contract, and the innocent party may rescind the contract by relying on the general provisions of contract law. So, the rescission of contract must be rescission of contract as a whole. Rescission of contract as a whole may cause the subsequent problems, i.e., the problem regarding maintenance and warranty clauses, the problem on commercial aspect and the problem where the breach of contract is the immaterial part of contract. These problems may be settled by allowing the innocent party to partially rescind the contract or prohibiting the innocent party from rescinding the contract as a whole, therefore, it is appropriate to develop the principle of partial rescission of contracts in the Thai Civil and Commercial Code.

CHAPTER 5

CONCLUSION AND SUGGESTION

As aforementioned in Chapter 2 and Chapter 3, many foreign laws have developed the principle of partial rescission of contracts. There are some different conditions in each foreign law, but the most important similarity of the conditions is that the obligation of the contract must be divisible. They even prohibit the innocent party from rescinding the contract as a whole. The innocent party may partially rescind the contract on the ground of breach of contract and impossible performance. Where the part of contract has been rescinded, the rights and the obligations of the parties under the rescind part are discharged and extinguished. As for the remaining parts of contract, they are still intact and unaffected. In addition, the partial rescission does not affect the rights to claim damages.

According to the Thai Civil and Commercial Code, as mentioned in Chapter 4, 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.

The author proposes to amend the law by adding the third paragraph of Section 386 and the sixth paragraph of Section 391 as follows;

Section 386

“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 in the foregoing paragraph cannot be revoked.

Where the obligations under the contract are to be performed in separate parts or are otherwise divisible, and in relation to a part to which a counter-performance can be apportioned, the rescission of contract has to be made only to the part which is affected by the breach of contract or the impossible performance so far as it relates to that part unless the breach of contract or the impossibility of performance is substantial to the whole contract.”

Section 391

“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.

To money which is to be repaid in the case of the foregoing paragraph interest is to be paid from the time when it was received.

For services rendered and for allowing the use of a thing the restitution shall be made by paying the value, or, if in the contract a counter-payment in money is stipulated for, this shall be paid.

The exercise of the right of rescission does not affect a claim for damages.

If the contract has been rescinded in part, the restitution in this section shall be applied solely to the part which has been rescinded.”

As proposed, the third paragraph of Section 386 is about the scope of rescission of contract. The author proposes that if the obligation of contract is divisible, the innocent party may only rescind the breaching part of contract as well as the related part. The innocent party may not rescind the contract as a whole unless the breach of contract or the impossible performance is substantial to the entire contract or the contract must be performed in whole according to the

intention of the parties at the time of conclusion of contract. Moreover, I propose to add the sixth paragraph of Section 391, this paragraph shall determine that the part which has been rescinded shall be extinguished, and the rights and obligations of the parties shall be discharged. Each party has to restore another party to the condition at the time of conclusion of contract.

For the benefit of mutual understanding, the author shall explain the proposal in the same structure as the former Chapters.

1. Nature of Contracts

Partial rescission of contracts can be applied in the case where the obligation of contract is divisible by agreement of the parties or by the nature of contract. For example, the contractor agrees to build two building for the employer. Each building has separated value which is agreed in the contract and shall be paid separately according to the completion of each building. In this case, with the agreement of the parties, it is visible that the obligation of the contract is divided by separate performance of the two building. However, if the employer agrees to pay the lump-sum for the completion of two building without separation, the obligation is not divided by the agreement of the parties, but by the nature of contract, the two building could be separated. Thus, in this case, the obligation is divisible by the nature of performance.

Moreover, the part which is separated or divisible must be able to establish the counter-performance. The counter-performance may not be negotiated in advance by the parties, if, by the nature of contract, the counter-performance can be apportioned and matched to each part of the separate performance, it is considered as counter-performance. In the contract, both parties have obligations, where the obligation of one party is discharged, for fairness, the obligation of to the other party regarding the counter-performance should be discharged as well. For example, in the case of the construction of the two buildings, each building must be able to establish the price as the counter-performance in order to partially rescind the contract. If it is impossible to establish the price for the counter-performance for each building, the obligations under this contract are not divisible. Therefore, the contract cannot be partially rescind, and the contract must be rescinded as a whole.

Furthermore, partial rescission of contract shall only be applied in the case of reciprocal contract. For the non-reciprocal contract, it is not appropriate to prohibit the parties from rescinding the contract as a whole because for the non-reciprocal contract, such as loan contract or gift contract, the reliability of the parties is very important. If there is a breach in the contract, the parties may not want to have any contractual relationship anymore, therefore, rescission of contract as a whole is more appropriate.

Section 386 paragraph three that I proposed prohibits the innocent party from rescinding the contract as a whole, unless the breach of contract or the impossible performance is substantial to the whole contract. For example, the buyer agrees to buy a computer with the operation software from the seller. If the seller delivers the computer without the operation software, the computer could not be used, which is considered as substantial to the whole contract. For that reason, the buyer may rescind the whole contract. This paragraph provides the principle that the partial rescission of contracts should be applied as a general rule and rescission of contracts as a whole should be an exception. This principle intends to encourage the contract to continue and only the part of contract which is defective should be dissolved. The contract should not be ceased easily because it will halt commercial activities. Moreover, in the case that the contract is valuable and complex, or has many separate performances, it will be unfair if a breach of a part of contract resulting in the rescission of contract as a whole. For example, the contractor agrees to construct the 77 floors tower for the employer. If the contractor has already constructed 77 floors, but the rooftop of the tower is not in accordance with the agreement in the contract. If the law allows the employer to rescind the whole contract, it must be unfair to the contractor since he has already performed most parts of the contract. Section 386 paragraph three that I propose shall obviate such unfairness by confining the scope of rescission. Thus, according to Section 386 paragraph three that I proposed, the employer may not rescind the contract as a whole; he may rescind the part of the rooftop and claim damages. This consequence shall not halt the business and encourage the flowing of commercial activities.

Section 386 paragraph three that I proposed does not stipulate that the divided obligation must not be in contrast with the intention of the parties at the time of conclusion of contract, because if the parties do not agree to separate the performance at the time of the conclusion of the contract, the contract tends to be interpreted as having indivisible obligation. Thus, the author purpose that the dividing obligation should be interpreted by the nature of contract. Moreover, Section 386 that I proposed does not stipulate that it has to be partial performance like in German Civil Code 2002. Thus, even though there is no partial performance yet, Section 386 paragraph three that I proposed is still applied.

Hence according to Section 386 paragraph three that I proposed, if the obligation of the contract is separated by the agreement of the parties or divisible by the nature of contract and the counter performance can be apportioned, the innocent party may only partially rescind the contract. However, if the breach of contract or the impossible performance is substantial for the whole contract, the innocent party may rescind the contract as a whole. Moreover, Section 386 paragraph three that I proposed is applied to the case of the continuing contracts as well.

2. Causes of Partial Rescission of Contracts

Section 386 paragraph three that I proposed itself does not entitle the innocent party to rescind the contract. It merely confines the scope of rescission. As proposed by author that rescission has to be made only to the part which is affected by the breach of contract or the impossible performance. Thus, the innocent party may rely on Section 387, Section 388 or Section 389 to rescind the contract, but rescission has to be confined to only the related part. However, the causes of partial rescission of contract are still the breach of contract and the impossible performance.

3. Consequences of Partial Rescission of Contracts.

Section 386 paragraph three that I proposed determines that rescission has to be made to the part which is affected by breach of contract or the impossible performance as well as the related part. For example, the buyer agrees to buy three houses with the set of furniture for each house. If the seller delivers only

two houses, the buyer may rescind the contract only in the part of non-delivered house as well as the set of furniture for that house. Furthermore, Section 391 paragraph six that I proposed determines that the restitution shall be made in the part which has been rescinded. It means that where the innocent party partially rescinds the contract, the related part is rescinded as well. The rights and obligations of the parties related to the rescinded part are discharged and extinguished. The remaining parts of contract are unaffected and valid. Moreover, for the rescinded part, the parties have to restore each other to the condition at the time of the conclusion of the contract according to the rule of restitution. This principal shall reduce the problems resulting from the rescission of the contract as a whole in the case of maintenance and warranty clauses, because the remaining part of contract is still valid, so the contract still has a ground for the innocent party to claim damages where the work is defective and also demand the breaching party to perform the obligation under the maintenance and warranty clause, which is still enforceable.

4. Damages

The author does not propose any change to the original principle of damages. Thus, according to Section 391 paragraph five, rescission still does not affect to the right to claim damages.

Hence according to the aforementioned, it may be said that the principle of partial rescission of contract should be developed in the Thai Civil and Commercial Code because it encourages commercial activities and reduces the problems resulting from rescission of contract as a whole.

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BIOGRAPHY

Name	Mr. Kitisak Suksumran
Date of Birth	December 7, 1988
Educational Attainment	2011: Bachelor of Laws, Thammasat University, Thailand
Work Position	Legal Officer at CAT TELECOM
Publication	Kitisak Suksumran, “Partial Rescission of Contracts” (A Thesis for the Degree of Master of Laws in Business Laws (English Program) Thammasat University, 2017)

