THAILAND

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PART ONE

INTRODUCTION

In Book I, Title 4 of the Civil and Commercial Code, provisions have been laid down concerning a person's act with the purpose of creating enforceable rights. In these provisions, freedom has been given, to a large extent, to the person to create rights and duties in accordance with his individual needs. A voluntary lawful act the immediate purpose of which is to establish between persons juristic relations, to create, modify, transfer, preserve or extinguish rights is called a juristic act, the definition of which appears in section 112 of the Code. To constitute a valid legally binding act, it must, therefore, comprise all elements mentioned in this section.

The law of contract is concerned with declarations of intention to do juristic acts thereby creating one or more obligations between the concerned parties, the principles of which have been laid down in Book 2 of the Code. Such obligations are distinguished from those which arise not from a voluntary act of the parties but from the operation of law. Some of these have been classified under different Titles in the same Code and some arise from the provisions of other laws. Speaking about a juristic act, it is considered an instrumental subject, whereas obligations in general connote the outcome of an accomplished act.

Principle of the autonomy of the will and its scope

According to the principles mentioned above, a juristic act is an act done with the intention that it be enforced by law, and that binding rights and duties are created between persons. When the intention to do the juristic act has been declared according to the law, it will see that the doer's intention be accomplished. A juristic act is therefore the principal factor with which the liberty of declaring one's intention is guaranteed by the Thai Code, and which may be termed the principle of the autonomy of the will. However, this does not mean that the principle of the autonomy of the will as recognised by the Thai Code is without a limit, as can be seen from section 112 that the freedom to declare one's intention has been limited. The first priciple is the object of the juristic act which requires that it be lawful. This principle has been defined in section 113 that an act is void if its object is expressly prohibited by the law, or is impossible, or is contrary to public order or good morals. Section 114 further enlarges the meaning of section 113 by providing that an act is not void on

account of its cause differing from a provision of any law if such law does not relate to public order or good morals. The factors which bar the intention can be divided into two groups. The first is what has been clearly provided in the law, or even though no provisions in the law regarding the prohibition exist, it is inconsistent with that relating to public order and good morals. Another group is what has not been provided in the law, but if its object is impossible or constitutes a threat to public order or good morals in general, such object is considered unlawful. It is hard to give an exact definition as to what constitutes a law concerning public order or good morals. However, it can be said that anything which does not concern in particular the interest of private persons who are the parties but which affect the interest of other members of the public is classified as concerning public order or good morals. The law on public order and good morals is the public law. With regard to private law, there have been provisions which may be divided into 3 groups: The first one concerns the standing and ability of a person, such as no private person may make any agreement for a minor in violation of the age limit prescribed by the law.[1] The second group concerns restriction regarding transfer of ownership in immovable property whereby excessively long-term obligation is prohibited. The third relates to protection of third parties.

Regarding the factor affecting the principle of the autonomy of the will in the last part of section 113, even though its object is not prohibited by the law, nor does it differ from the provisions of the law respecting public order or good morals, it will not be enforced by law if it is an act the object of which constitutes a threat to public order or good morals. The law allows that the court exercise its discretion in such cases. The examples covered by judicial decisions in the past related to contracts in restraint of trade, those to help others engage in litigation in which such persons have no interest but hope for a share in such involvement, transfer of legal rights to others in order to sue in court, sale of rice export quota for the purpose of smuggling, etc.

The principle of entering into a contract presupposes that the act is done with an object behind it. In this connection it was explained in a Supreme Court judgment[2] that what ultimate interest a person who declares his intention to do a juristic act aims at out of the juristic act is the ultimate interest the act could offer. Without an object there would be no reason why the contract should be entered into. The interest behind the object need not necessarily be a property or monetary value always. The virtue in morality, benefaction, or interest derived from an association

1. An agreement not to repudiate a contract on the ground of minority will be void as against public policy.
2. S. C. case 521/1946.

such as establishment of a foundation is also regarded as the object of a juristic act, and the interest is not necessarily for one's own good. If the intention is the interest of others, it would then be regarded as a good object. The Thai Code acknowledges 23 types of specific contracts in all, some of which are of a non-reciprocal type. That is to say, both contractual parties hold the status of either a creditor or a debtor only, such as a loan contract. This type of contract may be without any consideration or reciprocal interest, such as loan contract made gratuitously. The Thai Code also recognizes contracts which are concluded for the benefit of third persons. There is no provision in Thai laws that a contract must always be accompanied by reciprocal interest in order to become effective. On the contrary, contracts concluded without a reciprocal interest are recognized, taking into consideration their object which must exist, and must be a legal one as aforesaid. However, if without any interest which forms the object, a law-suit would be impossible. In Thai laws the principle of consideration does not apply to the validity of contract; the contract is based on the object which is, in fact, more or less realistic. What effectiveness an intention has as stated in the Title on juristic act, so much effectiveness has a contract which is the consequence of the intention. A contract concluded within the scope allowed by the law is in itself a law, and it should be interpreted and enforced accordingly as a law.

Capacity

In the Code the principle of incompetency to do a juristic act has been enunciated in relation to the following persons :

(*i*) *Minor :* According to the Thai Code, a person becomes *sui juris* upon completion of 20 years of age. One who is under 20 is regarded by law as a minor. There are, however, special exceptions. A person under 20 years of age attains majority upon marriage when the male minor and the female minor are 17 and 15 respectively. Juristic acts done by a minor become voidable unless consent has been given by a legal representative who, according to the Code, Book V, the Title on family, is generally the father, and in some special cases, the mother. In certain matters the law allows that the minor does them himself, such as those which are advantageous and beneficial to him without prejudice, such as acceptance of property gratuitously without any commitments. A minor may do anything which is required to be done personally, such as doing a juristic act which the law clearly provides that he is capable of doing himself. In conclusion, a minor may do anything which is befitting his standing and necessary for his liveliood. The above is an exception to the

general rule that a minor is not competent to do any juristic act by himself except with the prior consent of his legal representative.

(*ii*) *Person of unsound mind :* When the spouse, the heir ascendant or descendant, the guardian, the curator of a person of unsound mind or the Public Prosecutor has submitted a request to the court, the person concerned may be adjudged incompetent.[3]

A person when so adjudged by the court shall be put under the care of a guardian who will act as the caretaker of all the property of such person who is prohibited by the law to do any juristic act, even with the guardian's consent. However, a person of unsound mind without such judgment differs from the person mentioned above. That is, there must be proof that the act was done when his mind was unsound. It must also be proved that the other party was aware of his unsoundness of mind in order to render the contract voidable. This is unlike the former instance which is voidable without the requirement of any proof.

Quasi-incompetent person : This type of person is a person adjudged quasi-incompetent when a request is made by the persons mentioned in No. (*ii*) above, because of his mental or physical disability, or his extravagant habits, constant misbehaviour, or intoxication. With regard to mental disability, his case is not as serious as that of the person of unsound mind under No. (*ii*). A person who is quasi-incompetent and has been so adjudged by the court shall be under the care of a curator. This type of person is more competent than those of the above mentioned two types. He is required to seek the curator's consent for acts specifically mentioned only, such as to accept or use capital, or to enter into a loan contract or surety. Business other than those forbidden by the law may be done by him alone like a natural *sui juris*.

Married women : Normally a married woman is a person capable of doing a juristic act like a natural person. Her capacity will be limited only to acts which will affect the common property (*Sin Borikhon*). Such action if not approved by her husband will be voidable and may be avoided

3. The words *curator* and *guardian* may be differently used to express the degree of control over persons declared incompetent by the court. The degree of incapacity for a person adjudged a quasi-incompetent differs from that of a person whom the court has pronounced an incompetent. Whereas a person adjudged incompetent is placed under absolute control of his guardian who is to enter into any legal act on his behalf, a person adjudged quasi-incompetent is only required to seek the curator's consent for certain judicial acts specified in the Code. Apart from those specified acts, a quasi-incompetent may do any act like a normal person.

by him. The common property (*Sin Borikhon*) must be distinguished from personal property (*Sin Suan Tua*). The latter is strictly private property of the spouse separated from their common property. They have no connection with each other. A married woman may do anything with her personal property as if it were her own.

It is provided in section 116 that an act which does not comply with the requirements concerning the capacity of persons is voidable.

Form

Another factor to constitute validity of juristic act or contract is that it must be made according to the form prescribed by law. For the twenty three specific contracts contained in the Code, various forms have been prescribed. Contracts whose objects are creation or transfer of rights in immovable property such as contract for sale of immovable property are required to be made in writing and registered with the competent official. For certain kinds of contracts it would suffice if made in writing between the parties; such as, for instance, hire-purchase contracts. Some of them require special forms which are provided; for example, bills of exchange must have certain particulars.

Contracts required to be made according to a specified form must be distinguished from those required by law to be evidenced in writing and usually signed by the party liable. The lack of written evidence only prevents enforceability of action, and in no way affects the validity of the contract. These types of contract are valid by mere oral agreement. It should also be noted that certain contracts are not valid until certain actions are taken, such as a gift or a contract of loan which will be completed only upon delivery of the property given or lent.

It is provided in section 115 that an act which is not in the form prescribed by law is void.

Vitiating elements in the declaration of the will

Mistake

A declaration of the will or intention is deemed invalid if made under mistake. The degree of the invalidity of such declaration differs according to the kind of mistake under which the declarant is labouring. Thus a declaration of intention will become void if made under a mistake as to an essential element of the juristic act. Examples are mistakes as to the kind of contractual agreement, or the identity of the contracting-party, etc. However, it is provided that the declarant cannot avail himself of such

invalidity if the mistake was due to his gross negligence. Mistake merely as to a quality of the person or the thing which is considered essential in ordinary dealings, will render the contract voidable only.

Fraudulent misrepresentation

A declaration of intention procured by the party's fraud is voidable. However, a fraud committed by a third person will become voidable if the other party knew or ought to have known of the fraud.

The contract will become voidable only if the fraudulent misrepresentation is such that without it the other party would not have entered into the contract, and the same applies to intentional silence in respect of a fact or quality of which the other party is ignorant. But where the fraud is only incidental, that is to say, it has merely induced a party to accept more onerous terms than he would otherwise have done, it will only entitle the other party to claim compensation. He may not avoid the contract.

Where both parties have committed fraud, neither of them can allege it to avoid the contract or to claim compensation. The repudiation of the contract procured by fraud cannot also be set up against a third person acting in good faith.

Duress

It is provided that duress, in order to make an act voidable, must be such that it induced in the person affected by it a reasonable fear of injury of his person, his family or his property. It must be imminent and at least proportionate to that of the act extorted. The threat of normal exercise of a right or simple reverential fear is not considered duress. Duress even though exercised by a third person may vitiate the contract.

PART TWO

FORMATION AND INTERPRETATION OF CONTRACT

An offer made in the presence of the other contracting party or over the telephone may be immediately accepted unless a period of acceptance is specified by the offeror. A contract made at a distance comes into existence when the acceptance reaches the offeror. However, if according to the declared intention of the offeror or to ordinary usage whereby the notice of acceptance is waived, the contract comes into existence at the time of the occurrence of the fact which is to be considered as a declaration of intention to accept. Conditional or overdue acceptance is deemed to be a new offer. Where acceptance arrives out of time but viewed from the ordinary course of things, it ought to have arrived in due time, it is provided that the offeror must give notice to the offeree of the delayed arrival, otherwise the acceptance will be deemed not to have been out of time.

An offer in which a period of acceptance is specified cannot be revoked within such period. An offer made at a distance cannot be revoked within a period of time in which notice of acceptance might reasonably be expected. An offer having been sent will not become ineffective even though the offeror happens to die or becomes incapacitated afterwards unless the offeror has declared a contrary intention or the offeree, before accepting, is aware of the fact of the offeror's death or incapacity.

In principle the contract comes into existence when terms, obligations, promises made in the declaration of intention result in consensus *ad idem* between the concerned parties. After an oral or written agreement, however, some uncertainty may still seem to prevail. Certain matters not expressly agreed to by the parties, may have been well understood to become implied stipulations in the contract. Certain transactions involve several points to be agreed upon and, to achieve the purpose, many stipulations may need to be set out in the contract. Contracts such as those placing orders for the purchase of machinery, conditions regarding its fabrication, the materials to be used, its specifications, plans, shipment conditions, question of insurance coverage en route, transport charges, fees, liabilities for damage or defects, terms of payment, etc., may need to be agreed upon. All of these are usually required to be made in writing with binding clauses in page after page. The question may arise as to which clause or clauses are considered essential to the formation of contract and if the contract has come into existence how would it be interpreted. In this connection, the following provisions have been laid down in the Code.

Section 366 : So long as the parties have not agreed upon all points on which, according to the declaration of even one party, agreement is essential, the contract is, in case of doubt, not concluded. An understanding concerning particular points is not binding, even if they have been noted down.

If it is agreed that the contemplated contract shall be put in writing, in case of doubt, the contract is not concluded until it is put in writing.

Section 367 : If the parties to a contract, which they regarded as concluded, have in fact not agreed as to one point upon which an agreement was to be reached, those parts which were agreed upon are valid in so far as it may be inferred that the contract would have been concluded even without a settlement of this point.

The above two provisions are applied in the case where the facts have been established that the parties have not agreed on all points in the transaction, and it would be sufficient if such agreement is shown from the declaration of one party only. The second paragraph has nothing to do with the forms or written evidence required by law. It is only an essential agreeing point used by the party as a safety valve against the other who may claim that the contract has existed. The provision of section 366 applies only in case of doubt and hence the provision made in section 367. Thus a contract for sale where the price of the property is not fixed in the contract was held to be binding since by the provisions contained in the specific sale contract the buyer must pay a reasonable price.

Although a contract has existed with full right of enforcement according to the law, there may arise an argument between the parties, each for his own interest. The question, therefore, is how would the court interpret it. The Code has preliminarily provided in section 132 that in interpreting a declaration of intention, the true intention is to be sought rather than the literal meaning of the words or expressions. This principle is accepted by the laws of all countries. The difference lies in the matter of proving the true intention only. The views of legal scientists are divided. One group of them emphasises mainly the principle of true intention. If the act does not agree with the true intention, the contract would be ineffective. Another group insists principally on external declaration whereby the declaration would be regarded as legally binding even though it does not agree with the intention in the recesses of the declarant's mind. Another group stresses the principle that if the intention and the declaration do not correspond, the juristic act will not be regarded as valid. If the declaration, however, convinced the other party that it was a true intention, the declaration would be valid and legally enforceable. The principle of inter-

preting the declaration of intention as provided in the Code is such that preliminarily there shall require a declaration of the intention. Once it is declared, the law requires the true intention, be it one that can be proved from the literal meaning of the words or expressions. That it to say, the law does not make a definite decision on the intention as can be seen from one's attitude and words or written evidence only, but in practice if the agreement made in writing is not ambiguous or doubtful, the intention will be deduced from the statement and words which are explicitly shown. Nevertheless, exemption of the principle of true intention has been provided in section 117 of the Thai Code that a declaration of intention is not void on the ground that the declarant in the recesses of his mind does not intend to be bound by his expressed intention unless this hidden intention was known to the other party. The exception as stated above is compulsory, or the law may be used as an instrument for dishonest purposes. Except for the above exception, the law insists on the principle of true intention in all cases; hence the provision in section 118 that a declaration of intention which is fictitious, made with the connivance of the other party, is void; but its invalidity cannot be set up against third persons injured by the fictitious declaration of intention and acting in good faith. The second paragraph of the section provides further that if a juristic act is intended to conceal another juristic act, the provisions of law relating to the concealed act shall apply.

The principle of the Thai Code can, therefore, be summarized by saying that true intention is essential, irrespective of whether it is a true intention that can be proved from the literal meaning of the words or expressions. An intention, regardless of the means or manner of proving, can be found easily in certain cases, while in other cases it may be impossible to find it, thereby resulting in dismissing the plaintiff's charge or ignoring the defendant's contest, as the case may be, by reason of insufficient evidence to warrant a law-suit or contest. The law does not require that decision on an intention be based absolutely on demeanour or written evidence. It may be a matter requiring close scrutiny of the circumstances, also taking into consideration the prevailing usage to determine the true intention. Enforcement based on the principle of true intention has been provided for in other provisions as well. In certain cases where there are ambiguities in the words or conflicting clauses in the contract and the parties' real intention cannot be ascertained, the court will have recourse to those provisions governing certain rules of interpretation. Thus where the agreement may be interpreted in two senses, if the interpretation in one sense will render it effective whereas in another will render it ineffective, it is provided in section 10 that the sense which gives some effect is to be preferred rather than that which would give no effect.

It should be noted that the interpretation must be made on the basis of both parties' mutual understanding of each other's intention which is governed by the provision made in section 368 that contracts shall be interpreted according to the requirements of good faith, ordinary usuage being taken into consideration.

PART THREE

DISCHARGE OF CONTRACTS

From the provisions contained in Book 2 of the Civil and Commercial Code, it will be seen that a contract may be discharged in any of the following ways :

Performance : The contract comes to an end when both parties have performed obligations originating from it. Performance must be made in accordance with the true intent and purpose of the obligation. The obligation becomes, however, extinguished if the creditor accepts in lieu of performance something other than what was agreed upon.

Agreement : Provisions are laid down whereby the parties may discharge or vary their obligations. It may be by way of release which is effected by the creditor declaring his intention to release the obligation of his debtor. Where an obligation has been evidenced by writing, release must also be in writing or the document embodying it be surrendered to the debtor or cancelled. It may also be by the parties setting off their mutual obligations whose subject is of the same kind and both of which are due. Another way is by novation which is effected when the parties have concluded a contract changing the essential elements of the original obligation.

Impossibility of performance : Impossibility of performance may occur either in consequence of a circumstance for which one party is responsible or which is not attributable to either party. In non-reciprocal contracts where the performance becomes impossible in consequence of a circumstance for which the debtor is not responsible, he is discharged from his obligation forthwith, although the creditor may demand delivery of a substitute or subrogate a claim for compensation if acquired by the debtor.

Further provisions are, however, laid down in regard to reciprocal contracts in which both parties have mutual obligations to perform and although one party may be relieved of his obligation, he may or may not receive counter-performance. The effect of a reciprocal contract depends on the object of the contract. If the object is the creation or transfer of a right in a specific thing, and such thing is lost or damaged by a cause which is not attributable to the debtor, the loss or damage falls upon the creditor. This principle does not apply if the thing which forms the subject of a contract depending on a condition precedent is lost or destroyed while the condition is pending. In such a case it is provided that if the cause of damage is not

attributable to the creditor, the latter, if the condition is fulfilled, may either demand performance with reduction in his counter-performance or rescind the contract and in case the cause or damage is attributable to the debtor, his right to compensation is not affected.

If the object of a contract is not the creation or transfer of a right in a specific thing, and the impossibility of performance is not due to any party's fault, it is provided that the debtor has no right to receive counter-performance. If, however, the performance becomes impossible by a cause attributable to the creditor, the debtor does not lose his right to the counter-performance. He must, however, deduct what he saves in consequence of release from the performance, or what he maliciously omits to acquire by a different application of his faculties. It is provided that the same rule applies if the performance due from one party becomes impossible, in consequence of a circumstance for which he is not responsible, at the time when the other party is in default of acceptance.

Right of rescission : The exercise of the right of rescission also brings about the discharge of both parties' obligations arising from their contract.

PART FOUR

REMEDIES FOR BREACH OF CONTRACT

Breach of contract occurs where a party repudiates or fails to perform one or more of the obligations imposed upon him by the contract. The cardinal principle is that the obligor must perform according to the true intent and purpose of the obligations created and the breaches generally include the total or partial failure to perform and failure to perform within the stipulated date. In reciprocal contracts creating mutual promises from both parties, however, a party may refuse to perform until the other party performs or tenders the performance unless that other party's obligation is not yet due.

There may be a kind of breach which is termed "anticipatory breach, i.e., a breach, before performance is due. Where the obligor declares his intention not to perform before the time for performance is due, he is held to have waived the condition of time which is presumed to be for his benefit and the obligee may resort to the right of rescission by demanding the obligor to perform within a reasonable period, otherwise he may resind the contract.[4] A kind of anticipatory breach may be cited in the specific contract for hire or work which provides that "where the contractor does not begin to work at the proper time or delays in proceeding with it contrary to the terms of the contract, or if without the fault of the employer, he delays to proceed with it in such a manner that it can be foreseen that the work will not be finished within the agreed period, the employer is entitled to rescind the contract without waiting for the time agreed upon for delivery".

According to the Civil and Commercial Code, the following remedies for breach of contract are provided :

1. Right to demand specific performance

The right to demand specific performance has been provided in the Code as follows :

> If a debtor fails to perform his obligation, the creditor may apply to the court for specific performance, except where the nature of the obligation does not permit it.
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> Where the nature of an obligation does not permit of specific performance, and if the subject of the obligation is the doing of an act, the creditor may apply to the court to have it done by a

4. See the section 'Right to rescind the contract'.

third person at the debtor's expense; but if the subject of the obligation is the doing of a juristic act, a judgement may be substituted for a declaration of intention by the debtor.

As to an obligation whose subject is forbearance from doing an act, the creditor may demand the removal of what has been done at the expense of the debtor and have proper measures adopted for the future.

The provisions of the foregoing paragraphs do not affect the right to claim damages.

The main principles to be considered from the above provisions are as follows :

One of the main principles is that demand for specific performance may be made when the nature of the obligation permits, otherwise no such demand may be made, because according to the law, an obligation is a right over a person and may be enforced on the debtor's property only, and not on him personally. For example : a contract that depends on personal skill, as where Mr. A. is hired by Mr. B. to draw a picture. If Mr. B. fails to carry out according to the contract, Mr. A. can only take legal action by demanding compensation due to Mr. B's breach of contract.

Another principle is that demand for specific performance can be made only when it is still possible to carry out the contract. If it is impossible for any reason for which the debtor is responsible, the creditor is entitled only to payment of compensation due to the debtor's breach of contract as where the things which are the subject of obligation as mentioned in the contract are destroyed owing to the debtor's fault.

Usually in obligations or debts where a subject of obligation is delivery of property, the nature of an obligation is said to be a demand for specific performance, because the court can force the debtor to settle money or deliver things to the creditor. If the debtor fails to do so, execution by the Execution Officer would be adopted by attachment of the debtor's property for auction so that the proceeds may be used in the performance of the contract according to the judgement of the court.

With regard to an obligation the subject of which is the doing of an act or forbearance, and the nature of which does not permit of specific performance personal enforcement on the debtor would be affected. The Code therefore provides for other specific performance in lieu thereof as follows :

a. Where the nature of an obligation does not permit of specific performance, if the subject of the obligation is the doing of an act, the creditor may apply to the court to have it done by a third person at the debtor's expense. This is in order that the creditor may benefit as much from the performance according to the true intention of the obligation as possible, as in the case of a contract to construct a building. The creditor may apply for the court's order that a third person construct it at the debtor's expense when he is in default.

b. Where the nature of an obligation does not permit of specific performance, if the subject of the obligation is the doing of a juristic act, the creditor may apply that the court pronounce a judgement in lieu of declaration of intention by the debtor. An example of such a specific performance may be seen in a contract of sale of immovable property which must be put in writing and registered with the competent official. In the event the seller refuses registration of the transfer to the buyer, the latter may apply to the court that its judgement be substituted for declaration of intention by the former, and the latter then produces it to the Land Officer for registration of transfer of ownership in his name.

c. Where the nature of an obligation does not permit of specific performance, if the subject of obligation is forbearance from an act, the creditor may demand removal of what has been done at the expense of the debtor and have proper measures adopted for the future, such as a contract forbearing construction of building which obstructs the other person's land. In the event of a breach of contract by such impeding construction, the court may order demolition thereof at the expense of the party in fault. But for an obligation the subject of which is forbearance from an act, it may suffice if the court orders prohibition, thereby achieving the purpose of the obligation. This type of specific performance is like a contract not to operate a competitive business in regard to which the court may order prohibition from such operation according to the terms of the contract.

However, the provisions regarding demand for specific performance entitle the creditor to claim damages due to breach of contract by the other party. That is to say, a right is given to prove the claim for damages as explained below.

2. Right to claim damages

Besides being entitled to demand specific performance as provided in section 213, the creditor has the right to claim damages in addition. That is, in the event of a breach of contract, the creditor may demand specific

performance, and in the meantime he may also lodge a claim for damages, or refuse to accept performance and claim damages only; for instance, where the performance becomes useless to the creditor or impossible due to the circumstances for which the debtor is responsible, or if it is partly impossible but the part that is possible would be useless to him, or where the nature of obligation does not permit of specific performance.

It has been provided in the law regarding claim for damages that it refers to compensation of all such damage as usually arises from non-performance. The creditor may demand compensation even for such injury as has arisen from a special circumstance if the other party concerned foresaw or ought to have foreseen such circumstance. The first point relates to the damage suffered as a direct consequence of the debtor's non-performance, and not any unreasonable damage which the debtor may not foresee or could not have foreseen as arising from non-performance. The second point concerns damage arising from special circumstances about which the creditor is entitled to lodge a claim when it can be proved that the debtor knew in advance of such special circumstances or was in a position to have foreseen them.

Usually the compensation which the court would force the debtor to pay is a reasonable sum of money calculated on the basis of the damage done to the creditor. In determining the compensation to the other party suffering the damage, if any fault of the injured party has contributed to causing the injury, the obligation to compensate the injured party and the extent of the compensation to be made depend on the circumstances, especially how far the injury has been caused chiefly by the one or the other party. The fault of the injured party on which damages may be determined includes such fault as consists in an omission to call the attention of the other party to the danger of an unusually serious injury which the debtor neither knew nor ought to have known, or in an omission to avert or mitigate the injury. Moreover, the other party's fault includes the acts of his agent or person whom he employs in performing the obligation as if they were his own act.

Where the debtor is in default, i.e., where he fails to perform the obligation within the stipulated time or give warning in case a time for performance is neither fixed nor to be inferred from the circumstances, he is liable to pay damages incurred in consequence of his negligence during default. He is also responsible for impossibility of performance arising accidentally during the default unless he can prove that the injury would have arisen even if he had attempted performance in due time.

Where the subject-matter of the contract is a monetary debt, in addition to the proof of further damage, the debtor is liable to pay interest

during default at a yearly rate of seven and half per cent subject to the creditor's demand for a higher amount on any other legal ground. Compound interest shall not be required to be paid on default.

If the debtor is bound to make compensation for the value of an object which has perished during the default, or which cannot be delivered for a reason which has arisen during the default, the creditor may demand interest, on the amount to be paid as compensation from the time which serves as the basis for the estimate of the value. The same rule applies where the debtor is bound to make compensation for the diminution in value of an object which has deteriorated during the default.

The Thai Code recognises the penalty clause stipulated in the contract and regard it as a subsidiary agreement to the main contract and, therefore, its enforceability is dependent upon the validity of the main contract.

Where a party promises to pay a sum of money as penalty in the event of his failure to perform the obligation, the other party, in addition to his claim for damages, may demand the forfeited penalty as the minimum amount of damages and prove for further amount. He may also choose to accept the sum stipulated as penalty, and in this case, his claim for further amount of damages is barred.

If the penalty is stipulated otherwise than the payment of a sum of money, the claim for further damages is barred if the penalty is accepted by the injured party.

The court, with respect to the insertion of the penalty clause, is empowered in exercising its discretionary powers to reduce the sum stipulated as penalty to a reasonable amount where it appears to the court that the sum stipulated as penalty is disproportionately high. The court shall take into consideration every legitimate interest of the creditor or injured party, and not merely his property interest in the determination of the reasonableness of the stipulated penalty.

3. Right to rescind the contract

The contract once having been made thereby creating obligations on the contracting parties is not discharged merely where one party fails to perform his obligations. Usually in reciprocal contracts the injured party may, in the event of a breach committed by the other party, choose to treat the contract as still remaining by continuing to perform his part and demand performance by availing himself of the above remedies. He may,

however, choose to accept the breach as discharging the contract by exercising his right to rescind it. Apart from the agreement made between the parties where one party may rescind the contract in the event of another's breach, certain provisions of law allow the injured party to exercise such right. There are three main cases where he may exercise such right. First, where one party fails to perform, the other party may fix a reasonable period and notify him to perform within that period; if he does not perform within the notified period, the other party may rescind. Second, where performance at the stipulated time is the essential term in the contract, the right to rescind may be exercised forthwith without notification as in the first instance where one party fails to perform. Third, where performance becomes wholly or partly impossible by a cause attributable to the debtor, the creditor may rescind the contract. Certain provisions on specific contracts contained in the Code also empower the party to exercise such right.

The effect of rescission is that it puts an end to the contract. The creditor, the injured party, is discharged from his duty to perform his obligation, and his right to demand performance from the debtor also ceases. He is bound to restore the other to his former condition but without injuring the rights of third persons. Where restoration results in repaying the money, interest is to be added from the time it was received. For services rendered and for the use of a thing, restitution is to be made by paying the value, or by a counter-performance in money if that is stipulated in the contract.

The exercise of the right of rescission does not affect a claim for damages. Such right belongs to the creditor to exercise it at his own choice. When he has rescinded the contract, he may still sue the debtor for damages arising from the breach of his promise. The latter's liabilities do not end with the contract.

The right of rescission may be lost in certain cases. First, where the period within which one party may exercise the right of rescission is not fixed, the other party may fix a reasonable period and notify the party having such right to declare whether he will rescind; if no notice is received within such period, the right to rescind is lost. Second, the right is lost where the person entitled to exercise the right has, by his own act or fault, essentially damaged the thing which is the subject of a contract or has rendered the restitution of it impossible or has changed it into a thing of a different kind by working it up or remodelling it. The right to rescind is not lost if the thing has been lost or damaged without the act or fault of the party who has such right.