

Breach of Contract: Rescind or Perform?

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When a contract is breached, or a party does not perform its obligations, this does not instantly affect the validity of a contract. It will continue to be valid and binding unless it is rescinded.

As a party to a contractual dispute, you have two choices: sue for performance according to the contract, or rescind the contract. In both cases, the aggrieved party possesses the right to claim damages for any loss incurred due to the other party's breach of contract. Each option has its benefits, and deciding which one to choose will depend on whether the parties intend to continue doing business together.

In this article, we will explore the possibility of rescinding a contract without the existence of any specific contractual clause. It is possible to do so relying solely on the provisions of the Civil and Commercial Code, which sets out conditions under which a contracting party may rescind a contract.

A general right to rescind a contract arises when one party fails to perform its obligations under the contract. In the first instance, however, the party seeking to rescind must fix a reasonable period for performance and must notify the defaulting party to perform within that period. If such party still does not perform its obligations within that period, the other party may then rescind the contract.

Determining what is a reasonable period of time will require consideration of many factors, including the amount of any debt due, and the nature of any work to be performed by reference to the terms of the contract.

In cases where a party does not perform its obligation within a fixed period or at a fixed time specified in the contract, the other party may rescind the contract immediately, without notifying the defaulting party of a reasonable period for performance.

For example, let's say a land developer is due to deliver a condominium unit in March 2014, and, as of today, the construction has not yet begun. In this case, the debtor surely cannot satisfy its obligation to deliver a unit in time, and so the sales contract can be immediately rescinded by the purchaser.

Such right to rescind immediately can be lost, however, if the party seeking to rescind has previously accepted late performance under the contract, or has behaved in a lenient manner toward the deadline to perform.

In such a case, the deadline will not be considered an essential element of the contract, and rescission cannot take place without notification of a reasonable period to perform.

There are many Supreme Court precedents in which plaintiffs have lost their advantage because they have previously accepted late payments, and therefore a time limit clause in their contract has lost its virtue and cannot be relied on in order to rescind the contract.

For people in the business world, being lenient and willing to negotiate can be a key to success, but it can also compromise the rights of the parties. Careful thought should therefore be given to any decision not to strictly enforce contractual deadlines for payment or performance.

Once a party has established the right to rescind a contract, either by notifying the defaulting party of a reasonable period to perform, and which they have failed to meet, or by meeting the conditions described above, the contract may then be rescinded simply by making a declaration of intent to the other party.

Such a declaration is not required to be in any specific format and it can be made orally. But for purposes of certainty, sending a formal letter is always recommended.

When one party has exercised its right of rescission, each party is then bound to restore the other to its former condition. Interest will be added to the money to be repaid, and restitution made for services already rendered by either party by paying the appropriate value under the contract.

It is worth noting that any such amount to be paid will be separate from and in addition to the aggrieved party's right to claim damages for losses caused by the other's breach.

As stated above, once the party has exercised its right to rescind the contract, all the rights and obligations between the parties will end, and neither party can exercise its right to sue for compulsory performance.