CHAPTER 5

CONTRACT LAW FOR BUSINESSPEOPLE

1. General Introduction

The Contract Law is part of Civil Code that was amended in 2015 and became effective as of 1st July 2017. The Contract Law is characterized by a market-oriented economy by which governmental interventions are restricted and more freedom is given to parties to contract.

1.1. Contract Law is a Default Rule

Fundamental principles of the Contract Law shall comprise: equality; voluntariness or freedom of contract; good faith; and legality. The parties to a contract are free to agree to specific terms that they see fit, the contract law will be used to fill in the missing terms and reinstate the parties' meeting of minds.

1.2. Scope of the Contract Law under Civil Code

The Contract Law governs almost all the contracts creating civil rights and obligations, except those agreements relating to marriage, adoption, guardianship, etc., which are governed by other applicable laws. Therefore, as long as a concluded agreement is between natural persons, legal persons, or other organizations with equal standing for the purpose of establishing, altering, or discharging a relationship of civil rights and obligations, no matter whether the contracting parties are Vietnamese or foreign entities, or are individuals or corporations, it shall be governed by the Contract Law.

2. Pre-contractual Process

2.1. Overview

Like other emerging economies, Vietnam is full of business transactions in complexity and size. Complicated business transactions, such as the sale and installation of infrastructure facilities, turn-key projects for the construction of production facilities, arrangements for the exploration of natural resources, corporate acquisitions and mergers, and transfers of technology often contain contracts of many thousands of pages and go through a lot of contracting negotiations.

During the course of the contracting negotiations, a pre-contractual document so- called letter of intent has become controversial in terms of legal validity and enforceability. A letter of intent may be defined as a pre-contractual written instrument that reflects preliminary agreements or

understandings of one or more parties to a future contract. The named letter of intent can be used interchangeably, such as "*heads of agreement*", "*memorandum of understanding*", "*protocol*", "*letter of understanding*", "*memorandum of intent*", *"in-principle agreement"*, and "*term sheet*".

Potential risk of pre-contractual agreements is that they would lead to unintended consequences. In the worst case, a letter of intent that records "*partial*" agreement may be found to be a complete agreement, giving the party who withdraws from a negotiation to full damages for breach of contract.

2.2. Enforceability of Letters of Intent

In generally, enforceability of letters of intent is a "*grey area*", in which sometimes it is not contractually obligatory, sometimes partly contractually obligatory and partly contractually nonobligatory, and occasionally wholly contractually obligatory.

Contract Law recognizes the possibility of pre-contractual agreements even though the concept of *"consideration"* (commonly used in common law systems) does not exist under Vietnam Contract law. An agreement to make a contract is an agreement by which one party commits itself to enter into a contract with another on the terms and conditions specified in the agreement if the other party manifests, in the proper form, an intention to be legally bound. There have been no precedent case laws confirm majority view on how to enforce a letter of intent, the prevailing view is that all preliminary agreements are reached during the negotiation phase of a transaction that are already legally binding on the parties, but that must be complemented by agreement on other elements. In such circumstances, if the parties cannot reach agreement on the unresolved elements, the courts are authorized to fill in the gaps.

Once the courts look to fill in the gaps, the starting point is to examine six general concepts: offers, acceptances, pre-contractual agreements, complete contracts, enforceable parts, and contracts to negotiate, which constitutes contractual obligation.

2.3. Pre-contractual Liability

In general, the common law countries have been reluctant to impose good faith obligations during the negotiating stage of a transaction.

As Vietnam is one of civil law countries, it is not necessary to determine that a complete contract or contract to negotiate exists in order to impose pre-contractual obligations to negotiate in good faith, obligations of such a nature that are expressly included in letters of intent are plainly enforceable. Thus, it is likely that the courts impose tort liability on breaching parties once a letter of intent become legally enforceable.

Civil Code sets forth the liabilities a party shall take before concluding a contract. Article 127 of Civil Code 2015 states that, where in the course of concluding a contract, a party engages in any of the following conducts, thereby causing loss to the other party, it shall be liable for damages:

a) negotiating in bad faith under the pretext of concluding a contract;

b) intentionally concealing a material fact relating to the conclusion of the contract or supplying false information; or

c) any other conduct, such as threat or coercion, that violates the principle of good faith.

3. Formation of Contract

The common law basically refers to a contract as "a promise in return for good consideration". Like other civil law countries, Vietnam contract law seems to accept that a contract is an agreement. Thus, there is no equivalent of the common law doctrine of consideration in Vietnamese law, which is also not a requirement for the validity of a contract that its parties intend to make it.

Under Article 401.1 of Civil Code 2015, a contract is formed once the acceptance becomes effective. In general, contract formation is that an acceptance must fully conform to the terms of an offer. An acceptance that does not conform to the offer is considered a counteroffer, and thus a rejection that prevents subsequent acceptance.

Article 117.1 of Civil Code 2015 sets out three elements that must be present for a contract to be valid:

a) the actor has relevant capacity for civil conduct;

b) the intention expressed is genuine; and

c) the act does not violate the law or the public interest.

Article 119.2 of Civil Code 2015 further states that, where the laws or regulations require such contracts to be approved and/or registered to be effective, such requirements shall prevail.

4. Breach of Contract and Entitlement to Damages

As a contract is breached, the damaged party, in order to establish its entitlement to damages, must prove that the breach is the fault of the obligee.

Put it simply, the existence of a cause-to-effect relationship between the behavior of the obligee and the breach of the obligation is a prerequisite for the further identification of the amount of the actual damages to which the other party is entitled. Thus, liability for breach requires the existence of fault—lack of standards of correctness, good faith, and diligence —of an obligee.

On the other hand, the mere lack of the promised result also would determine the obligee's liability in the presence of an actual damage suffered by the other party. No investigation as to whether the breach of the obligation is attributable to the fault of the obligee is necessary to establish entitlement to damages.

5. Quantification of Damages

Damages are reimbursable

Code Civil states that damages that are reimbursable as a consequence of a contract breach are those that are the direct and immediate consequence of the breach itself.

Although terminology is different and sometimes contradictory in practice, competent courts are likely to place a damaged party in the same position the party would have been in had no loss been suffered, while at the same time preventing recovery in excess of the loss suffered. In addition, recovery of money for injury is likely permitted.

Limited damages

Courts are likely reluctant to award damages that a damaged party could have avoided or that a damaged party caused. In addition, courts also seek to limit damages in a way that prohibits recovery for injuries that are too remote or indirect.

During a contract negotiation, lawyers are concerned with excluding categories of damages that will be understood by both parties and enforced by a court or arbitral body should disputes arise, other than predicting limitations when litigation arises. In doing so, negotiators and drafters repeatedly have adopted concepts and formulae related to contract damages that cannot be clearly connected to any specific national legal system.

6. Changed Circumstances and Contract Adaptation

Adaption clause stem from hardship clauses that have been used widely in domestic and international contracts, as contracts are more likely to be of a long-term, relational nature, usually including obligations that are continuing, periodic, and differentiated. Thus, entities frequently negotiate provisions in international contracts clauses that are designed to maintain the original economic value of each party's obligations and/or adapt a contract to unforeseen changes of circumstance.

Article 156.1 of Civil Code 2015 provides that force majeure means any objective circumstance that is unforeseeable, unavoidable, and insurmountable. Therefore, a party who was unable to perform a contract due to force majeure is exempted from liability in part or in whole in light of the impact of the event of force majeure, except as otherwise provided by law. Where an event of force majeure occurred after the party's delay in performance, it is not exempted from liability.

In the case of force majeure, the party who is unable to perform a contract due to it shall timely notify the other party so as to mitigate the loss that may be caused to the other party, and shall provide proof of force majeure within a reasonable time.

7. Dealing with Government Contracts

Unique features

In a commercial contract, buyers and sellers generally operate on a common ground and with relatively equal leverage. They are free to bargain and negotiate the contract and its terms with little

outside influence. In a government contract, however, this is not the case. The government -- as buyer -- essentially sets the rules of the game and controls the contracting process. Although theoretical similarities do exist between commercial and government contracts, there are significant practical differences.

First, the government is not free to buy from anyone it pleases, and the government contractor does not enjoy the same freedom of contract as does its counterpart, the commercial seller. A commercial buyer -- as compared to the government -- is not restricted by any set of rules or procedures as to how it must advertise its need or structure its contract. Further, the law of agency as applied to federal government contracts differs from agency principles as applied to commercial contracts.

Second, how the government determines its baseline "fair" price between government and commercial contracting.

Third, different procedures exist to address both contract award decisions and, once the contract is awarded and performance begun, contract administration issues. Government contracts generally require adherence to a pre-established "disputes procedure" to address disputes that arise during contract performance, a procedure nonexistent in the commercial world.

Fourth, government's public accountability affects almost every aspect of the purchasing decisions. The government also routinely uses its contracts to achieve socioeconomic policies set by National Assembly (e.g., equal opportunity, small business set-asides. etc.). In the commercial arena, the buyer and seller seldom concern themselves with such policies when negotiating contracts.

Key issues

Once dealing with government contracts, drafters and negotiators should pay attention to the following key issues:

a) requirement for actual authority, limited authority, implied authority, and ratification;

b) cost treatment;

c) contracting agencies; and

d) dispute process.