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NEW PROVISIONS OF CIVIL CODE 2015 RELATING TO COMMERCIAL DISPUTE RESOLUTION

STRUCTURE OF PRESENTATION

New points of Civil Code (CC) 2015

Some issues need clarification for the application of CC 2015 in adjudication

I. NEW POINTS OF THE CC 2015

The CC 2015 came into effect from 01 January 2017 aiming at the satisfaction of fundamental demands

To deal with shortcomings revealed in the course of implementing CC 2005 in the past 10 years

To meet requirements of socialist-oriented market economy or to make the CC become the code of market economy.

To satisfy the requirement of rule of law: recognition, respect, protection and assurance of human rights provided in the Constitution 2013.

1. The CC 2015 highly emphasizes principles of free will, voluntary undertaking and agreement of parties in civil transaction

5 fundamental principles:

- Free and voluntary undertaking and agreement (Article 4);
- Principle of equality (Article 5);
- Principle of good will and honesty (Article 6);
- Principle of bearing civil liability (Article 7);
- Principle of respect for state and public interests, legitimate rights and interests of other persons (Article 10);
- Other principles which are not classified as fundamental principles shall either be integrated in relevant sections or deleted.

05 principles provided in the CC 2015 are all vital as they illustrate the nature of civil relation: **equality, free will, voluntary undertaking and agreement, bearing their own liability** → they help judges to examine, evaluate whether the establishment and implementation of civil transaction are consistent with the nature of such civil tractions → The judges shall apply these principles in resolving civil disputes when parties do not have any agreement, the law does not regulate or no custom or analogy of law is applicable (clause 2 Article 6).

1. The CC 2015 highly emphasizes the principles of free will, voluntary undertaking and agreement of parties in civil transaction.

The CC 2015 gives priority, in the course of implementation and dispute resolution, to civil transactions that are not in violation of banned provisions or contrary to moral ethics. Provisions relating to the application of practices (Article 5), application of analogy of law (Article 6) all give priority to the use of agreement made by the parties. Only when there is no agreement made by the parties, will the law, and then other rules, be applied. → This illustrates the fact that the will of parties in civil transaction is highly respected.

1. The CC 2015 highly emphasizes the principles of free will, voluntary undertaking and agreement of parties in civil transaction

The CC 2015 settles more appropriately the connection between the will of parties in civil transaction and formality requirement of civil transaction in a way that the parties' will is given priority. The CC 2015 also replaces the concept of "legal regulations" with the concept of "law", that means only the National Assembly is entitled to specify formality requirements for civil transaction by adopting *a law*. ➔ This narrows significantly the scope of formality requirements as a condition for an effective civil transaction, that is to emphasize the respect of parties' will.

Similarly, the CC 2015 also provides: "*In cases where it is provided for by law that a civil transaction must be expressed in writing, notarized, authenticated, registered or permitted, such provisions must be complied*" (clause 2 Article 119) ➔ This opens the parties to a wider freedom to choose the formality of transaction and highly respects the will and agreement of the parties.

2. The CC 2015 contains many new provisions relating to property, ownership and other property-related rights which are expected to contribute to the promotion of civil transaction, and satisfy the requirement of an active market economy.

Property

Land use rights

The Constitution 2013 only states that: ”*land use rights are protected by the law.*” (clause 2 Article 54)

Article 322 (clause 2) of **the CC 2005** listed land use rights as a property right which can be used as security for the performance of civil obligations; land use rights also considered as immovable property by **Law on Real Estate Trading**.

The CC 2015 affirms that land use right is property right

People shall be more confident and civil transaction relating to land use rights shall be more active and safer → This will promote real estate market

2. The CC 2015 contains many new provisions relating to property, ownership and other property-related rights which are expected to contribute to the promotion of civil transaction, and satisfy the requirement of an active market economy.

Pro-perty

Amended and clarified concisely the concepts of possession, possession in good faith, possession not in good faith (Articles 179, 180 and 181)

Poss-ession

Added a new provision: "*presuming status and rights of possessors*"

2. The CC 2015 contains many new provisions relating to property, ownership and other property-related rights which are expected to contribute to the promotion of civil transaction, and satisfy the requirement of an active market economy.

Property

Ownership rights

The CC 2015 contains many new provisions that better protect the ownership rights when the ownership relation is in active transition and non-stop circulation corresponding to market requirements.

2. The CC 2015 contains many new provisions relating to property, ownership and other property-related rights which are expected to contribute to the promotion of civil transaction, and satisfy the requirement of an active market economy.

Pro-perty

- No one shall be illegally restricted in or deprived of ownership and other property-related rights to his/her property (clause 1 Article 163)

- Owner and other holders of property-related rights are entitled to be self-protected and prevent any person from infringing his/her rights by any mean which is not contrary to provisions of law (clause 1 Article 164)

Owner ship rights

- Owner and other holder of property-related rights shall have the right to request the court or relevant state authority to compel the person infringing upon their rights to return property, stop illegal act obstructing the exercise of ownership rights or other property-related rights and make compensation for any damage (clause 2 Article 164)

- Ownership and property-related rights can only be restricted by law: only when the State conducts compulsory purchase or requisition of property in case of extreme necessity for reasons of national security or military defense or national interests, urgency situation or natural disaster prevention (clause 2 Article 163).

2. The CC 2015 contains many new provisions relating to property, ownership and other property-related rights which are expected to contribute to the promotion of civil transaction, and satisfy the requirement of an active market economy.

Pro-perty

Owner ship rights

- Concerning the types of ownership, they are appropriately regulated by the CC 2015 that help us to clearly see differences of means used for exercise of ownership rights
- **The CC 2015** provides three types of ownership including (1) the People's ownership; (2) private ownership; (3) multiple ownership. The means of exercising ownership rights are clearly different depending on the type of ownership.

3. The CC 2015 contains some new provisions which form a foundation for the establishment of credible remedies to protect legitimate rights and interests of individuals and organizations timely, lawfully and efficiently.

It specifies responsibility of the court and relevant authority to respect, protect civil rights of individuals and legal entities (clause 1 Article 14)

Protection of civil rights by administrative procedure ➔ applicable only when provided for by the law

When civil rights are infringed or disputed ➔ The protection of rights shall be made in accordance with judicial or arbitral procedural rules.

The court is empowered to review administrative order resolving the dispute under administrative process.

3. The CC 2015 contains some new provisions which form a foundation for the establishment of credible remedies to protect legitimate rights and interests of individuals and organization timely, lawfully and efficiently.

Principle that "*The court must not refuse to settle a civil case or civil matter for the reason that there is no applicable legal provision*" ➔ is introduced for the first time in the CC of Vietnam ➔ This is consistent with the court's function to ensure justice in accordance with the Constitution 2013.

In the-rule-of-law State, the court must be the main institution dealing with arising disputes and ensure justice → There must be grounds for the court to deal with civil cases and civil matters where there is no applicable provision of law. These includes the application of common practices, analogy of law, fundamental principles provided in Article 3 of CC 2015, court precedent or equity.

3. The CC 2015 contains some new provisions which form a foundation for the establishment of credible remedies to protect legitimate rights and interests of individuals and/or organization timely, lawfully and efficiently.

Regulation

The court shall only apply provisions on time limitation at the request of a party or parties provided that this request is presented before the first-instance court adopts judgment or decision on the case resolution (clause 2 Article 149)

Purpose

Exclusion of the court's authority to initiate the application of time limitation for recognition or non-recognition or protection or non-protection of legitimate rights and interests of involved parties

3. The CC 2015 contains some new provisions which form a foundation for the establishment of credible remedies to protect legitimate rights and interests of individuals and organizations timely, lawfully and efficiently.

The court's jurisdiction in dealing with request of the parties concerning the termination, amendment of contract when there is fundamental change of circumstances arise

The Code clearly defines conditions which must be satisfied for the change of circumstances to be considered fundamental (clause 1 Article 420).

It provides the rights of a party, of whom his rights and/or interests are affected, to request the other party to re-negotiate the contract

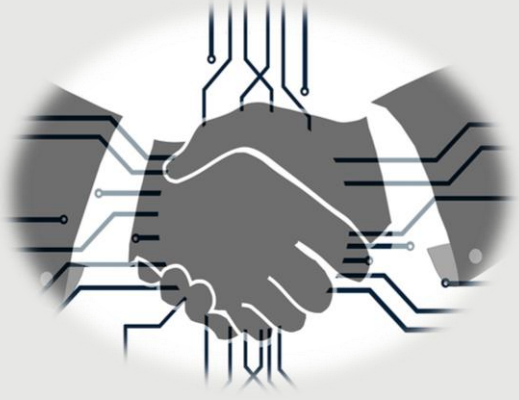
(clause 2 Article 420).

If both parties fail to reach an agreement on the amendment of contract, either party can request the court to terminate or amend the contract. The court shall only decide to amend the contract in case the termination of contract causes more damage than the implementation of amended contract. (clause 3 Article 420).

II. SOME ISSUES TO BE CLARIFIED IN THE APPLICATION OF CC 2015 IN ADJUDICATION PROCESS

1. Change in statutory requirements for contract formality

The CC 2015 contains general provisions on contract (Part 3 chapter XV) which is not to regulate specifically on civil contract as provided for in the CC 2005 (Part 3 chapter XVII).



- It is not purely a change in the name but it affirms that the Civil Code is a basic and original code of contract.
- Other regulations on specialized contracts including commercial contract, credit contract, investment contribution contract ➔ must be consistent with the CC 2015

2. Interpretation of contract

According to the CC 2015, when the contract contains unclear clause and there is no regulation directly applicable to such clause, what is the law applicable to the interpretation of contract?

2. Interpretation of contract

The source of law used for interpretation of contract ordered in priority

3. Model contract

Approaches taken by the court in case of dispute over model contract or contracts using general terms and conditions, which has not yet been registered with Vietnam Competition Authority (Ministry of Commerce) are categorized in two circumstances:

- Where the model contract requiring registration in accordance with Law on Consumer Protection but the enterprise fails to register, will it be voided? If yes, how consumer protection shall be made?

- Where registration of the model contract is not required in accordance with Law on Consumer Protection, will the conditions for model contract provided in Article 405 of the CC 2015 be applicable?

4. Tentatively estimated damages

Article 13 of the CC 2015 provides for compensation as following: *“individuals, legal entities whose civil rights are infringed shall be entitled to full compensation for damage, <u>except otherwise agreed by the parties</u> or provided for by law.”* Accordingly, will the CC 2015 accepts the parties’ agreement on estimated damages in the contract?

THANK YOU!

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