SOME SHORTCOMINGS IN PART 7 OF THE 2005 CIVIL CODE OF VIETNAM

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When the problem of amending the 1995 Civil Code was posed, it was everyone's hope that the big shortcomings of this Code, which were found during the drafting process would be corrected, including the stipulations of civil relation with foreign factors. Nevertheless, such hope had not only been dashed but there also arose some worries when the 2005 Civil Code was passed. Due to my big disappointment, I will not have a word for the complimentation of the new Code. All that I am going to deal with in this article is upon the shortcomings of this Code.

1. Backwardness in the conceptualisation of civil relation with foreign factors

1.1. According to Article 826, Civil Code of 1995, "In this Code, civil relation with foreign factors means civil relation in which a foreigner or a foreign juristic person takes part, or civil relation which is established, changed or ended in a foreign country, or the property of which is from a foreign country." This definition fails to make a distinction between a foreigner and a foreign juristic person. Instead, the concept of "person" in legal definition includes physical person and juristic person, different from the common understanding that a person means a natural person. Anyway, this definition is right when it mentions both physical person and juristic person as the subject of civil code as in international understanding. However, this good point of the 1995 Civil Code was made wrong in the 2005 Civil Code which writes as follows: "Civil relation with foreign factors is civil relation with at least one part to be a foreign organization or individual, or a Vietnamese person living in a foreign country or civil relation between Vietnamese organizations or individuals,(1) but the ground for establishing, changing and ending thar relation is exercised according to a foreign law, generated in a foreign country or with the property in a foreign country" (Article 758).

This definition shows that the law-makers are not updated with the concept of legal person, which is now divided into common and private legal persons (in countries with civil law). Nowadays, legal person not only includes a human community or organization but also, say, a sole-trader. In my opinion, the law regulation of relations with international

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(1) Underline is mine.

factors requires an international-like standard.

1.2. Clause 1, Article 827, Civil Code of 1995 stipulated: "All legal stipulations of the Socialist Republic of Vietnam are applied to civil relation with foreign factors, unless this Code launches another stipulation". This statement was exactly replicated in Clause 1, Article 759, Civil Code of 2005. This statement force readers to understand that the legal application to civil relation with foreign factors is, first and foremost, a matter of the Civil Code, and if the Civil Code has such a stipulation, then other stipulations of other services will have be taken into account. It can be inferred from this that the concept of "civil relation with foreign factors" as stipulated in the Clause above and other issues concerned with civil relation with foreign factors in Part 7 of the 2005 Civil Code covers all the civil relations with foreign factors generated from international exchange. Naturally, the law-makers have also imposed their stipulations on the conflicts of laws in specific areas such as aviation and navigation. What matters is that those stipulations have led to big mistakes that will be mentioned below.

International air transportion is an interesting but complicated issue that attracts all nations' attention. In order to unify different or even conflicting principles and procedures, a great number of Conventions have been signed on the regulation of international air transportion operation. According to most of these conventions, international air transportion is understood as any kind of transport by aeroplane of which, according to the agreement between differrent parts in the transportation contract, destination and departure are in two different countries' territories, or in the same country with an agreed transit place in another country, without any interruption in the transportation or forwarding. This definition reveals no concept of subjects as foreign physical or legal persons or related property. In sum, the definition of civil relation with foreign factors in the 2005 Civil Code cannot be applied to international air transportation.

Although stipulations in the Civil Code in civil relation with foreign factors are gien priority, when confronting with specific issues, the 1995 Civil Code or in the 2005 Civil Code will have to give the priority to other specific codes such as the Aviation and Navigation laws. An example for this can be taken from Articles 766 and 773 in the 2005 Civil Code. This is a serious error law-makers committed due to their lack of knowledge aviation and navigation laws. The conflicts in aviation will be discussed later.

2. The lack of principles

It is inevitable to refer to foreign laws when regulating civil relations with foreign factors. Nevertheless, the 2005 Civil Code lacks the principles for application when it comes to refer to the law of a multi-legal-system nation. A multi-legal-system nation consists of two

kinds: (i) a nation with different territories of different legal systems; and (ii) a nation with different legal systems applied to different classes of people. With the first type of nation, each territory is regarded as a separate country. With the second type, legal reference is taken to the legal system that the nation's principles mention; if there is no such principle, reference is taken to the legal system closest to the specific situation. The lack of principles and solutions may cause the court a lot of troubles to solve specific cases, while legal theories are not considered as a legal source. In addition, the Civil Code has no principle and the explanation of the legal regime are unfamiliar the court.

It is necessary ro refer the stipulations to foreign laws, and this work is necessary as it helps to avoid complication, but this has not been adopted by the 2005 Civil Code.

3. Conflicts of laws in aviation

The conflict of laws in aviation in particular and the autonomy of air law in general is a complicated and controversial issue. However, it is taken for granted that aviation law has its own way to solve the problems of air transport and air freight. These viewpoints have not been considered thoroughly by Vietnamese law-makers, which leads to a lot of shortcomings in Part 7 of the Civil Code of 2005.

3.1. On the indemnifications beyond a contract

Clause 2, Article 773, oc the 2005 Civil Code stipulates: "The indemnification for the damage caused by an aircraft or a ship in international air or sea territory is defined in accordance with the law of the nation where the aircraft or ship takes its nationality, unless otherwise stipulated in the Civil Aviation Law and and the Navigation Law of the Socialist Republic of Vietnam."

Law-makers have divided this stipulation into two parts: one stipulates the solution of conflicts of laws; the other stipulates the priority of application, if the stipulation of specific law is different from that of the Civil Code.

+ Looking into the first part, it can be seen that there are two cases of damage indemnification beyond a contract in air transport:

First, two or many aircrafts crash or obstruct each other, causing damage.

Second, the flying aircraft causes damage to the third person on the ground; or two or many aircrafts crash or obstruct each other, causing damages to the third person on the ground.

In the first case, if two or many aircrafts of different nationalities crash or obstruct each other, the problem would be very complicated. The law of which nation would be taken for the court to solve the conflict? Or suppose a hydroplane crashed into a sea-ship in an international sea area? Then would both the principle of conflicts of laws of Sea Law and the law of the country where the case is settled be applied?

Similarly, in the second case, if two or many aircrafts of different nationalities crash or obstruct each other, causing damage to Vietnamese sites or ships in international sea territory, the case would be more complicated then. It is obvious that the court could not apply the stipulations as mentioned above. If only one foreign aircraft causes damage to a Vietnamese site or ship in an international area, the problem would already be too complicated.

The Convention on foreign aircraft causing damage to the third person on the ground signed on October 7, 1952 and Article 93a of Vietnamese Civil Air Law (amended in accordance with Law of Adjustment, Amendment of Vietnamese the 1995 Civil Air Law) stipulates, "if a flying aircraft causes damage to sites or ships in an international area, these sites or ships are considered as part of the territory of the nation where these sites or ships take their nationality. Thus the law of the nation that suffers from damage will be applied. From the analysis above, it can be seen that the very stipulations of Clause 2, Article 773, are in conflict with the stipulations in Clause 1 of the same Article, which states, "*the damage indemnification beyond contract is defined in accordance with the law of the nation where the action causing damage arises or where practical consequences of the action causing damage arise.*"

Giving further comment on these stipulations, we can see that air freight businesses in Vietnam mainly use rented aircraft for commercial transport; therefore, in many cases, these aircrafts take a foreign nationality but are employed by a Vietnamese legal person. In the case of damage as mentioned above, for instance, if these aircrafts cause damage to a Vietnamese site or ship in an international area or crash into a foreign aircraft rented by Vietnam, the foreign law would be applied to solve the conflict, then, not the application of the stipulations in Clause 3 of this Article.

+ Although the first part of the stipulations in Clause 2, Article 773, Civil Code of 2005 is not satisfactory, they still have the second part for the application priority of air law and sea law. Regretfully, Point d, Clause 2, Article 5 of the Vietnamese Civil Air Law of 1991 only stipulates the principle of solving conflicts of laws in case of an aircraft crashing or obstructing each other or flying aircraft causing damage to the third person on the ground in the territory owned by or in the right of judgement of a certain nation. This point does not in the least mention the damage occurring in the territory owned by or in the right of judgement of any certain nation. Article 93a (amended in accordance with Law of Adjustment, Amendment of Vietnamese Civil Air Law, 1995) stipulates the case of a flying aircraft causing damage to Vietnamese sites or ships in the area that is not owned by any nation in a different way and this stipulation requires a clear

explanation in terms of content and relation.

3.2. Solution to conflicts of laws in ownership

An aircraft is, first and foremost, defined as a movable property. Its mobility is very great. It is movable in three kinds of environment: air, land, and water. In argument for the common principles of private international law, it is understood that the solution of ownership tends to include movable and immovable property due to the principle of *lex rei sitae*. However, the principles of air law does not show that the law of the flagstate is applied to most of the issues related to the legal life of the aircraft. Most experts believe the law of the flagstate is the most suitable for aircraft's *jura in re*. Actually, the law of the flagstate does not intervene in the whole legal life of the aircraft but sometimes it gives in to *lex rei sitae* in the case of confiscation and execution of privileges and mortgage.

It is owing to the points mentioned above that it is believed that it is impossible to apply Clause 1 and 2 in Article 766, The Civil Code of 2005. This article states:

"1. The establishment and abolition of ownership and the content of ownership is defined in accordance with the law of the nation which possesses the property, except for the case stipulated in Clause 2 and Clause 4 of this Article.

2. The ownership of movable property in transit is defined in accordance with the law of the nation where the movable property is heading, if there is no other agreement."

With Clause 1, there is probably no discussion because Point a, Clause 2, Article 5 of Vietnamese Civil Air Law, 1991, stipulates that the ownership of an aircraft is defined in accordance with the law of the nation where the aircraft is registered. However, with Clause 2, there is something to consider. Some western lawyers believe *res in transitu* (things in transit) is most suitably adjusted in accordance with the law of the place of destination in general and base airport in the case of an aircraft. This means that Clause 2 as mentioned above can be applied to aircraft. This is quite a complicated problem that requires further discussion.

4. Criteria for the definition of legal person's nationality

It seems that Article 765, Civil Code of 2005 takes the location of establishment of the legal person as a criterion for the definition of legal person's nationality. These stipulations show that it is impossible to apply to businesses in air transport. In order to define the nationality of an airline, it is necessary to take its business operation into account. Criteria for assessment include its location of establishment and registration, head quarters and power of control.