

Dilemma: File a claim or nix the contract?

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Having multiple legal options is generally viewed as positive in a business context. It may, however, also imply the need to make a difficult decision — one with significant practical and legal consequences. This is particularly so where the transaction is unique, has significant monetary value or has the potential to affect existing third-party contracts. Real estate transactions fall firmly into this category.

Take a situation in which parties enter into a sale and purchase agreement for real estate. If the seller fails to perform its obligations under the contract, the buyer who is not in breach must decide how best to proceed with the exercise of its legal rights.

These options are provided in Thailand's Civil and Commercial Code (CCC) and have been further clarified by the Supreme Court.

Together, they establish two specific remedies for the buyer: (i) the right to claim specific performance under the contract, e.g., force transfer of ownership as contemplated by the contract; or (ii) the right to terminate the contract and restore the non-breaching party to its pre-contract condition.

The Supreme Court has made clear that these options are mutually exclusive, so a non-breaching party must clearly adopt one or the other. This is because one option legally terminates the contract, while the other maintains the breaching party's obligation to perform under the contract — positions that are in legal contradiction.

Deciding on a specific remedy to address the seller's breach thus requires careful consideration of the benefits and potential disadvantages of each option. In this article, we elaborate on issues the buyer should consider before exercising the right to claim specific performance or terminate the contract entirely.

Option one: Claim for specific performance. According to Section 213 of the CCC, when one party fails to perform its obligations under a contract, the other is entitled to enforce the contract by filing a civil claim against the defaulting party asking the court for compulsory performance.

Under Section 213, if the obligation is to carry out a juristic act such as transferring ownership of property, the court is empowered to order specific performance on the basis that such performance is consistent with the seller's declaration of intent at the time of contracting.

In addition to obtaining specific performance, a non-breaching buyer has the right to claim compensation for any damages incurred from the seller's failure to perform the contractual obligation. This may include contractually stipulated penalties for non-performance.

Option two: Terminate the contract. According to Section 391 of the CCC, when a seller does not fulfil its contractual obligations, the buyer has the right to rescind the contract entirely, and each party is thereafter bound to restore the other to its pre-contract condition.

To terminate the contract, the buyer must express its intent to terminate, typically by sending a termination notice to the seller. Such expression of intent cannot be withdrawn.

The buyer also has the right to claim compensation for damages incurred from the seller's failure to perform its obligation.

For example, if the seller fails to transfer land ownership and the buyer chooses to terminate the contract, the buyer can claim for both the price paid and for damages. After the contract is terminated, the buyer cannot claim for specific performance.

After the contract is terminated, parties then have the obligation to restore each other to their pre-contract condition. A non-defaulting party may refuse to restore the defaulting party to its pre-contract condition, however, if the latter fails to restore the former to its pre-contract condition.

Consider the case of a buyer who has placed an initial deposit for land and is permitted by the seller to possess the land before transfer of ownership.

If the seller fails to transfer ownership within the prescribed period and the buyer terminates the contract due to such breach, then the seller is required to return the deposit. If the seller refuses, however, the buyer can possess the land until the deposit is returned.

Conclusion: Prior to deciding how to proceed with a claim for specific performance or contract termination, a buyer should carefully assess its objectives in entering the contract and the seller's ability to perform if at all possible including conducting financial due diligence. The conduct of adequate due diligence can significantly reduce the risk of breach and can avoid the cost and time required to litigate a dispute.

If avoiding a dispute is unavoidable, however, negotiation and settlement efforts should be seriously considered, as they may lead to a solution that is preferable to protracted litigation. In some cases where litigation is an unavoidable last resort, understanding the best option available to a non-breaching party can help to maximise the benefits from the dispute resolution process.