

## Some features of commercial Law in Vietnam

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**Abstract.** The article introduces and analyses some features of the current commercial law branch in Vietnam in order to facilitate researches on it. The principal features of Vietnamese commercial laws in general and in its concrete institutions can be found in this article.

### 1. Outline of history

The Vietnamese legal system developed through some periods, and had several changes. Before the year 40, perhaps Vietnam had owned a proper legal system. But now we have no evidence for it except the letter written by Ma Vien sent to his King at that time. It said that Vietnamese laws had 10 articles more than those in Chinese laws [1]. After 40 A.D. Vietnam was settled by Chinese who imposed their laws upon Vietnamese. Until the settlement by French, Vietnam followed the Far East legal tradition and Confucianism. In the middle of the 19<sup>th</sup> Century, the Vietnamese legal system changed to Civil Law. It has changed to Sovietique Law tradition since 1954, especially after 1975. Now, Vietnam is in Sovietique Law style because the socialist orientation is its choice. Therefore commercial law did not arise in the Far East period, and has been abandoned in the pure Sovietique period. But now commercial law is a branch of law in the Vietnamese legal system because of the requirements of socialist oriented market

economy development. In the Civil Law period, commercial law had an opportunity to develop. Actually, the Civil Code of 1931 in the North, the Civil Code of 1936 and the Commercial Code of 1942 in the Middle, and the Civil Code of 1972 and the Commercial Code of 1972 in the South had plenty of provisions for regulating commercial relations. At that time, commercial law was an autonomous branch of law, but very closely connected to the civil law branch.

Before the enactment of the Commercial Act of 2005, the branch of commercial law in Vietnam was confusing due to the law classification issue in the Sovietique legal tradition. At that time we had three branches of law paralleled but opposite with/to one another. The Civil Code of 1995, the Economic Contracts Decree of 1989, and the Commercial Act of 1997 all regulated contractual relationships between traders, and between traders and non-traders. The Courts usually denied to apply the Commercial Act of 1997 for contractual disputes because probably they were accustomed to using rules of civil law and economic law branches only. One more reason was that the Commercial Act of 1997 only addressed the sale of goods and some related

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issues. Some jurists deemed commercial law to be an area of the economic law branch [2]. In this situation, many Vietnamese jurists had an idea for the uniforming of the laws of contract. It caused so much arguments about this issue for jurists. Consequently in 2005, the new Civil Code and Commercial Act were promulgated. The Economic Contracts Decree of 1989 was also rescinded.

## **2. Distinction between civil law and commercial law**

Vietnamese laws have no any detailed provision for the distinction between civil law and commercial law. The distinction depends on the definition of commercial acts what is called “commercial activities” provided in Article 1, paragraph 1 of the Commercial Act of 2005: “Commercial activities mean activities for profit including the sale of goods, provision of service, investment, commercial promotion and another activities for profit”. For distinction, jurists usually consider Article 29 of the Code of Civil Procedure of 2004, which distinguishes between commercial disputes, civil disputes and labouring disputes. There are two components for recognizing commercial disputes: *First*, disputes arise in the course of commerce in which parties purpose of gain profit; *second*, parties in the dispute are traders (individuals or organizations are recorded in the business register).

## **3. Commercial law structure**

Private law in Vietnam today is similar to Civil Law countries. However Vietnam has a separate Maritime Code that contain rules of public law and private law. Besides that problem, financial and banking laws seems to be separated from commercial law although leasing and banking are commercial acts by their nature. Financial and banking laws in Vietnam therefore include all relevant regulations in private law and public law.

Many Vietnamese jurists have the idea of unifying civil law and commercial law. In fact this is displayed in the Civil Code of 2005 (Article 1). But all provisions of the Code are unsuccessful in accepting this idea.

Commercial law in Vietnam has a complex structure. It contains basic institutions including traders, commercial acts, bankruptcy, dispute resolutions. But each of them is in different Act or Code.

## **4. The sources of commercial law**

In theory, the Constitution is a source of all branches of law that any textbook refers to. But the Constitution of Vietnam is a Sovietique type that has some different characteristics compared to constitutions of capitalist countries. One of the differences is the lack of remedy and judicial review in the implementation. The Constitution therefore is seen as a revolutionary declaration or unilateral engagement by the government. It is never invoked in the courts.

In the commercial law, four sources are posited: (1) Legislation; (2) subordinate legislation; (3) usages; and (4) commercial practices. Precedent is not recognized as a source of law. However some years ago, the Supreme Court’s annual Digest contains certain judging lines that were used by judges in performing their functions. Now such a line is put in the Resolutions adopted by the Supreme Court’s Council of Judges every year. Those are legal instruments (subordinate legislation). Recently, the Polit Bureau of the Communist Party issued its Resolution number 49- NQ/TW June 2, 2005 on Judiciary Reform Strategy to 2020 in which case law is being considered to be a source of law. But now it is not. Legal doctrines have not been one of the sources of law since the legal system is influenced by the Sovietique Law tradition.

Generally, legislation is the most fundamental and highest source of law. The Commercial Act, the Enterprise Act, the Civil

Code, the Maritime Code, the Civil Aviation Act, the Commercial Insurance Act, the Credit Institutions Act...are legal instruments that contain almost rules applied to commercial disputes. For implementing, the Government and other public authorities are delegated by The National Assembly to promulgate several forms of legal instruments based on the mentioned statutes. Subordinate legislation is inferior to legislation, but provides more details. At times, an Act without subordinate legislation instrument may amount to a meaningless Act.

The Commercial Act of 2005 sets up two basic principles. Those are (1) the application of commercial practices created between the parties (Article 12) and (2) the application of usage in commercial activities (Article 13). This Act distinguishes between practices and usage while the Civil Code of 2005 mentions only one principle of usage application (Article 3) among other principles. It is therefore difficult to say that these Acts are in one legal system although the Civil Code stipulates that it regulates commercial relationships. Commercial practice arises from parties in their particular commercial relationship that they have known or should have known. If there is no any agreement between them, their commercial practice is considered the rule acquiescently applied. Usage will be applied for commercial disputes when there is no any agreement or practice between parties.

Under the Commercial Act of 2005, "Commercial practices are Parties' behavioural rules which have obvious contents set up and reiterated several of times in the long period, and are tacitly accepted by parties in order to determine parties' rights and obligations in commercial contract"; and "Commercial usages are commercial practices which are largely accepted in commercial activities in an area, a region or commercial field, and contain explicit contents recognized by parties in order to determine their rights and obligations" (Article 3, paragraphs 3 & 4, Commercial Act 2005).

Although these definitions are very confusing, they mention two components of practice and usage. Those are substantiality and mentality. In the legislature mind, the difference between practices and usage is a difference of sphere of influence on traders in the concrete contract or on traders in the community of any commercial field. After the promulgation of the Commercial Act of 2005, The Supreme Court's Council of Judges adopts Resolution number 4/NQ-HĐTP September 17, 2005 defining that "Usages are practices which becomes a habit in the social life, in the production and in everyday life, and are accepted and conformed to as the common rules by the community where such practices arose". This definition is rather different from above-mentioned definition by the Commercial Act of 2005. It does not mention of the definition of usage.

International treaties prevail when they conflict with provisions of domestic law. Certainly, international customary law applies to international disputes in Vietnam.

## 5. Principles of commercial law

There are six fundamental principles provided in the 2005 Commercial Act:

1) Principle of traders' quality before the law in commercial activities. This principle abolishes the distinction between economic sectors. In fact, the elimination of the gap between the public economic sector and the private economic sector in Vietnam is being carried out gradually by the State.

2) Principle of freedom of contract. The State respects and protects contracts while establishing rules to nullify defective contracts.

3) Principle of application of commercial practice.

4) Principle of application of usage.

5) Principle of protection of legitimate interests of consumers. Traders are under an obligation to inform consumers sufficiently and

faithfully about goods and services supplied by them, and shall be responsible for the correct information.

6) Principle of recognition of validity of data messages in the course of commerce. The data of messages meeting the condition and criteria provided by law shall be recognized the same as documents regarding validity.

Otherwise, principles set up in the Civil Code of 2005 shall be applied (For example: good faith, respectability for good ethics and tradition, respectability for public interests...). However, these principles are rarely taken into consideration by courts, because judges prefer clear and detailed provisions. This is probably because they are appointed to the bench for a term of five years and shall be reappointed for the next five years if their judgments is rarely corrected or abolished by the courts above in the last period. Therefore they always tend to choose safety for their position by applying clear and detailed provisions to pending disputes.

## 6. Company laws

1. Vietnam tends to promulgate a single law for all business organizations. In fact it is done via the so-called “the Enterprise Law of 2005”. Certainly, in addition to this law, there are some special provisions for business entities found in other acts too (For example: the Maritime Code, the Civil Aviation Act, the Commercial Insurance Act...). But such provisions merely regulate some speciality areas. Jurists and politicians in Vietnam have managed to create uniform business organization laws. They comprehended that such unification is useful for enterprises’ equality before the law, so the distinction between public enterprises and private enterprises is erased by “the Enterprise Law of 2005”. This Act applies to all enterprises, whether public or private. Legislators forget that creation of enterprises’ equality is a duty of the whole legal system, not merely treatment in a single legislation.

2. Vietnamese enterprise laws are not really a stable area of the law because of the following features:

*First*, The Socialist Revolution has abolished the old political and legal systems set up based on private property ground. Until the implementation of the renovation policy, there had not been the class of traders and company type recognized by law. All company types of the old regime had been abolished with the ruin of such regime. In the Socialist Society there used to be three types of economic organizations: industrial nationalized business enterprises, combination of enterprises, and union of enterprises. These company types were little by little revived by the implementation of the renovation policy. We can assume that being rather different from legal systems of “bourgeois” countries, the current company law of Vietnam creates all types of companies other than accepted their existence in the practice of traders.

*Second*, Vietnamese enterprise laws relatively are separate from other areas of law. For example the Enterprise Act of 2005 does not correlate to the Commercial Act of 2005 and the Civil Code of 2005. It lacks provisions for company disputes, and has superfluous provisions that contradict provisions of two others and of many other Acts.

*Third*, it seems that only one single source of the later two Vietnamese enterprise law is accepted. In judicial proceedings all other sources of law are not considered by courts.

*Fourth*, Vietnamese enterprise laws provide a lot of powers for administrative organs, including invalidating companies.

*Fifth*, the tendency of adopting a single act to regulate all business entities is displayed clearly and concretely in the Enterprise Act of 2005. Provisions for managing the state-owned enterprises, therefore, take a very important position in such act in the circumstance of a large proportion of such enterprises.

*Sixth*, the Vietnamese legal system is in the process of being reformed of which enterprise

law is but one component. Therefore, it seems that a lot of provisions of the Enterprise Act of 2005 are being tested by the State for improvement on from time to time.

3. The Enterprise Act of 2005 sets forth the policy of enterprise development and a basic regulatory scheme applicable to traders. It is a significant progress in legal reform to implement a market economy by facilitating enterprise establishment and operation.

The policy presents three important and fundamental issues that constitute a solid foundation for enterprise development in the period of transition from a planned economy to a market economy. The policy can be divided into two segments.

In the first segment, the essential conditions for the establishment and operation of enterprises are declared: the State shall (1) recognize the long term existence and development of enterprises' forms, and lawful profits gained in commercial activities; (2) guarantee enterprises' equality before the law regardless of which economic sector and what ownership form they belong to; and (3) recognize any lawfully profiting purpose in the course of business.

In the second segment, the State declares the policy on protection of enterprises' and their owners' properties such as their ownership, other rights and interests. Enterprises' and their owners' lawful properties and investment capital shall not be nationalized and expropriated by administrative means. Requisitions or compulsory purchases are carried out for real necessary reasons of national defence or security, or other national interests, but shall be paid or compensated at market price determined at the time of declaration of requisition or compulsory purchase. Consequently, investors do not worry about transferring their property to the enterprises. This segment of policy is very important today in Vietnam because, before Renovation, private property could be

requisitioned or deprived at any time by public authorities for public reasons.

A trader has the nationality of the country or territory in which his enterprise is established and registers its business.

4. Principally, every individual or organization (legal person, public or private) has the right to establish and manage enterprises, or purchases shares of shareholding company or contributes capital to limited liability companies or partnerships (Article 13 of the Enterprise Act of 2005). Inferentially, Vietnamese laws distinguish between establishment of enterprises and capital contribution to companies. The establishment and management of enterprises, and share purchase or capital contribution to limited liability companies or partnerships shall be prohibited by the Enterprise Act of 2005 in the following two circumstances:

+ Regarding the establishment and management of enterprises, the State organs or armed force units using the State properties to make profits for themselves by establishment and management of enterprises, or persons being civil servants, officers or non-commissioned officers or career service men or national defence workers of military might, career officers or non-commissioned officers of public security, management personnel or professional management personnel of enterprises with one hundred percent state-owned capital, minors or majors with limited capacity or capacity deprived, prisoners or any person prohibited from doing business by court;

+ Regarding share purchase or capital contribution to companies, the State organs or armed force units using the State properties to make profits for themselves by capital contribution to companies, or civil servants under cadre and civil servant laws.

5. Traders are under an obligation to business registration. Organs for business registration shall consider documents filed by traders for issuance of a business registration

certificate. Documents filed by traders must satisfy all conditions required by laws. The Enterprise Act of 2005 and some other statutes shall stipulate what documents and their contents traders must file for business registration subject to the business form they intend. Articles 15- 23 of the Enterprise Act of 2005 provide in details such documents and their contents. Traders shall be responsible for the accuracy and truthfulness of such documents. Organs for business registration shall only be responsible for regularity of such documents.

6. Under the Enterprise Act of 2005, traders have lots of obligations such as: to conduct business under the line of business recorded in the business registration certificate; to perform accounting and financial regimes; to pay taxes; to ensure the rights and interests of employees; to perform statistical regimes; to abide by laws of national defence, national security, social order and safety, natural resources and environmental protection, historical or cultural sites and places of interests protection; and to keep business documents, books of accounts, accounting records...

7. Traders shall provide information relating to the contents of business registration and announce them to the public. Each trader shall be named in compliance with requirements by law. Trader's head office is located within the territory of Vietnam. The establishment of representative offices, branches and business locations shall be in compliance with law. Each enterprise shall have its own seal which is provided by the competent authority and retained, preserved and used in accordance with provisions by law.

8. Traders, under the Commercial Act of 2005, include all lawfully established economic

organizations and individuals who conduct independently and regularly commercial acts, and are registered in the business register (Article 6, paragraph 1). The definition shows two things: (1) Classification of traders; and (2) criteria for being traders. Not any different from other countries, traders in Vietnam are divided into two kinds: natural person traders, and legal person traders. The Enterprise Act of 2005 therefore regulates all of them. For being a trader, one person shall meet two requirements: to do business independently and regularly, and to be recorded in the business register. The second requirement is eliminated by Article 7 of the Commercial Act of 2005 contemplating de facto traders. In fact judges almost did not consider applying this Article yet, because probably they do not want to interpret the meaning of any provision that may be contradicted by another.

The Enterprise Act of 2005 contemplates four forms of business as follows: Sole proprietorship, partnership, shareholding company and limited liability company. Nonetheless, this Act does not provide for business households- an important and popular business form in Vietnam.

Surely Vietnamese laws are under reform. The above features of the country's commercial law may change. But almost of them have not yet been comprehended sufficiently for a change.

## Reference

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