one of the largest rice exporters and become one of the lower mid-income level countries (i.e., GDP per capita per annum between US$1,000 and US$3,000). However, poverty and overpopulation are still big problems. The country's export products are mainly electronics, garments and footwear, rice, coffee, peppers, seafood and raw materials, such as oil and gas.

III. Political System

4. Vietnam is a socialist country. The current Constitution (1992) consists of 147 articles divided into twelve chapters that follow a preamble, embodying the policy and legislation of *Doi Moi*. As to the political system, it is stated that:

> The State promotes a multi-component commodity economy functioning in accordance with market mechanisms under the management of the State and following a socialist orientation. The multi-component economic structure with various forms of organization of production and trading is based on a system of ownership by the entire people, by collectives, and by private individuals, of which ownership by the entire people and by collectives constitutes the foundation. (*Constitution*, Art. 15).

Under the current Constitution, freedom of enterprise is also recognized. However, individual rights and freedoms must yield to collective interests. Hence, freedoms may be restricted from time to time by the law when it appears to be contrary to the Constitution's purposes.

While the economy is a 'multi-component commodity', the politics is under the leadership of a single party: the communist party of Vietnam (the 'Party'). The Party is a large organization that has many para-administrative organs, expanding down to the lowest administrative levels, under the leadership of a General Secretary. He is voted and elected by the Party's National Congress that is held once every five years.

5. The National Assembly is the supreme legislative body and consists of 496 deputies. It consists of only one Chamber with a term of five years. Any citizen over 18 years of age may vote and those over 21 may stand for election. Candidates are normally introduced by the Party, the Government and the Fatherland Front. According to statistics from the most recent election, the women's percentage of the total of deputies is about 20%. Recently, there has been a trend to give more powers to the General Assembly and a start of a process called democratization at local administrative level (villages and wards).

The Assembly elects the Prime Minister who will nominate his ministers to establish the Government, subject to the approval of the National Assembly. The Assembly also elects the President of the State Council (the 'President'). The President together with the Prime Minister and the General Secretary of the Party become a triumvirate of powers in Vietnam. In short, Vietnam is constructing a State of laws, with a division of powers along legislative, executive and judicial lines. The State

is constructed under a principle of 'concentrated democracy', under the leadership of the Communist Party.

IV. Social and Cultural Values

6. Like in all Far Eastern countries, Vietnamese culture has been shaped by Buddhism, Confucianism and Taoism. Confucianism is based on fundamental individual obligations towards collective structures, Taoism favours the state of resignation, flexibility and modesty, Buddhism views life as a 'circle between reason and consequence'. Hierarchy, trust and loyalty are cornerstones of harmony.

Vietnamese cultural values are now mixed with various foreign influences, the most visible of which come from China and France. For example, the tradition of codification in Vietnamese law is inherited from the French culture but the reluctance to bring a dispute into court is most probably derived from Taoism, a philosophy from China.

§2. Legal Family

7. While features of the French legal family are still visible in Vietnamese contract law today, it would be a mistake to think that the current Vietnamese Civil Code is just similar to the French Napoleonic Code. Laws of other socialist and ex-socialist countries, such as Russia and China, also strongly influence Vietnamese civil law. With the long history of wars, foreign influences and its specific political system, it is difficult to qualify the Vietnamese legal system into any legal family. For certain, the Vietnamese legal system is a civil law legal system.

8. In the feudal periods, Vietnamese monarchies focused on building a strong and disciplined State to protect the country from aggression from abroad rather than on establishing a civil society. Criminal law was severely imposed, while civil relationships were flexibly governed. Therefore, Vietnamese law is difficult to fit, in a Western way of categorization, into any particular 'legal family'. Civil relations were governed in a basically criminal code, the *Hong Duc Code* (or QuocTrieu-HinhLuat) adopted by King Le Thanh Tong in 1483. However, even at that time Vietnamese civil law had been relatively developed as regards to property law and procedural law (see paragraphs 34 et seq. *infra*). Civil wars and the stagnation of the economy in the sixteenth century resulted in the decline of feudalism. People also worried little about their economic rights. As a consequence, the further development of contract law was not pursued.

9. During the eighty-year colonial period, starting from 1865, the French had imposed the Napoleonic Code into Indochina, including Vietnam. The French legal tradition was continued in the South until 1975. Imposing French law on Vietnam did not mean that the people knew French law by heart, nor that the courts at that time followed the principles of *liberté, egalité et fraternité* of the Napoleonic Code. Dating back to the 1930s, many Vietnamese jurists claimed that French law

(1981) on Settlement of Succession Cases. They are not considered as sources of civil law. However, they may be used as gap-filling guidelines for specific kinds of disputes.

III. Interpretative Acts

28. As in other countries, interpretative acts play an important role in applying principles set forth in the Civil Code. Many provisions in the Code are general by nature and usually contain words like 'unless the law provides otherwise' or 'in accordance with the law'. In this case, one will have to look at interpretative acts for further clarification. Normally they are issued in the form of sub-law documents. As examples, below are some of the regulations interpreting provisions of the Civil Code:

- Decree 163/2006/ND-CP dated 29 December 2009 on security transactions.
- Decree 83/2010/ND-CP dated 23 July 2010 on registration of security transactions.
- Decree No. 17/2010/ND- CP on Rules on Sales of Assets in the form of Bidding and Tendering issued by the Government on 4 March 2010.
- Resolution No. 45/2005/QH11 on Implementation of the Civil Code on 10 August 1996.
- Decree No. 47/CP on Compensation for Damages Caused by Public Servants, issued by the Government on 14 June 2005.
- Resolution No. 58/1998/NQ-UBTVQH10 on Housing Civil Relations, which were Established before 1 July 1991, adopted by the Standing Committee of the National Assembly on 20 August 1998.
- Resolution No. 03/2006/NQ-HDTP on guiding the application of a number of provisions of the Civil Code on extra-contractual damage compensation on 8 July 2006.
- Resolution No. 1037/2006/NQ-UBTVQH11on house-related civil transactions established prior to 1 July 1991 and involving overseas Vietnamese on 27 July 2006, and
- Decree No. 138/2006/ND-CP on providing detailed regulations for implementation of civil code with respect to civil relations involving foreign elements on 15 November 2006.

IV. Analogies

A. General Conditions of Analogies

29. The Civil Code, despite the fifteen years it took to make it, cannot solve all contractual disputes. This Code regulates civil law relations, which by nature are based on the principle of freedom of contracts. Therefore, the parties may voluntarily engage in all variations of agreements whose contents and purposes are not provided in the law, if they are not contrary to the law. For instance, a civil court may not refuse to hold a case just because of a lack of provisions directly applicable,

if the nature of the case pertains to that of civil transactions. Such cases are called 'gaps' in the law and the technique to fill the gaps is called 'analogy'. The Civil Code accepts the principle of applying analogy when the parties do not provide otherwise or custom and practices do not provide otherwise. (C.C., Article 3).

B. Customs and Practices

30. Customs and practices are considered a source of gap filling or a source of contract interpretation. For example, when a contract contains a term (or provision) or wordings that are difficult to understand, they will be interpreted in accordance with the customary practice of the place where the contract was entered into. As a means of gap filling, the customs and practices to be applied must not be contrary to the remaining part of the contract (i.e., the common intention of the parties) and the mandatory provisions of Vietnamese law.

C. General Principles of the Civil Code (Analogia iuris)

31. Part I of the Civil Code contains several principles which will be applied to all civil transactions. These are the principle of good faith, the principle of respecting and protecting personal rights and property rights, the principle of freedom and voluntariness of undertakings and agreements, the principle of equality, and so on. If an issue in a contract arises which the parties have not anticipated, the court will try to seek a provision in the Civil Code that regulates similar circumstances. This method is called analogy by law (*analogia legis*). If such provision cannot be found, then the court will solve the dispute at hand based on the general principles of Civil Law, as set forth above. This method is called analogy by principle (*analogia iuris*). In so rendering the decision, the court must state clearly why such analogy method is applied, since it can be used only as the last resort of the case.

V. International Sources of Law

32. Foreign law and International Treaties can be sometimes treated as a source of law. Such situations are anticipated in Part 7 of the Civil Code, which states that if Vietnam has signed or acceded to contain provisions in an international treaty which conflicts with the provisions of the Civil Code, the provisions of the international treaty shall apply.

VI. Soft Law

33. Soft law that is recognised in Vietnam include UCP500 or UCP600 for documentary credits, ISDA for swaps and derivatives, GMRA for repo or FIDIC for construction contracts. Other reference could be to the *UNIDROIT Principles of International Commercial Contracts* (the PICC), published in June 1994, constitutes a

into seven parts: General Provisions, Patrimony and Property Rights, Civil Obligations and Civil Contracts, Succession, Regulations on Transfer of Land-Use Rights, Intellectual Property Rights and Transfer of Technology, and Juridical Acts with Foreign Elements.

Apart from the Civil Code, other statutory laws remain an important source of contract law in Vietnam. The Civil Code often provides a provision like 'unless the law otherwise provides'. Thus, if there are other laws or regulations which more specifically or more directly govern the case at hand, the Civil Code is not applicable, but such specific law or regulations are applicable, pursuant to the principle '*lex specialis derogat legi generali*' and '*lex posteriori derogat legi interiori*'.

§4. Definition of Contract

I. The Definition in the Civil Code and the Commercial Law

42. Article 388 of the Civil Code defines a contract as 'an agreement of two or more parties directed towards the creation, modification or termination of civil rights and obligations'. As such, the notion of contract is also extended to the transfer of legal consequences or creating measures for performance among the parties involved.

By saying 'agreement', the Civil Code intends to refer to the common will (the 'consent') and the expression of wills of at least two parties participating in the contract. Moreover, the consents must be interdependent. Without this there is no contract (the contract will be voidable for mistake, fraud or deceit, see paragraphs 156 et seq. *infra*). Finally, the consent must be aimed at the creation of legal effects (legal rights and obligations), and not only for example social or moral obligations. If A agrees with B to go to the cinema together, no contract is created.

43. The above-mentioned definition in the Civil Code is only related to civil contracts but could be extended, by way of analogy, to other types of contracts. As noted, contracts in Vietnam are also governed by other laws and regulations.

II. Principles of Contract Law

44. The contract in Vietnam is based on two principles (C.C., Article 389):

(a) Freedom of contract, that is, a party is free to enter into a contract or not and to draft the contract in whatever forms and contents as agreed with the other party, provided that such forms or contents are not immoral or illegal.
(b) Voluntariness, equality, goodwill, cooperation, honesty and fair dealing. Those general words can be summed up in a term which is common in other countries: good faith.

Just as freedom of enterprise is the fundamental principle of the economy, the freedom of contract is the fundamental principle of law, because the contract is an agreement between the parties. An agreement would lose its sense if it did not stem from the free will of the parties. The contract which does not respect this principle would be held void for lack of voluntariness (C.C., Article122). Obviously, the freedom of contract also has its own limit if it is abused by a stronger party in a contract for imposing unreasonable conditions on the weaker party. In order to effectively protect the right of the weaker party, the Civil Code requires that the parties must perform and conclude their contract in good faith. Of course, the principle of good faith can correct the disadvantages of the principle of freedom of contracts in as much as it corrects the side effects of the first.

45. Apart from these two principles, contracts are also subjected to other general principles which are implied in the contractual nature, such as *pacta sunt servanda* (C.C., Article 412) and reconciliation. The first principle means that a contract legally concluded shall bind the parties to the contract. Such binding force is not only derived from the contract itself, but also from other mandatory laws and regulations and to some extent, usages and common practices. Reconciliation means that contracts are always subject to actual mutual agreement and the court always gives favour to the modification or discharge of contracts if it is truly what the parties have agreed to.[1] These two principles are not contradicting each other because at the end of the day, the parties' will is always respected; which is basic to contract law, in Vietnam and elsewhere.

1. Ngo Cong Ly, 'Ton trong quyen dan chu tu quyet cua cong dan va ngan chan toi pham', *Business & Law* 3 (3 Jan. 1998).

III. The Parties to the Contract

A. Who can be Party to a Contract?

46. The parties to the contract are subjects (*chu the*) of the contract. The Civil Code lists four categories of subjects: individuals, legal persons, family households and cooperative groups. Individuals comprise all natural persons including foreigners. Legal persons are organizations which are recognized or established by law. Their legal entity is recognized *ipso iure*. Family households are entities whose members contribute their land-use rights and certain assets for common use for agricultural purposes or other purposes to be specified or not. Their legal entity is recognized *ipso facto*. Cooperative groups are entities whose members contribute either their capital or conducts in order to perform a certain task. They are established by a cooperative contract, certified by a competent State authority. As such, their entity is recognized *ipso iure*, but their scope of liability is only limited to certain acts conducted for the purposes of performing this task.

Whereas the first two categories are similar to that of natural person and legal (or moral) person in other legal systems, the concepts of family households and cooperative groups form specific characteristics of Vietnamese law. In family households, the members bear unlimited liability for the transactions conducted on behalf

When an issue in a nominate contract is not therein stipulated, it will be governed by the main rules in relevant laws or regulations. Hence the parties' agreement to the type of the contract and a few essential terms will suffice to make the agreement definite. However, if an issue in an innominate contract is not therein stipulated, either by ignorance of the parties or intentionally, such gap may be filled only by interpretation or analogy.[2]

1. See J.H. Herbots, 'Belgian Monograph', *Encyclopaedia* (1993): 51.
2. See paras 29 et seq.

VII. Communicative and Aleatory Contracts

72. In communicative contracts, one knows from the beginning the exact outcome and the obligations of each party. A contract is aleatory when the extent of one party's performance depends on some uncertain future events and the other party's performance varies correspondingly. Aleatory contracts are not directly defined in Vietnamese law, but they can be qualified as contracts which impose conditional performances upon appearance of an uncertain event. (C.C., Article 294). The most practical example of an aleatory contract is the insurance contract, such as the motor vehicle insurance contract and the contract on promises of rewards and prize competition. The insurer's extent of performance will depend on whether the damage to the motor vehicle will arise during the insured period. So far, there is still no experience of sales contracts in exchange for life annuity in Vietnamese law, which is also a kind of aleatory contract in other legal systems.

VIII. '*Intuitu personae*' Contracts

73. The contract is traditionally called '*intuitu personae*' when it is entered into because one requires a work to be performed by a specific person with his particular skill in the arts or specific expertise, for example, a contract with a famous painter or a well-known attorney. However, not all service contracts and agency contracts are '*intuitu personae*'. The clear distinction between *intuitu personae* contracts and other contracts is necessary to determine whether the contract is terminated when the obligor cannot perform his obligations; in other words, the object of the contract. If the contract is '*intuitu personae*', then when the obligor dies or is liquidated, the contract is terminated. (C.C., Article 424, §3). In other cases the obligations of the obligor pass on to the heirs. Obviously, obligations *intuitu personae* cannot be performed by a third party. The most obvious alternative to the '*intuitu personae*' contract is the contract of agency (see paragraph 308 *infra*).

IX. Standard Form Contracts

74. Under the Civil Code, standard contracts are defined as 'contracts which are drafted in a uniform manner (a 'form') by the offeror for the acceptance of the other

party (the offeree) in a reasonable time; if the offeree accepts (the offer), he will be deemed to have agreed to all the terms and conditions provided in the standard form offers of the offeror'. (C.C., Article 407, §1). The Code gives favour to the offeree by requiring that he must have had a real knowledge of the standard clauses. Therefore, the court may apply the *contra proferentem* rules of interpretation so that if a standard clause is unclear, an interpretation against the offeror is preferred. (C.C., Article 407, §2). However, it is not allowed to annul clauses which create a clear unbalance between the mutual rights and duties of the parties, neither does the concept of gross disparity exist in Vietnamese law.[1]

1. See however the Belgian concept of gross disparity in J.H. Herbots, 'Belgian monograph', *Encyclopaedia* (1993): 52.

X. Conditional Contracts and Terms

75. Condition is a future and uncertain event, as opposed to term (time clause) – a future and certain event. Conditional juridical acts are acts whereby their enforceability is dependent upon a future event, either called conditions or terms. The conditional contract is a form of conditional juridical act.

76. Article 125 of the Civil Code states that a juridical act can be performed under a condition. In addition, it is widely accepted that prescriptions and lapse of time are also sources of civil rights and obligations. Thus, a juridical act can also be performed subject to a prescription. Both 'condition' and 'term' are used interchangeably when prescribing conditional contracts in this section.

The Vietnamese Civil Code does not contain provisions that further regulate the issue of conditional juridical acts, such as non-genuine conditions or '*sivoluerim*' conditions.[1] Article 125 §1 simply states that: 'in circumstances where the parties have an agreement on the conditions which give rise to or cancel a civil transaction, the civil transaction shall arise or be cancelled upon the occurrence of such conditions.'

For the purposes of Article 125, only express condition, and not tacit condition, is regulated. However, tacit conditions may arise from the law. In this case, they are called statutory conditions. An example of statutory conditions is the condition for validity of a juridical act. (See paragraphs 77 et seq. *infra*). Tacit conditions may also arise from established practices between the parties or from usage. Those conditions may be constructed by way of interpretation, gap filling (see paragraphs 182 et seq. *infra*) or by analogy (see paragraphs 29 et seq. *supra*).

1. See the 'Hellas monograph', *Encyclopaedia*, 130.

77. Conditions are divided into *suspensive* conditions and *resolutory* conditions. A suspensive condition causes the juridical act to take effect upon the occurrence of the event; a resolutory condition ends the juridical act upon the occurrence of the event. (C.C., Article 125). As such, the fulfilment of the condition has no retroactive effects.

§10. Good Faith: Principles of Goodwill and Honesty

I. Principle of Goodwill and Honesty

105. Though the terminology of good faith is not used in the same way under Vietnamese law (as in Western countries), concepts similar to good faith are long-rooted in Vietnamese legal tradition, namely the principle of respecting good morals and traditional values.

The current Civil Code refuses to use the Western terminology 'good faith' and returned to the Vietnamese tradition of mutual trust by naming it the principle of goodwill and honesty. This principle underlies a number of other provisions contained in the Civil Code and other laws and regulations related to contracts. By stating '*the parties must follow the principle of goodwill and honesty by [...] helping and facilitating each other*', Article 6 of the Civil Code clearly indicates that the parties' behaviour must conform to goodwill and honesty throughout the life of the contract, and perhaps including the negotiation process. Furthermore, at the stage of contract performance, that the parties should cooperate with each other in a goodwill spirit (C.C., Article 283), which is again an indication of the principle of goodwill and honesty. A similar provision can be found in Article 11 Commercial Law.

II. The Functions of Goodwill and Honesty

106. The principle of goodwill and honesty has two functions in contract law: as a sword and as a shield of justice.

As a sword, goodwill and honesty play a 'supplementing' role; which means that if we have a gap in the law, then the court may use *analogiaiuris* (see paragraph 34 *supra*) and decide how the gap can be filled in accordance with the principle of good faith.

As a shield, the principle of goodwill and honesty will restrict or derogate provisions which may lead to performance contrary to goodwill and honesty. Article 389 of the Civil Code provides that 'contract must be concluded in accordance with the principle of equity, cooperation, goodwill and honesty'. This spirit stems from an Ordinance which was issued in the earlier time of the Republic on 10 October 1945, which stated that 'the application of French civil law in the newly established Vietnamese land must not prejudice people's legitimate interests'. As for performance, Article 412 of the Code again provides that 'contracts must be performed honestly, according to the spirit of cooperation, so that it provides the best benefits for the parties and protects their mutual trust'.

107. In practice, however, good faith was rarely enforced before the court. To a limited extent the judges try to use other terms with the same function, such as 'due consideration', 'encourage the ethical conduct of the parties'. In short, good faith in Vietnamese law is not considered at the time the contract was made but at the time it was performed.

At the end of the day, the function of good faith is nothing but a compromise between the interests of both parties to the contract. Finally, it would be wrong to assume that the content of good faith in Vietnam is the same as the content of good faith in other countries. Each judge or person while deciding a case or considering to sign a contract always bases his judgment on his knowledge and cultural background. The duty of good faith was commonly understood in Vietnam as '*tin*' (mutual trust).

108. Many urgent aspects – where the principle of goodwill and honesty can play an important role, are not yet dealt with in the Civil Code. These are gross disparity, excessive risk and hardship. The Civil Code does not have the concept of hardship (clausule *rebus sic stantibus*), which enables the court, based on the principle of good faith, to set aside or modify the contract if unforeseen circumstances have arisen and have created major difficulties at the performance of the contract. Practical experience also shows very few attempts of the court to decode a case based on the principle of goodwill and honesty. It is also partly because Vietnamese judges lack creativity (see paragraphs 19 et seq. *supra*).

III. The Scope of Concept of Goodwill and Honesty

109. The principle of goodwill and honesty, as provided by Articles 389 and 412, operates with respect to all rules that are binding upon the parties – express terms and implied terms. In addition, as a general principle of civil law (C.C., Article 6), goodwill and honesty does not only apply to contracts, but are also applicable to all civil juridical acts. It is enlarged from the scope of application under French tradition to become a 'super control norm' as the modern trend so suggested.[1] However, the difference between the two approaches should not be exaggerated. The importance of this principle does not rest on how large the scope of goodwill and honesty is, but how the court will interpret and apply this principle. Since the meaning of goodwill and honesty is unclear, while imposing such principle we should be beware of provoking freedom of interpretation. No matter how meaningful a general word is, it is still a general word and will be, in the final analysis, subject to particular judgments. However, the judgment of the party or the judge depends mostly on where they come from.

1. See Art. 204 *BGB*, Art. 6:248 of *NBW* and Art. 1.7 of the *UNIDROIT Principles of International Commercial Contracts*.

§11. Style of Drafting

110. Contracts in Vietnam are shorter and simpler than in other common law countries or even other civil law countries. It is a matter of habit. Such contracts are usually enforceable because ungoverned terms are supplemented by the Civil Code, so long as the parties have agreed on the subject matter of the contract before drafting it. Also, the Vietnamese prefer using simple and clear words, both in drafting the Civil Code and in drafting contracts. An average length of a contract in Vietnam

registered subsequently. However, such avoidance is not entirely absolute. When a party seeks to avoid a contract, by petitioning to the court to invalidate the contract, based on a lack of formal requirement, the court will give the parties a chance to fix such shortcoming. At a failure to do this the court will avoid the contract. (C.C., Article 134). (See paragraph 156 *infra*).

Article 404 §5 of the Civil Code states that if a contract is required by law to be notarized, certified, registered or approved, then the effective time of the contract shall be the time when such acts of notarization, certification, registration or approval are rendered. By the same token, if a contract has been signed in writing, notarized or registered, its modification must follow such forms. Otherwise, it will have no legal effect. For example, a contract for transfer of a pledge must be notarized, because it is a modification of a notarized contract (the pledge contract).

129. However, when the law provides words like 'the contract … must be signed in writing if the parties so stipulate', or when the law requires a contract to be in written form without warning of the consequence of failing to comply, it is assumed that such requirement is for the purpose of evidence (*ad probationem*), for example, when the parties may require notarization for a lease contract with a term of less than six months or a contract for transfer of rights. Even then, the modification of such contract should be made in the same form as it was concluded, because it will have a higher evidential effect.

130. It should be noted however that the writing requirement *ad probationem* can be rebutted. When the parties execute a contract in written form with a four-corner clause, that is terms and conditions provided in such contract constitute an entire agreement, no oral agreement is allowed. The court may, however, set aside such clause and incorporate an oral agreement into such contract, if it is clear from the surrounding circumstances that such agreement existed.[1]

1. See the case *Dat Thinh v. Giao Thong Van Tai Hai Phong* (1995).

§4. Evidential Requirement & Proof: A Matter of Procedural Law

131. Vietnamese law, as other legal systems, makes a clear distinction between procedural law and substantive law. They are two distinct fields of law that supplement each other and not a single subject. Whereas substantive law aims at a fair solution to an issue as a general matter, procedural law aims at making such solutions exercisable in a specific case.

132. Vietnamese law considers issue of proofs and evidential requirements as procedural rules and not substantive rules. Therefore, those issues are not covered by the Civil Code, but the Civil Proceedings Code on 15 June 2004. According to the said Law, the following means can be considered as proof: testimony from a person involved, written evidence, expert assessment or evaluation assessment at site. The Law does not provide exactly whether the written evidence will be considered more seriously than oral testimony without such qualification, the judge may use his own discretion at assessing the evidence.

§5. Modification of the Contract

I. Modification by the Parties

133. The contract validly concluded may be modified or even terminated by mutual agreement between the parties without further requirement such as *causa* or consideration. It is unclear under Vietnamese jurisprudence whether such contract as modified is a new contract or not. In any case, the only contract still in force is the old contract with relevant modification. When the contract was concluded in a specific form (in writing, with notarization, certification, registration or approval), the modification should follow such form to be effective (C.C., Article 423 §2).

II. Modification by the Judge; Unforeseen Circumstances

134. A concept by which a judge may modify or adjust the contract in the case of unforeseen circumstances which alter materially the equilibrium between the parties, called '*clausula rebus sic stantibus*' or 'hardship clause' is regulated under foreign laws or international jurisprudence. Perhaps the most complex regulations on hardship are provided in section 2, Chapter 6 of the UNIDROIT *Principles of International Commercial Contracts*.

As yet, the concept of hardship does not exist in Vietnam nor did it exist in other Civil Codes of ex-socialist countries, prior to 1990.

III. Modification by the Judge; Obligations with Regard to Registered Property

135. This situation is dealt with in Article 134 of the Civil Code, which states that if the contract does not comply with formal requirements provided by the law, then the judge, at his discretion, is entitled to grant the parties an extra period to rectify such shortcoming. This case most probably occurs for the obligation with regard to registered property. (See paragraph 128 *supra*.)

IV. Modification by the Judge; Error and Undue Influence

136. When a party has made a relevant mistake and then concludes a contract, he is entitled to request the other party to change the content of the contract to what he originally wanted it to be. Under this provision, a mistake is relevant if it is related to the subject matter, the characters of the objects and the content of the contract. If the other party refuses to change such contents, then the party in error is entitled to request the court to invalidate the contract. Contrary to some civil law countries, in this case, the judge may not modify the contract, otherwise it could violate the principle of voluntariness of the parties to the contract. (See paragraphs 157 et seq.)

interpretation must be well founded and comply with the rules of interpretation, which will be further discussed in paragraphs 183 et seq.

The mistaken fact must be related to the circumstances at the time that the juridical act was created and the mistake must exist at the time that the juridical act was created. Mistake as to a future circumstance is inoperative. Nor is there a mistake if a party then realizes that the terms and conditions of the contract were so unfair and have caused gross disparity between his performance and the performance of the other party. The Civil Code provides no provision for gross disparity. At best, such party may apply only *contra proferentem* rules to such terms. (C.C., Article 126, §2, see also paragraphs 183 et seq. and paragraphs 242 et seq. *infra*).

159. The contract that is concluded by mistake is not per se invalid. It may well be possible that the mistaken party, after discovering the true facts accepted the terms as he now understands them. By the same token, the non-mistaken party may agree to modify the contract to comply with the content that the mistaken party understood. In this case, the contract is deemed to be concluded at the time that the mistaken party discovers the true facts or when the other party agrees to modify the contract. Thus, a lack of common intention at the time that the contract is concluded is no reason for rendering the contract void. If the non-mistaken party does not agree to comply with the content as understood by the mistaken party, the latter may bring the case to court for declaring the juridical act null and void. For giving a ruling, the court will have to discover if the claimant was in mistake.

Finally, the Civil Code does not mention mistake of law. By way of an interpretation *a contrario*, a contractual mistake of law is not an excuse for the mistaken party, pursuant to the principle *ignorantia juris non nocet*.

VI. Fraud

160. The notion of fraud is comparable to the notion of misrepresentation in English law. However, Vietnamese law does not draw a line between fraudulent, negligent misrepresentation and innocent misrepresentation, as English law does. Article 132 states that where a party participates in a civil transaction as a result of deceit or threats, it shall have the right to request a court to declare such civil transaction to be invalid.

Deception in a juridical act can be an act of a party for the purpose of misleading the other party as to his identity, the nature of the subject, or the contents of the transaction on the basis of which the misled party has established the transaction. This Article 132 requires in the first place the causal connection between the intention of a party to mislead his opposite party and the conclusion of the contract. The misleading fact must be limited to the subjects, and characters of the objects. Above all, there must be a causal connection between a mistake of a person and the fact that the contract was concluded. For example, if a seller of the house said that his house is without defects, then the fact that the buyer discovered some substantive defects of the house after the purchase is in itself not enough to render the contract void. It may well be possible that the buyer bought the house in order to use the land beneath, and would sooner or later tear down the house in order to build a new

one. In such a case, the quality of the house is not the reason for the buyer to avoid the contract because of fraud.

VII. Threat

161. A threat in a civil transaction is an intentional act of a party that causes fear to the other party. Therefore, the latter must undertake a civil transaction in order to avoid damage to life, health, honour, reputation, dignity and/or property of the threatened party or its relatives (C.C., Article 132).

Pursuant to the prevailing court decisions, the meaning of threat must be interpreted broadly. Thus, it comprises not only threats to persons but also to property, not only direct threats but also indirect threats. A car mechanic who refuses to help a motorist unless the latter agrees to pay an unreasonably high service fee may not be normally viewed as a threat but as an exercise of freedom of contract. However, such refusal to deal in a specific situation (e.g., at midnight, when other dangers may confront the motorist) is a threat. In short, not just an unlawful act, but any abuse of circumstances may be sufficient to be a threat, provided that it is serious enough to influence a reasonable person to conclude the juridical act.

A contract obtained by physical violence or by threats (either directly or indirectly) involving imminent and serious danger is null and void. Article 132 of the Civil Code provides that where a party participates in a civil transaction as a result of threats, it shall have the right to request a court to declare such civil transaction to be invalid.

162. Like mistake and fraud, the threat makes a juridical act avoidable because the act lacks the voluntariness between the parties, one of the four conditions for an juridical act to be valid (see paragraphs 50–55 et seq. *supra*). However, such voluntariness need not have existed at the time of the establishment of the juridical act. The threatened party may indeed rectify the act that was concluded under threat. Therefore, threat is only a cause for relative invalidity of a juridical act. (See paragraph 165 *infra*).

If the juridical act is held by the court as invalid, the party committing a deception or threat must compensate the other party for damage. The transacted property, the fruits and income of the party committing the deception or threat may be confiscated and appropriated into the State fund. The law is silent as to under which circumstances such confiscation can be made.

163. The Code does not anticipate the situation where the duress was exerted by a third party. In the absence of relevant provisions, it is arguable that this case must be considered depending on whether the other party should have known about the duress or not and whether he can cooperate with the first party against such duress or threat. If he could have helped the first party to avoid the dangers but did not, he may be held responsible for the threat on the basis of tort.

Chapter 3. The Contents of a Contract

§1. The Different Clauses

I. Express Terms and Implied Terms

174. The Civil Code does not differentiate contract clauses as to express terms and implied terms. However, these notions can be understood in the light of the principle of analogy, which is stated in Article 3:

> In cases which the law does not provide for and for which the parties do not have an agreement, customary practice or analogous provisions of law may be applied provided that such applications are not contrary to the basic principles of this Code.

Therefore, express terms are terms which are stipulated by the parties in the contract. Implied terms are terms that are stipulated by the Civil Code, usages or by analogy, to fill the gaps that the parties left when they concluded the contract. The reason for the adoption of analogy is understandable because the parties may not predict all the circumstances that may arise at the time that the contract was concluded. If the agreement of the parties is not complete, the content of the contract can be supplemented by similar provisions of laws, general principles of the Civil Code, usage and equity.

The Civil Code is obviously the main supplementary source for contracts (see paragraphs 110 et seq. *supra* on style drafting). Some of the provisions regulated therein have a mandatory character (*ius cogens*), such as a guarantee for the quality of the goods sold for commercial purposes; others have suppletive characters (*ius dispositivum*), such as the forfeiture of deposit in case of non-conclusion or non-performance of the party who deposited an asset as a security for performance of his obligation. Such remedy is only applicable when the parties did not otherwise provide.

II. Conditions and Warranties

175. Condition in the meaning of this section is different from the 'resolutive' and 'suspensive' conditions mentioned in paragraphs 74 et seq. Here conditions are terms which are essential to the operation of the contract and the breach of a condition may lead to termination of the contract.[1] However, warranties are terms whose breach gives the aggrieved party only the right to claim damages. In some specific contracts, such as loan contract or insurance contract, the meaning of warranties is quite the opposite. It is the representation of facts from one party to another, whose breach may give the other party the right to terminate the contract and claim damages. Such meaning is excluded in this monograph.

Only on two occasions, the Civil Code mentions terms which have similar characteristics of condition. The first is the suspension of a bilateral contract and the second is the termination of contracts. These issues are represented in paragraphs 251 et seq. *infra*.

1. It is presented in conformity with the same concepts in common law countries.

III. Standard Terms

176. The issue of standard terms is related to the standard form contract, which is presented in paragraphs 74 et seq. *supra*. In general, stipulation of standard terms is acceptable in Vietnam. Such practice is mostly used for telephone service contracts, small credit contracts, or popular software license contracts, where many customers are the opposite party to one contractor. In a way, stipulating that 'issues not governed by this contract will be regulated by the Decree X' is also an application of standard terms.

Normally, standard terms are interpreted primarily in accordance with the literal meaning. If such interpretation is impossible, then, for the sake of fairness, the court may apply the *contra proferentem* rules so that if a standard clause is unclear, an interpretation against the offeror is preferred. (C.C., Article 406, §2).

For the time being, the Civil Code provides no special regulations in case of application of standard terms to consumer sale transactions, except for the general obligation of the seller to notify the buyer on the use and the quality of the goods sold, and the obligation to guarantee the quantity of such goods. No 'black list' or 'grey list' has ever been issued.

IV. Exemption Clauses and Limitation Clauses

177. The terms of exemption clauses and limitation clauses are not regulated in the Civil Code. Thus, the parties may, pursuant to the principle of freedom of contract, incorporate such clauses into the contract. However, some mandatory rules may not be simply ignored by an exemption clause, such as the obligation of guarantee or formal requirements, in order too validate the contract. Also, Article 126 of the Civil Code states that 'if the party with an economically superior position introduces into civil transactions contents which adversely affect the party with an economically inferior position, then the civil transaction shall be interpreted in a manner tending to benefit the party with inferior economic advantages.' Exemption clauses and limitation clauses are clauses contrary to the general principle stated in Article 308, where non-performance will give a right to the innocent party to claim damages.

Chapter 4. Privity of Contract

§1. Privity of Contract; Contract for the Benefit of a Third Party

I. Third Parties and the Contract

190. As in other legal systems, contracts in Vietnam are normally effective only between the parties to the contract. The rights obtained under contract are rights 'in personam'. The parties to the contract may agree on a performance for the benefit of a third party. By the same token, one of the parties may promise that a third party will perform the contract. Obviously, such a contract may not impose obligations on third parties without their consent. Otherwise, it would be contrary to the principle of voluntariness (see paragraphs 44 et seq.). However, some exceptions can be found, namely contracts signed with an unauthorized agent with knowledge of the principal (see paragraphs 308 et seq.), or collective labour agreements within an enterprise. In case of collective labour agreements, from the date the agreement has been registered at the local bureau of service, war invalids and social affairs, its terms and conditions are binding on any employers and employees entering the enterprise.

191. Also, a three-party relationship may arise in certain cases, such as with transfer of rights and obligations or *Actio Pauliana*. (see paragraph 211 *infra*). Another example is when a contract may influence the position of a third party, for example, in the situation where a third party acquired illegitimate interests in good faith (see paragraphs 105 et seq. *supra*); or a situation of joint and several obligations (see paragraphs 232 et seq. *infra*).

The relationship with a third party is also well-evidenced in the case of exercising the rights to priority of continue the lease of a tenant in a lease contract when the lessor sells the premises to another party ('*quyen luu cu*', see paragraphs 436 et seq. *infra*).

192. Finally, the relationship between parties to the contract and a third party is reflected in the guarantee relationship. In this case the guarantor of the obligor, even though a third party with respect to the contract between the rightful party and the obligor, has rights and obligations strictly depending on the extent of the rights and obligations of the obligor. If for example the obligor has exempted himself from liability, the guarantor is also allowed on the same ground to invoke the same exemption. This is one of the characteristics of the accessory relationship between the guarantor and the obligor (see paragraphs 441 et seq. *infra*).

II. Contract for the Benefit of a Third Party

A. *Definition*

193. Article 406 §5 of the Civil Code states that: 'Contract for the benefit of a third party, which is a contract under which the contracting parties must perform their obligations and the third party shall enjoy benefits from the performance of such obligations.'

A contract for the benefit of a third party is different from a guardianship (see paragraphs 103 et seq. *supra*). With guardianship, only the guardian is under the obligation to act for the benefit of the beneficiary, whereas in the contract for the benefit of the third party both parties may be liable to act for the third party's benefit. Moreover, such obligation does not arise from the stipulation between the parties but from some statutory provisions. Also, the guardian is under a legal obligation to manage the patrinomy of the person (not of himself) under guardianship, exclusively for the latter's benefit (C.C., Article 69 §2). In the case of a contract for the benefit of a third party, the obligor also performs the contract for the benefit of himself (being released from liability towards the rightful party).

However, the words of Article 406 §5 do not necessarily mean that both parties have to perform their obligations to a third party. In the case of unilateral contracts (see paragraphs 65 et seq. *supra*), the rightful party may request the obligor to perform its obligation to a third party. In case of a bilateral contract, one party may perform its obligation to the other party, in exchange for the performance of the other party to a third party he may appoint. This usually is a situation where there is a particular relationship between such party and the third party, for example, the parent company and a subsidiary company. These contracts are also qualified as contracts for its benefit. Moreover, there is a possibility of *action directe*. Article 419 states that 'the third party may also request the obligor to perform the contract for the benefit of the third party'. To make the terminology comply with that of other legal systems, the party who requests is called the stipulator, and the party who performs is called the promisor.

B. *Conditions of Validity*

194. Pursuant to the definition, it is not necessary that the third party must accept the benefit in order to make the contract valid, as it is required in other legal systems. Thus, a contract for the benefit of a third party takes effect from the date both parties agree to conclude it. The third party acquires its right by accepting the performance, but the obligation between the parties has been created before, when the contract was concluded.

195. The right to revoke stipulations by the parties to the contract stems not from the uneffective character of the contract, but from the principle of freedom of contract. As mentioned, the parties to the contract may modify, revoke or terminate contractual terms and conditions by mutual agreement at any time they think fit. (see paragraphs 133 et seq.). However, the Civil Code also restricts the right to revoke.

§3. Transfer of Contractual Obligations

I. Differences between Transfer of Rights and Transfer of Obligations

205. Contrary to the transfer of rights (which can be interpreted as a sale of an asset), the transfer of obligations is a method to terminate the obligations of the obligor. By transferring a burden to another person, the obligation of the current obligor is thereby discharged and the contract is terminated. Hence, the termination of a contract cannot be done without the consent of the rightful party. By nature, the obligation relationship between the obligor and the rightful party is a relationship in personam. There is no general assumption that such obligation is transferable (as in the case of rights). From legislations' viewpoint, the central problem of the transfer of rights is how to protect the debtor (who does not need his consent when the rights are transferred because his position regarding the performance is unchanged). However, the central problem of transfer of obligations is how to protect the rightful party. He has the right to know whether the new obligor is capable or has enough assets to perform the obligation at least as the current obligor.

II. The Formalities

206. Contrary to the transfer of rights, which can be made orally, the transfer of obligations must be made in writing. It is for evidential purposes. If the law requires such transfer to be notarized, registered or certified at competent State agencies, the transfer becomes effective only if such formalities are fulfilled.

III. Effect of the Transfer

207. As from the time when the transfer becomes effective, the transferor of the obligation is totally discharged from performance. It is no longer an issue whether the rightful party was informed of the transfer. By allowing the obligation to be transferred, the rightful party has agreed that the existing obligation between the transferor and himself is terminated (see paragraphs 251 et seq. *infra*), together with the security attached thereon (unless otherwise agreed). In this case, the last solution for the rightful party is to reject the transfer, making it ineffective. This is why Article 315 of the Civil Code provides that 'when a secured obligation is transferred, the security is terminated, unless otherwise agreed by the parties'. This is because the security attached is an accessory obligation. It will terminate when the main obligation terminates. A means of security is normally created to guarantee the capacity to perform of the obligor. If the obligation has been transferred to a new obligor, then the latter's capacity to perform is unknown to the people guaranteeing the performance since an obligation of the security arises from the agreement between the guarantor (pledgor or mortgagor) and the (former) obligor (or by the unilateral act of the obligor himself when he is the owner of the asset pledged or mortgaged). The new obligor, or a third party, is not privy to such relationship and is not entitled to claim rights arising therefrom. Thus, it is up to the rightful party

and the guarantor (or pledgor/mortgagor) to decide whether he may wish to keep the security or not. The law is silent as to the resolution if the rightful party wants to keep a guarantee, but the guarantor refuses to guarantee the obligation of the new obligor. In this case, two options may arise. First, the transfer will become effective without the security measure attached to the former obligation. Second, the whole transfer will become ineffective if the parties may not agree upon the issue of security, if such is deemed essential from the rightful party's viewpoint.

§4. Subcontracting

208. Subcontracting is an act whereby the obligor contracts with a subcontractor to perform his obligation to the rightful party. Subcontracting is totally different from transfer of rights or obligations. In this case, the parties responsible for the performance remain the same (see paragraphs 207 et seq. *supra*). The obligation of the obligor is not terminated, nor has the right of the rightful party been altered. Only the person to perform is charged. This is similar to the case of the contract burdening a third party (see paragraph 201). The obligor becomes the guarantor to the rightful party if the subcontractor does not perform his subcontract properly to the benefit of the rightful party. The obligor is even liable for default attributed to the subcontractor. However, if the subcontractor cannot perform his contract due to the fault of the rightful party, or because of force majeure, the obligor is released from liability because such events entitle him for defence (see paragraphs 257 et seq. *infra*). In other words, nothing is changed as to the rights and obligations of the rightful party regarding the performance of the obligor which is taken up by the subcontractor. Likewise, a non-payment of the rightful party cannot be a reason for the non-payment of the obligor to the subcontractor.

209. As noted, the obligation performed by a third person differs from a transfer of obligations, since the party responsible for performance is the same. However, it is considered as a modification of a contract and would need notice from the obligor and could be subject to the consent of the rightful party. (C.C., Article 293). However, such consent needs not to be specific as to the name of the subcontractor. It is enough to stipulate in the main contract that 'the obligor is entitled to have the subcontractor perform his obligation'. In principle, all kinds of contracts except contracts *intuitu personae* can be subcontracted.

Where, at the performance of an obligation, the obligor uses the services of other persons, he is responsible for their acts as if they were his own. For the application of Article 293 it is not relevant whether the other person is a servant or a subcontractor. Thus, if the damage is caused by his employee, he will be held responsible even if such act would not have been imputable to him if he had performed himself, in the same manner as set forth above. The situation is also the same if the obligor is to blame for the choice of subcontractor (*culpa in eligendo*).

rightful party instead of the things. This rule may apply in the case of things subject to decay or depreciation. The Civil Code provides that a rightful party who has delayed the acceptance must compensate the obligor for damage. He shall also bear all the risks arising as from the time of delaying the acceptance except in circumstances where otherwise agreed or otherwise stipulated by law.

§2. Types of Performance

I. Payment

223. There are a few differences between an obligation to pay and an obligation to give a thing. This is because money is easy to convert into goods or services (but not vice versa) and it is difficult to ascertain to whom it belongs. Therefore, some special rules should be applicable for payment. Earlier payment is subject to the same regulations on earlier performance (i.e., the creditor must give consent to earlier payment since it may lead to the creditor losing the right to interest). If the contract does not stipulate the time of performance, either party may perform its obligation at any time upon a reasonable notice served to the other party. However, late payment should entitle the creditor for additional interest if the parties so agree or the law so provides. Interest may be approved only upon the principal, interest on interest is prohibited, unless specifically allowed by the law. For the purposes of this section, the rightful party will be called the 'creditor'; and the obligor will be called the 'debtor.'

First, for the passing of risks, it is stated that risk passes to the recipient when he receives the money claimed. Second, unless otherwise stipulated, the payment must be made to the creditor's domicile or place of business. If the creditor is incapable and the amount of payment exceeds what is called 'ordinary transaction appropriate to ages and capacity',[1] his guardian shall be entitled to receive as the manager of the creditor's patrimony. (C.C., Articles 65 and 66). It is unclear from the law what happens if payment is made to an incapable creditor and he has benefited from the payment. There can be two options. First, the debtor is released if the incapable creditor does not raise the issue of incapacity. Second, the court declares the payment as null and void and the creditor or his legal representative must restitute such payment to the debtor, if the issue is so raised by the creditor.[2] The power to receive payment on behalf of the creditor, such as in the case of a guardian, follows in general from the law or from a judgment. The latter case occurs when the guardian is not a legal guardian (parents, grandparents, brothers, etc.) but an appointed guardian, such as social institutes for minors under 15 years of age and with no legal guardian.

If payment is made in good faith and with reasonable ground to believe that the recipient is the right person to pay, the debtor's obligation may be discharged. This situation happens when, for example, payment has been made to the creditor after the claim has been transferred. (see paragraphs 445 et seq.), or payment is made to the creditor whose right has been annulled, or payment is made to the place of business of the creditor, when the creditor has moved to another place.

1. C.C., Art. 20.

224. Currency of payment must be in Vietnamese Dong, unless otherwise stipulated by the law. In practice, many laws stipulate exceptions to this rule, for example, the Law on Foreign Investment, Labour Law or Banking and Credit Institution Law. These laws provide that the currency of denomination in some contracts will be a foreign currency, but the currency of payment will be the Vietnamese Dong. The exchange rate will be the official buying rate set forth by the State Bank of Vietnam at the time of payment, unless otherwise agreed by the parties (C.C., Article 290).

Payment by check or transfer of account is not regulated by the Civil Code, but it is provided in some regulations of banking law. Where payment is made by check, postal order, transfer order or another equivalent instrument, it is presumed to be subject to the existence of sufficient funds to pay. If it turns out that there are no sufficient funds, the creditor can still claim payment, as there is no performance yet.

The obligor in delay of making payments must pay interest on the unpaid amount at the interest rate for overdue loans stipulated by the State Bank of Vietnam, except in circumstances where otherwise agreed or otherwise stipulated by law.

II. Non-monetary Performance

225. Non-monetary performances contain performances to do or not to do something. The performances to do things include performances to deliver things (*dare*) and performances to render a work or a service (*facere*).

226. If it is a performance to deliver goods, Article 289 states that a person who is obliged to deliver a thing must look after it until it is effectively delivered. This means that even if the rightful party was in delay of acceptance, the obligor is still liable for the loss of a thing if he has not done his best to safeguard the thing. By the same token, an inappropriate conduct towards it would be a breach and will give rise to a separate claim even before the delivery. If a thing is specifically ascertained, the obligor must deliver this exact thing in conditions agreed with the rightful party. If things are only determinable in kind, the obligor must deliver in quantity and quality as agreed. If the quality of the things due is not determined by the parties or if the law does not provide otherwise, the obligor must deliver things with average good quality, comparable to similar goods of the same kind. (C.C., Article 430 §3). If the things due are things in complex, Article 289 also provides that they must be delivered in complex (e.g., shoes, costumes, etc.). All costs related to the delivery up to the time of delivery should be borne by the obligor.

Also, Article 434 states that the carrier must deliver the goods at one time and directly to the recipient, unless otherwise stipulated by the parties. In addition, the delivery must be made in an appropriate manner depending on the quality and the nature of the thing.

227. If it is a performance to render a work or service, the obligor has to perform the exact work or service. (C.C., Article 291 §1) The word 'exact' aims at the

has no right to claim for damages. However, if the obligor derives benefit in connection with the non-performance which he would not have had in the case of proper performance, the rightful party is entitled to compensation for his loss pursuant to the rules relating to unjustified enrichment, up to the maximum of the said benefit. The defence of force majeure will not release the impeded party from paying damages, if for the purpose of reliance the other party has entered into subcontracts and pursued many performances with the aim to expedite the performance of the counter-party.

259. In the case of bilateral contracts, the rightful party is not obliged to counter-perform if the contract became impossible to perform to the obligor. As a consequence, the rightful party has no right to claim performance or damages or the obligor has no right to claim counter-performance. However, if he has performed already, he may not claim restitution, because the impossibility arises *ex-nunc*. All of his expenses are not therefore recovered, but for the situations stipulated in the contract. (see paragraph 20).

260. Force majeure will bar a claim for performance to the extent that the obligor is impeded to perform, unless the parties agreed otherwise. This means that if the force majeure is permanent, the obligation has lost its force. Temporary force majeure may also be relevant if the time of performance is the essence and the performance is meaningful if it is performed within a time limit. In other cases, force majeure will only suspend the obligation. In the case of permanent force majeure, the counter-obligation of the rightful party only lapses after he has set aside the contract by written declaration. In the case of partial force majeure, the rightful party also has the right to set aside the contract, if the failure in the performance is such as to justify the setting aside. A partial setting aside is also possible.

If the force majeure is temporary, the obligations are mutually suspended. When the impediment has been removed, the obligations regain their force.

II. Default of the Rightful Party

261. Breach of the duty of cooperation from the rightful party's side, such as delay in acceptance, will arise in a situation called the default of the rightful party. Of course, there is no default of the rightful party if the non-cooperation cannot be imputed to the creditor (because of for example force majeure). The three conditions of default of the rightful party are:

(1) performance is not possible without cooperation of the rightful party;
(2) the obligor must be capable and ready to perform and in general, the obligor must have informed that his cooperation is required (or the circumstance shows that the duty of cooperation is extremely necessary); and
(3) the rightful party must have failed to give the necessary cooperation.

262. If the default of the rightful party has a permanent character, performance will not be possible and the obligor is released from his obligation. However, there is still a problem to define whether or not the default has a permanent character. Regardless of this issue, the obligor is still required to cooperate with the rightful party until all other possibilities of performing the obligation have been exhausted by the obstruction of the rightful party.

To a reasonable extent, the obligor is entitled to compensation for the cost attributable to the default. This case is similar to the late acceptance of the rightful party (see paragraph 123 *supra*).

An event occurring during the default of the rightful party, making proper performance wholly or partially impossible, is not imputed to the obligor, unless he is to blame or because he has failed to exercise the care which could be expected from him in the circumstances (C.C., Article 302).

263. If the obligation results from a synallagmatic contract, the rightful party in default remains obliged to perform his obligation. The setting aside of the contract cannot be based upon a failure of any obligation in respect of which the rightful party is himself in default. This is even the case when the act of the obligor becomes wholly or partly impossible to perform.

III. Notice of Default

264. A default from either party must be reasonably give notice of before any remedy can be taken. This rule, although not written in the Civil Code, is a cornerstone of the principle of good faith and cooperation in performance between the parties (see paragraphs 105 et seq.). A notice can be oral or in writing, regardless of whether the addressee of the notice has received the whole content of the notice, or not. A failure of notice may result in the loss of the innocent party's right to claim damages (see paragraphs 281 et seq.).

IV. Effect of Default

265. The effect of default of the rightful party is the same as the effect of non-performance, defective performance or late performance. The party in default is held in breach of the contract. However, a default of the rightful party does not always give the obligor the right to claim damages. For example, if the rightful party failed to accept the object of performance in due time, the obligor is still responsible for arranging custody for such object. He should grant an excess period for the rightful party for acceptance in delay, provided that all costs and expenses arisen therefrom shall be borne by the party in default – the rightful party. If the object is lost during the excess period due to a risk, the rightful party should bear the risk, except when the law provides otherwise (e.g., in sales contracts, see paragraph 348 *infra*). The obligor is also under a duty to cure the disadvantageous situation, in order to minimize the loss. It is also compulsory to resolve conflicts in Vietnam through conciliation.

damages are not governed by the general principles, such as liquidated damages (penalty clauses) and insurance (insured amount). Although the theory on damages under Vietnamese law is quite similar to that of other laws, it should be noted that in practice most cases of damages liability are settled outside court or before the court on the basis of reconciliation and agreement between the parties.

The term 'damage' refers to the actual harm that has been caused by the non-performance of an obligation or an unlawful act. By using the word 'actual harm', this concept excludes damage that is not reasonably foreseeable for both parties. For example, a supplier of a processing contract may not claim from a delay by the processor compensation for loss of profit incurred from the delay. He is entitled to do so only if he can prove that he has signed some contracts with a third party regarding the same processed goods (i.e., the loss is real) and moreover, he must have informed the processor beforehand that for him time is essential (he may not stay idle and wait for compensation).

The damage which must be repaired pursuant to a legal obligation to make reparation consists of patrimonial damages and other harms. Pursuing that subject, Article 310 provides for a provision on moral damage (see paragraphs 294 et seq.).

Damage may be repaired in general by paying money. In some cases, however, factual reparation is more natural than the payment of money, for example reparation of an object in case of warranty obligation. Upon the demand of the aggrieved party, judges may award reparation in a form different than the payment of a sum of money. It is at the discretion of the court to grant it. Also, damages can be paid at once or by instalment (e.g., paying allowances to relatives of an injured person who has lost the capacity to work and look after such relatives who no longer can be taken care of by the aggrieved party because of the injury caused by the party in breach).

281. In order for a compensation for damage to be rewarded, the court must be satisfied that four factors related to the case were proven, regardless of whether the liability is contractual or non-contractual:

- there is an actual loss;
- there was an illicit act (either a non-performance of a contractual obligation or a tortious act);
- there is a causal relationship between the loss and the illicit act; and
- the party in breach was at fault.

The burden of proof varies depending on the case. If the case is related to a contractual relationship, the burden of proof lies on the party in breach. In the reverse case it is for the innocent party to prove the above-mentioned factors.

I. Loss

282. There is no damages if no loss has occurred. Thus, if because of a breach the aggrieved party is able to conclude a more profitable contract because of the breach, he is not entitled to claim damages. In this respect, the concepts of loss in

common law and civil law are different. In common law countries, 'reliance damage' can also be rewarded in case of breach even if the aggrieved party has incurred no actual loss.

283. Damages in material forms comprises both loss incurred by the rightful party and the actual loss of profit he would have had. Article 310 lists some categories of costs that may be claimed as material damages:

(a) actual personal injury or/and damage to property and reasonable costs to prevent or mitigate damage which would be expected as a result of the event giving rise to liability;
(b) loss of reasonable profits, which may incurred, had the breach not occurred; and
(c) mental suffering caused by the breach.

Costs related to category (a) and (c) are similar to what is called in other countries '*damnumemergens*' (actual loss), whereas costs related to category (b) are '*lucrumcessans*' (loss of profit). To the extent that the loss can be ascertained, such loss shall be recovered. The concepts of '*damnumemergens*' and '*lucrumcessans*' are not similar to 'reliance damages' and 'interest damages' as in common law countries. For example, in common law countries, 'interest damages' are not recoverable if they stem from tort (because it is an commercial loss). On the contrary, a court in Vietnam has ordered an infringer of copyright (the defendant) to pay damages for a loss of possibility to sign a contract between the plaintiff and a third party, although there was no contractual relationship between the plaintiff and the defendant (*Tran Tien v. Saigon Audio (1997)*). In order words, the damages regulatory regime is the same for both contractual and non-contractual liability.

II. Illicit Acts

284. The second factor that the innocent party must prove is that the act committed by the other party is an illicit act. A non-performance or undue performance of a contractual obligation is prima facie considered as an illicit act. This is because Article 302 states that an obligor who fails to perform or improperly performs an obligation must bear civil liability with respect to the rightful party. Improper performance can be either performance to the wrong person, performance in a wrong place, early performance, delay in performance or performance not in accordance with the manner agreed. Those issues were discussed in paragraph 272 above.

The law however does provide for some cases when a non-performance is not an illicit act. First, when a non-performance is expressly agreed by the parties as not being a breach (see exclusion clause, paragraph 185, or termination, paragraphs 271 et seq.). Second, when a non-performance is treated by the law as a right of a party (e.g., the right to stop performance in case of anticipatory breach, see paragraph 238). Other defences have been discussed in paragraphs 239 et seq. *supra*.

Chapter 1. Agency

§1. Introduction

307. Agency is dealt with in two chapters separately of the Civil Code: the representative regime and the agency contract regime. The first mentioned is an act whereby a person, that is, the representative, is acting on behalf of another person, that is, the principal, to establish or perform transactions within the scope of the principal's authorization. The scope of authorization is either determined by the law (in case of a legal representative) or by the will of the principal (in this case the representative is called the 'appointed agent'). An appointment is created from a contract concluded between the principal and the representative called the agency contract.

308. According to Article 581 of the Civil Code, an agency contract is an agreement between the parties pursuant to which the agent is obliged to perform a task in the name of the principal, and the principal must only pay remuneration, if so agreed or provided by law.

309. The agency contract may be gratuitous or remunerated. In any case, it must be executed in a written form, and should be notarized if the parties so agree or the law so requires. Vietnamese law does not accept the concept of so-called implied agency as in the case of other legal systems. Likewise, an agency can be either specific or general, but the scope of the agency must be clear and unambiguous.

It is not clear if a minor can be the principal in the agency contract. However, the answer will be affirmative if he has enough property to cover the obligations arising from the transaction he entrusts the agent to conclude. Nevertheless, a minor or a person mentally ill cannot be an agent.

Unlike Civil Code 1995, the Civil Code 2005 does not require agency contract to be in writing. Thus an oral agreement may give effect to an agency contract, or an implicit relationship upon employment contract could amount to a de facto agency contract.

§2. Different Types of Agency

310. There are three types of agencies: civil agencies, commission agencies and distributors. Civil agencies are regulated by the Civil Code; commission agencies and distributors are regulated by the Commercial Law. Under the Civil Code, the term of agencies is normally one year unless stipulated otherwise by the parties. Those restrictions are not provided in the Commercial Law. Under the Commercial Law, commission agency is a form whereby the agent sell goods on behalf of and at a certain price stipulated by the Principal, in return for a remuneration called commission. The rate of commission is equal to a percentage of the sales turnover as agreed by the parties.

311. Distributorship is a special form of agency whereby the agent sells a specific quantity of goods at the price stipulated by the distributor. The remuneration to which the agent is entitled is the difference between the actual sale of the actual price and the

price stipulated by the principal. The difference between the commission agency and the distributorship is that the commission agent is an employee of the principal whereas the distributor is an independent trader.[1]

1. Cf. *Business & Law*, vol. 40 (8 Oct. 1998).

§3. Contents of the Agency Contract

312. The agency contract is a bilateral and consensual contract. The terms of the agency contract can be agreed by the parties or stipulated by law. If it is not agreed or stipulated by law, then an agency contract shall be effective for one year from the date when the authorization is established.

313. Apart from the duty to perform on the principal's instruction and inform the latter accordingly, the agent must notify all third parties he deals with in his capacity as agent of the time limit and scope of the authorization and take care of documents and facilities provided to perform the authorized task. The agent must also keep all information related to the works confidential during the performance of the authorized task and return to the principal the property received and benefits collected during the performance of the authorized task as agreed upon or provided by law. If the agent breaches any such obligation, he is liable to pay damages.

314. As for the rights of the agent, he can demand from the principal to provide the information, documentation and facilities necessary for performing the delegated task. He has the right to receive remuneration and to be reimbursed for reasonable expenses he has incurred at performing the delegated task.

315. The principal is under a duty to provide the information, documentation and facilities necessary for the agent's performance. The principal must reimburse reasonable expenses that the agent incurs to perform the delegated task and pay remuneration to him, if agreed upon.

316. However, the principal shall have the right to demand that the agent report fully on the performance of the authorized task, receive the property, and benefits collected from the performance, if not otherwise agreed. He shall be compensated for damage if the agent breaches his obligations.

317. The principal shall not be liable for undertakings given *ultra vires* by the agent, unless he subsequently rectifies the agent's *ultra vires* acts. The agent shall bear full responsibility if he was acting on his own behalf. The act made *ultra vires* is void regarding the principal and to the extent that he does not rectify. The principal must take all responsible steps to notify the third party affected by the *ultra vires* act. If he fails to notify, contracts with third parties shall remain in effect, except where such third parties knew or should have known of such suspension.

risk, the parties may provide otherwise. This is an important rule to remember when the object of the contract is a registered asset, such as shares, cars, ships or houses.

1. Cf. *Business & Law*, vol. 40 (8 Oct. 1998).

II. Passing of the Ownership

356. There is a principle, not only in sales contract, but in almost all typical contract, that the ownership passes when the risk passes, unless when the parties provide otherwise or the law requires otherwise (e.g., hire purchase or sale on trial contracts). In those exceptional cases, the seller may retain ownership over the goods until the final payment has been settled.

The transfer of ownership can be redeemed, as a condition in a sales contract. For example, the seller may agree with the buyer on the right to redeem the sold property during a period of time, which is called the redemption period. The parties may agree upon the redemption period, but it shall not exceed one year in respect of moveable property and five years in respect of immovable property, from the moment of the handover of the property. During this period, the seller shall be entitled to redeem at any time but must give advance notice to the buyer within a reasonable period. The redemption price shall be the market price at the time and place of redemption, if not otherwise agreed. During the redemption period, the buyer is not permitted to sell, exchange, give as a gift, lease, mortgage, or pledge the property, or offer it as a guarantee, and must bear the risk in respect of the property. For example, the buyer must be liable in case the property was destroyed in the redemption period.[1]

1. Cf. *Business & Law*, vol. 48 (3 Dec. 1998).

§7. Seller's Warranties of Title and Quality

I. General Concepts

357. As noted above, a good must fulfil a certain level of quality, compared to the goods of the same grade. Also, the buyer has the right to have a quiet enjoyment of the good purchased. The warranty for the title of the goods is valid for the lifetime of the goods, whereas the warranty for the quality of the goods is only limited to a certain time period, afterwards the buyer loses the right to request the seller to make good the defect discovered. The warranty period may be agreed by the parties (in most cases) or stipulated by the law (in some exceptional cases, such as sales contract of real estates). Such warranty obligation does not exist in the case of the selling of second-hand goods in an antique shop, or when the goods are purchased in an auction. By the same token, the obligation of warranty does not arise for the latent defects (defects that must have been known to the buyer at the time of purchasing the goods) or if the buyer causes the defects himself.

II. Obligations of Warranty from the Seller

358. If the buyer discovers a defect during the warranty period, he may demand, normally at his choice, from the seller to repair the same free of charge, reduce its price, exchange it for another object or to return the object in exchange for a refund.

The seller must repair the objects and must guarantee that the same fully satisfies the quality standards or possesses the particular characteristics as promised. The seller shall bear the cost for repairing the object and for its transportation to the place of repair and from the place of repair to the buyer's place of residence or head office.

The buyer shall have the right to demand from the seller to complete the repairs within the time limit agreed upon by the parties or within a reasonable period. If the seller is unable to make or complete the repairs within that time limit, the buyer may demand a price reduction, an exchange of the defective object for another object or the return of the object in exchange for a refund.

§8. The Right to Performance and Damages of the Buyer

359. It should be noted that the obligation of warranty does not prejudice the buyer's right to performance (see paragraphs 267 et seq. *supra*). It is also different from the liability for damages. In addition to demanding that the warranty measures are performed, the buyer shall have the right to demand from the seller compensation for damage caused during the warranty period by technical defects of the object. The seller does not have to compensate for damage, if he can prove that the damage was caused by the buyer's fault. The seller shall be entitled to a reduction of the compensation for damage, if the buyer has failed to take the necessary measures available within his capacity in order to prevent and limit the damage.

§9. Interests

360. If the seller is delayed at delivery, the buyer shall pay interest on the amount pre-paid at the interest rate for overdue debts stipulated by the State Bank. He may also demand from the seller compensation for damage having arisen from the time that the contract must be performed to the time that the complete set is handed over.

§10. Sale by Instalment

361. Special attention should be paid to Article 461 (purchase by deferred payment or payment in instalments). This article is the basis for hire purchase or commercial leasing contracts. Article 461 states that the parties may agree on a purchase by the buyer by deferred payment or by payment in instalments of the purchase monies within a specified time period after receipt of the purchased object. The