

SOME OUTSTANDING PROVISIONS IN THE DRAFT RESOLUTION GUIDING THE APPLICATION OF COMPENSATION FOR NON-CONTRACTUAL DAMAGE

HAI LINH

After more than 15 years of implementation, Resolution 03/2006/NQ-HDTP guiding the application of a number of provisions of Civil Code 2005 on compensation for non-contractual damage promulgated by the Judges' Council of the Supreme People's Court (**Resolution 03**) has revealed many obstacles and inadequacies because it is inconsistent with the provisions of the Civil Code 2015 and no longer suitable with actual conditions. To overcome the above obstacles and inadequacies, the Supreme People's Court is drafting a Draft Resolution guiding the application of a number of provisions of the Civil Code 2015 on compensation for non-contractual damage (**Draft Resolution**) to replace Resolution 03. In this Newsletter, NHQuang will analyze some outstanding provisions of the latest Draft Resolution (the 2nd Draft which was uploaded on the Government Portal on August 5, 2021).

Grounds giving rise to damage compensation liability

The Draft Resolution stipulates that the liability to compensate for damage only arises when all the 4 factors below appear:

- (i) Any damage occurs;
- (ii) There must be an illegal act infringing upon the life, health, honor, dignity, reputation, property, legitimate rights and interests of other persons;
- (iii) There must be a cause-effect relationship between the damage that occurs and the infringement mentioned above;



(iv) The person causing damage is not responsible for the compensation in the case that the damage is caused by force majeure events or is entirely due to the fault of the aggrieved party, unless otherwise provided for by law.

Compared with Resolution 03, the Draft Resolution removes the factor "*There must be an intentional or unintentional fault of the person causing the damage*". Fault is understood as a psychological state of a person, thus it is difficult to determine at the time of committing the violation act, whether the person causing the damage is at fault unintentionally or intentionally. This provision of Resolution 03 has placed the burden of proof on claimants, making it more difficult to claim. In addition, the removal of the request on proving the fault of the person causing damage also aims to be consistent with the provisions of the Civil Code 2015 on compensation for non-contractual damage. The Civil Code 2015 also removed the term "*intentional/unintentional fault*" in the general provisions on compensation for non-contractual damage in Article 584 to ensure fairness in the settlement of such cases. In fact, judgments on non-contractual damage only determine if there is a fault or not and to which party the fault belongs (the party causing damage or both parties - in the case where the aggrieved party is also at fault) as the basis for determining compensation liabilities; while the "*unintentionality/intentionality*" of the fault is not addressed.

Principle of compensation for damage

Basically, the principles of compensation for damage in the Draft Resolution are inherited from Resolution 03 such as the principle of respecting the parties' agreement on issues related to compensation, the principle of compensation for all damage, or the principle

that the Court must quickly settle the claim for damage so that the damage can be compensated promptly.

In addition, the Draft also supplements a number of new principles to be consistent with the provisions of the Civil Code 2015 as well as with the reality, including:

(i) In the case that the aggrieved party is the partly at fault for causing the damage, such party shall not be compensated for that part of damage.

(ii) The parties whose rights and interests are infringed shall not be compensated for the part of the damage that occurs due to their failure to adopt necessary and reasonable measures to prevent or limit the damage, while they could know or see it in advance and have sufficient conditions to prevent and limit the damage from occurring, but let the damage happen.

Furthermore, the Draft Resolution amends the conditions for the persons causing the damage to enjoy reduction in compensation amount. Previously, under the Resolution 03, one of those conditions was that the damage caused must be too large for their available and long-term economic capabilities, consequently they cannot afford to compensate for the full or most of such damage. However, it is difficult to determine what percentage (%) out of the total damage to be considered the "*large damage*", and it is also difficult to determine the duration of "*long-term economic capabilities*" of the persons causing the damage. To overcome these obstacles and inadequacies, the Draft Resolution has revised this condition so that the reduction is only based on the available economic capabilities of the persons causing the damage and the ability to compensate in cash of the person causing the damage is determined to be only ½ of the damage at maximum instead of "*large damage*" as stipulated in Resolution 03.

The statute of limitations for initiating a claim for damage compensation

According to Resolution 03, the statute of

limitations for initiating a lawsuit to claim damages is 2 years from the date on which the legitimate rights and interests of the relevant individuals, legal entities and other subjects are infringed. This provision causes problems in practical application due to the basis for determining the time when "*legitimate rights and interests ... are infringed*". In fact, there are cases where those with rights and interests infringed do not have the right to initiate a lawsuit because they are underage or do not have civil liability capacity. There are also cases where the time when the damage actually occurs is different from the time when the person with the right to claim for compensation knows that the damage has occurred, even the statute of limitations for initiating such lawsuit expires as prescribed in Resolution 03. Therefore, to solve the obstacles and to be consistent with the Civil Code 2015, the Draft Resolution stipulates that the statute of limitations is determined "*from the date when the person with the right to claim knows or should know*". The above provision helps to ensure the right to initiate a lawsuit of the claimant if the aggrieved people cannot initiate the lawsuit for a long time or permanently (for example, due to severe injury, inability to perceive) so as to protect the legitimate rights and interests of the aggrieved people; it also helps to ensure the right to initiate the lawsuit of the claimant in the case that they know or should know about the damage after the time when the damage actually occurs.

In addition to the above contents, the Draft Resolution also provides guidance on other contents such as: capacity of individuals to be responsible for damage compensation; reasonable expenses specified in Articles 590, 591, 592 of the Civil Code 2015; damage resulted from infringement upon health, life, honor, dignity, and reputation; compensation for damage caused by sources of extreme danger.

Currently, the Supreme People's Court is collecting comments on this Draft. Individuals and organizations interested in the Draft can find the full text of the Draft Resolution at: http://chinhphu.vn/portal/page/portal/chinhphu/congdan/D_uThaoVanBan?_piref135_27935_135_27927_27927.mode=reply&_piref135_27935_135_27927_27927.id=4467 to send comments.

