

Managing change

Client Alert Vietnam

Vietnam – the new civil code

Issue: October 2017 www.roedl.com/vietnam

> New Civil Code in comparison with other Vietnamese substantive law provisions

Being a significant source of law in the legal system of Vietnam, notably in the private substantive law, the civil code plays an important role in governing a wide variety of civil transactions. The enactment of the New Civil Code No. 91/2015/QH13 (the “**New Civil Code**”) is considered as one of the most recent visible development of legislative activities in Vietnam. The aims of new set of rules are not only to codify new regulations into the civil code but also to form a unified legal basis. Notwithstanding, it is still unclear how these new provisions are applicable where there are inconsistency among these rules and others.

This article presents certain issues prescribed in the New Civil Code in comparison with the Civil Code No. 33/2005/QH11 (the “**Old Civil Code**”) and other legal regulations.

Requirements for a valid civil transaction

The validity of civil transaction is the main concern and great care of parties involved. The essential prerequisite for the validity of civil transaction under the New Civil Code is generally same as the relevant provisions in the Old Civil Code. Accordingly, only if the specific statutory requirements in terms of competence, capacity and consents of subjects, lawful objectives and contents’ transaction, and forms of transaction are satisfied is a civil transaction valid and legally binding. Among other things, it should be noted that certain provisions of the New Civil Code contrasts with the previous ones.

Competence and capacity of subjects:

Under the New Civil Code, legal capacity is provided exclusively for natural persons (individuals) and juristic

persons (legal entities). The concept of legal capacity is not applicable for non-legal entities (e.g. representative offices and branches). In the view of interpretation of these regulations, other than the subjects being individuals or legal entities can enter into civil transactions under their own names, there is no one else to be entitled to establish civil transaction as a subject of such transaction. For instance, a branch of a company cannot sign up any contract under its own name as a contracting party since the branch does not have the legal capacity any longer and it is unable to represent its parent company to engage in such contract according to the New Civil Code. In contrast, by virtue of Article 45 of the Law on Enterprises (the “**LOEs**”), the branch may act as representation of its parent company. From the practical standpoint, the majority of companies apply the rules of LOEs to virtually all contracts between its branches and other parties. It is worth pointing out, however, that in principle the New Civil Code prevails over the LOEs in case of any inconsistency by reason of its latter enactment.

Forms of civil transaction (e.g. in writing, notarized, certified and/or registered form):

In this respect, the Old Civil Code regulates that the competent court at request of one party can nullify the transaction which fails to meet requirements on forms in case of continuation of failure after a time-limit permitted by the court for correction to the lack of conformity. In reality, a party who intends not to be bound to a transaction may exploit the loophole from this regulation during the statute of limitation (02) years as from the date of establishment of transaction to request the Court to state the transaction invalid due to the non-compliance with requirements on forms.

The New Civil Code, however, makes an exception in case where the transaction does not comply with requirements on forms but has been performed at least two-thirds of obligations for recognition of validity of

such transaction according to the request of the party involved.

Rescission of contract

The New Civil Code elaborates further on bases for rescission and legal consequences of contract rescission as compared to the Old Civil Code.

Under the New Civil Code, occurrences of events for contract rescission include (i) material breaches of contractual obligation which are defined as ones deprive the aggrieved party of substantially what he is entitled to expect under the contract, (ii) any breaches giving rise to right of contract rescission as agreed by the parties, (iii) late performance of obligations, (iv) inability to perform contract; or (v) loss or damage of property being subject matter of contract. One party can resort to contract rescission as a self-help remedy by contractual agreement or a legal remedy by claiming in court or arbitrator. When one party stands upon the legal grounds for rescission, the rescinding party is required to provide the other party with proper notice of rescission as soon as practically.

For contracts established in commercial activities, the contracts may fall within the ambit of the Civil Code and the Commercial Law in parallel. In the terms of legal consequences of contract rescission, the Commercial Law is quite distinct from the Old Civil Code. In addition to the discharge of contractual obligations and the annulment of contract as from the date of its formation as provided in the Old Civil Code, the Commercial Law regulates that the provisions on dispute settlement and rights and obligations of the parties consequent upon the rescission of contract is not affected by the rescission in line with the provisions of the United Nations Convention on Contracts for International Sale of Goods in 1980 (the “**CISG**”). Even now the New Civil Code recognizes the viable contractual provisions remaining after the rescission of contract, but it is confined to the provisions on penalties, compensation and dispute settlement and apparently is narrower than that in the Commercial Law. Furthermore, in respect of interest rate paid on the amount of payment received by one party when the contract is rescinded, the courts have reasoned the issue differently on a case-by-case basis. The fact that the court awarded such interest was subject to claim of one party. Meanwhile, the CISG expressly provides that the buyer is entitled to interest rate calculated on any payment made to the seller prior to the rescission of contract.

Law of agency (representation)

In contrast to the previous regulations of the Old Civil Code, the New Civil Code regulates that both the principal and the representative in agency (representation)

relationship must be individuals or legal entities. Such new regulation may be interpreted that the branch of a company may no longer represent its parent company as a function of representative.

In the context of representation relationship, there are two kind of representation including legal representative and authorized representative. In principle, the legal representative is vested to act for and on behalf of the company to exercise the rights and perform the obligations of the company and represent the company to act as plaintiff, defendant or person with related interests. In the course of operation, a company may have multiple legal representatives concurrently as specified in its articles of association and Enterprise Registration Certificate. Under the LOEs, the legal representative shall hold the managerial post of the company and have rights and obligations within the scope of authority that is conferred to him/her individually. Where it is impossible to determine the scope of authority of legal representative, he/she is entitled to perform any and all civil transactions in the interests of the company and such transaction will be binding to the company. The representative must inform any third party who deals with the representative of his/her scope of authority.

It is the first time where the apparent authority is recognized in the New Civil Code; whereby an authorized representative who appears to have authority is capable of binding his/her principal where the third party has acted on the faith of such appearance of authority. Likewise, the apparent authority happens where the existing representative performs beyond his scope of authority.

Statute of limitation

Another attention should be called to the new rules on the statute of limitation. The statute of limitation provided in the New Civil Code is now longer than one provided in the Old Civil Code as described below.

Statute of limitation	The Old Civil Code	The New Civil Code
(i) For breach of contract claims	2 years	3 years
(ii) For requesting court to declare civil transaction invalid	2 years	2 years
(iii) For tort claims	2 years	3 years
(iv) For claims for distribution of heir	10 years	30 years (for immovable properties) 10 years (for moveable properties)

Under the Old Civil Code, in most cases, the statute of limitation commences on the date of the breach of the contract or infringement or the date of contract for different types of claims. The New Civil Code changes on the commencement date of statute of limitation into the date on which the claimant was or reasonably ought to have been aware of the infringement of his/her rights and interests. The new statute of limitation shall be applied retroactively to civil transactions which were established before the effective date of the New Civil Code (1st January 2017).

Conflict of Laws (Private international law)

In the event of absence of valid clause on choice of law in the contract involving foreign elements, under the Old Civil Code, the contract may be governed by different legal systems. In particular, the rights and obligations of contracting parties may be determined in accordance with the law of the country where the contract is performed; forms of contract must comply with the law of the country where the contract is entered into. Put differently, in this circumstance, the New Civil Code regulates that the law most closely connected with the contract shall be the law applicable to all matters of contracts.

Conclusion

Reviewing certain new points of the New Civil Codes shows that these new set of rules on the one hand make good progress in the Vietnamese legal framework, but on the other hand it still exposes the overlap and inconsistency between this code with other legal documents. It is required further supplemental interpretation from the law marker on the applicability of new rules to day to day civil transactions.

Rödl & Partner Vietnam, being the international law firm with hands-on experiences on Vietnamese legal market is confident to support you in the business operation in Vietnam to ensure the compliance with the Vietnam law and alignment with your business strategy.

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Imprint Client Alert, October 2017

Publisher: **Rödl & Partner Vietnam**
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