SEVERAL LEGAL ISSUES ON CONSTRUCTION CONTRACT TERMINATION

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Abstract: *A construction contract is a legal binding agreement between the contracted parties on the construction performance specified in Construction Law 2014 and its enforcement guideline documents. New construction law system creates a legal framework for the contracting parties to enter into and execute the construction contract but there are some problems inside. In this article, the authors focus on analyzing the regulations of construction contract termination under the Decree 37/2015/ND-CP and its aspects of legal construction technique and content, therefore assess to clarify the inadequacies of those regulations. As a result, the article proposes some recommendations to improve the law's regulations on construction contracts termination in particular and the law of construction in general.*

Keywords: *Construction contract; construction contract termination; damage compensation; contract cancellation; general law and sector-specific law.*

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1. Introduction

Construction contract, a specific type of contract in the construction field, is currently governed by the Construction Law 50/2014/QH13 and its enforcement guidelines, Decree 37/2015/ND-CP on construction contracts [2] (referred to as Decree 37), Circular 07/2016/TT-BXD [3]; Circular 08/2016/TT-BXD [4]; Circular 09/2016/TT-BXD [4] and Circular 30/2016/TT-BXD [5]. Legal regulations on construction contracts have been gradually developed, amended and supplemented on the basis of provisions on the contract of the Civil Code in 2005 [6] (considered the original law source) and the Ordinance on Economic Contracts in 1989. However, according to the recent legal documents, the regulations on construction contract termination has not yet reached the legal technical assurance and the consistency among all the documents and some other issues which are mentioned in this article. On the basis of the general legal principles of the contract of the Civil Code (applicable to all contract relationship), the "sector-specific law" (Construction Law) regulates several supplementary matters that are specifically applicable to contract types in the construction field. Specific regulations of contracts in "sector-specific law" generally address the following key issues: The subject of the contract relationship, the form of the contract, types of contract, contract price, rights and obligations of the parties, liability for breach of contract. In addition to legal documents promulgated by competent state authorities, international treaties related to contracts in general, which Vietnam agrees to comply, are also a source of governing laws for construction contract relationship, for example, the United Nations Convention on Contracts in 1980 of the International Sale of Goods [7].

2. Four legal issues on construction contract termination

Construction contract termination is a legal status that terminates the exercise of rights and obligations arising from the contracted relationship. This event leads to the termination of the legal ties between the principal and the contractor of the construction contractual relationship. However, it should be noted that after the termination of the contract, not all obligations are terminated, but there are obligations that are likely to exist for a period of time to come to an end, such as obligations of warranty, repair and replacement of damaged property. Unlike other things and phenomena, contract relationships in general as well as construction contract relationships in particular arise from conscious behaviours of subjects. Thus, events that

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end a construction contract relationship are not transformations caused by the motion of nature, but events that arise from the conscious behaviour of the subjects or regulated by laws. Currently, the issue of construction contract termination is stipulated in Article 145 of the Construction Law and Article 41 of Decree 37. These regulations have created the legal basis for construction contract's parties in contract implementation. On the basis of the basic principles of techniques for developing legal norms and the application of the laws, considering the clauses of construction contract termination in Article 41 of Decree 37 above, four significant issues that need to be addressed are illustrated in Fig. 1 and discussed in the next sections.

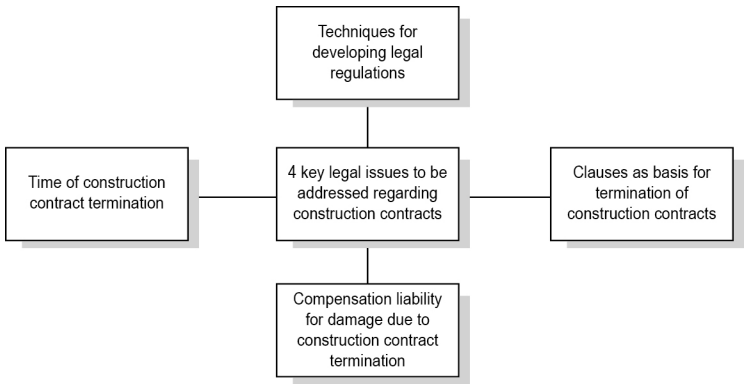

Figure 1. *Four legal issues of construction contract termination*

2.1 Techniques for developing legal regulations regarding Article 41, Decree 37

Article 41 of Decree 37 consists of nine clauses, but the arrangement of the clauses is not as reasonable and logical as in the ordinary order of a legal norm. Specifically, Clause 1 regulates the establishment of contract termination clauses; Clauses 2 and 4 regulate the rights to terminate the contract and pay damages; Clause 3 regulate the cases of contract termination after the contract is suspended; Clause 5 regulates the order and procedures of contract termination; Clauses 6 regulates the termination time and the legal consequences of contract termination; Clauses 7 and 8 regulate the unilateral contract termination; Clause 9 regulates the procedures after a construction contract expires. The illogical arrangement of such clauses will make readers confuse the content of the laws. It is thought to be necessary to rearrange the clauses of Article 41 on the construction contract termination in the following order: Clause 1 regulates termination specification for the rights to terminate and termination cases of construction contracts; Clause 2 regulates the order and procedures of construction contract termination; Clause 3 regulates the consequences of the construction contract termination; Clause 4 regulates other relevant matters. This order makes clauses be arranged in a more logical way, making it easier for the readers to understand the construction contract termination procedures and more effective to implement.

Clause 1, Article 41 states: "Termination cases, the rights to terminate; the order and procedures of termination and the level of compensation for damage caused by contract termination must be agreed upon by the parties in the construction contract". It is understandable that this is the type of compulsory legal norm. This type of norms requires the parties to agree and establish particular clauses in construction contracts to ensure their rights and interests (upon regulating the subjects' obligations). However, regarding to the logic of legislative techniques when setting mandatory legal norm, the content of that mandatory norm or its attachments must contain regulations of legal consequences and liability, if not complying with the requirements in accordance with the content of the norms developed. While the whole Article 41, as well as Decree 37, does not contain any clause regulating the legal consequences and liability applicable to the parties in the case of disagreement with clauses of construction contract termination. Such regulations have made Clause 1 of Article 41 become open, be an inadequate clause in terms of content, thus reducing the effectiveness of the legal law in regulating the construction contract relationship. The nature of the contract relationship is established on the basis of equality, freedom, and volunteer of the parties. In principle, when building the terms of the contract, except for the general terms (terms that are required to be agreed and established), for other terms the parties may discuss for an agreement about establishing them or not. Regarding the non-compulsory clauses, the parties must comply with the relevant laws to act their duties which are established in the contract. As a consequence, binding regulations in Article 41 (1) are not necessary. It is thought that, when developing the law and regulations, lawmakers should consider and draft legal norms

that are highly classsified according to the above principles, so that new legal norms show uniformity and higher efficiency when applied.

2.2 Provisions of clauses as a basis for termination of construction contracts

The lack of a number of cases presented as the basis for termination of construction contracts compared with the general provisions on contracts, as follows:

In addition to the other criteria, a bill is required to have clear content, covering the full range of social relations to be regulated. When a clause presents the condition to terminate a contract, the content of the clause must state clearly what the contract termination contents are. For example: what the termination of the contract is, what the cases of contract termination are, the procedures for terminating the contract and possible legal consequences. Regulations of contract termination cases must also be fully documented. Article 422 of the Civil Code of 2015 stipulates the termination of contracts, which lists the cases of contract termination and unilateral termination. Meanwhile, Article 41 of Decree 37 does not fully list the cases of contract termination; the termination of the contract when the contract was completed; termination of the contract as agreed by the parties; Termination of contract due to the death of individuals; termination of the contract due to the cancellation of the contract; Termination of the contract when circumstances change (Article 420, Civil Code 2015) ... If explaining that lawmakers intend to draft Article 41 Decree 37 in the direction of defining the cases of termination of a construction contract, it will be unreasonable when Point a of Clause 7 and Point a of Clause 8 of Article 41 re-stipulate the case of natural termination of a construction contract when the contractor or the principal is "bankrupt, dissolved". Thus, it can be said that, when drafting the content of Article 41, lawmakers have insufficiently listed cases of termination. Detailed information is as follows:

Table 1. *Regulations on Cancellation of a contract*

Source / Criteria	Civil Code 2015	Construction Law 2014	No. 37/2015/ND-CP
Position of regulation on Cancellation of a contract	Article 422.4 Termination of contracts	Article 147.3 Settlement and liquidation of construction contracts	Article 41: Article 428. Unilateral termination of performance of contracts
Content of regulation on Cancellation of a contract	The contract is cancelled or unilaterally terminated;	A construction contract may be liquidated in the following cases: a/ The parties have fulfilled their contractual obligations; b/ The construction contract is terminated or cancelled in accordance with law.	None

Cancellation of a contract is the termination of a contract by a party when the other party breaches the contract as a condition of cancellation agreed by the parties or provided for by law. When the contract is cancelled, the contract shall not be effective from the very first entering into the contract and the parties have to return to each other the property received; If not refund in kind then pay in money. Cancellation of a contract is also as a condition for termination of the contract which is stipulated in Clause 4, Article 422, Civil Code 2015. Meanwhile, Article 41 of Decree 37 regulates the cases of grounds for termination of a construction contract, there is no provision for the cancellation of the contract and the legal consequences of the cancellation of the contract. However, at Point b, Clause 3 of Article 147, the Construction Law of 2014 contains provisions on cases where a construction contract is liquidated because “The construction contract is terminated or cancelled according to the provisions of law”. With such provisions, perhaps the lawmakers agree that the termination of the contract and the cancellation of the contract are the same. This should be clarified more clearly because contract termination and contract cancellation are different. Cancellation of a contract is a measure whereby the breached party applies in the event of a breach of contract as a condition of cancellation. When a contract cancellation measure is applied, its legal consequences will make the contractual relationship ineffective as of the time of entry into force, the rights, duties and obligations of the parties shall cease to exist. Therefore, the termination of the contract is considered a basis for terminating the contractual relationship. Article 147 of the Construction Law 2014 is unclear; Article 41 of Decree 37 is expected to resolve the shortcomings of Article 147 in the relationship between contract termination and

contract cancellation. But Article 41 also does not contain provisions on termination of contract - basis for termination of construction contracts.

For cases where the contract is terminated because one party to the contractual relationship is an individual who has passed away, it shall not be recognized by Article 41 of Decree No. 37. The Civil Code 2015 stipulates that when the individual has passed away and the performance of the contract must be done by himself or herself, this is the basis for the contract to be automatically terminated. In the case of any individual passes away, it will terminate the activity of that individual in both marketplace legally and practically. However, Clause 7, and Clause 8 of Article 41 of Decree 37, only the case where the contractor is a "bankrupt or dissolved" organization, without regulation on the cases where the contractor is an individual who dies.

The lack of enumerated regulations of some cases of termination under the provisions of Article 41 of Decree 37 has led to the fact that, when applied, the parties incur unacceptable disputes, which reduce the efficiency and effectiveness of the legal provisions on the termination of construction contracts. This has shown a shortcoming of legal development as well as limitations in the application, resulting in inconsistencies in the provisions of the law on contracts between general law and specialized law. The legal provisions on the termination of construction contracts need to be amended and added to the missing cases as analyzed above. This will overcome the above limitations and build the legal system. On the other hand, in the connection between the "general law" and the "sector-specific law", the same law regulates the basis for terminating the contract, the general law (Civil Code) termination of a contract. These bases will be applicable to all types of contracts regulated by specialized laws. Therefore, when forming cases of the basis for the termination of construction contracts, the Construction Law and the guiding Decree required only specifies cases of termination of specific contracts in the field of construction. Thus, the legal system on construction contracts can be consistent, avoiding conflicts and overlapping.

The basis for the termination of construction contracts is unreasonable, as follows:

+ The provisions on cases where "*the contractor is bankrupt or dissolved*" (Point a, Clause 7) shall serve as basis for the principal to terminate the contract and provide for the case of "*the principal is bankrupt or dissolved*" (Point a, Clause 8) - the basis for each party to exercise the right to terminate the contract but it is unreasonable and illegal significance when applying the right to terminate the contract under the provisions of Clause 2 Article 41. If a party "*goes bankrupt*" by which the other party exercises the right to terminate the contract to protect the legitimate rights and interests of the others. Bankruptcy under the provisions of the Bankruptcy Law 2014 is understood as a business or co-operative or declared bankrupt by a court (magistrate) declaring that the business or cooperative has gone bankrupt after conducting the bankruptcy proceedings of the business falling into the state of bankruptcy. When a party "*is bankrupt*", this is the basis for terminating the contract in accordance with the general provisions of the contract law applicable to cases where the contract is automatically terminated without depending on the will of the parties (the contract must be terminated). As provided for in Clause 2 of Article 41, the right to terminate the contract in the cases provided for in clauses 7 and 8 is to demonstrate the unilateral will of a party exercising its right to terminate or not. This would lead to the presumption of a bankrupt party leading to the right of the other party to terminate the contract; this is inappropriate and fails to protect the legitimate rights and interests of the terminating party if not it is too late when applying the right to terminate the contract. Provisions on the right to postpone the performance of obligations in the contract, Article 411 of the Civil Code 2015 contains provisions on the cases where "*the obligee must perform the obligation in advance if the property of the other party has already been so severely impaired that it is unable to perform its obligations as committed until the other party is able to discharge its obligations or take measures to secure the performance of its obligations*". In the specific contract provisions, the Civil Code 2015 allows a party to unilaterally terminate the performance of the contract if the continuation of the contract does not benefit it but must compensate for damages to the other party (Article 520 on unilateral termination of service contract, Article 551 on unilateral termination of a processing contract). These provisions of the Civil Code protect the rights of the obligee to avoid the situation where the obligor is incapable of fulfilling the committed obligations, thereby damaging or affecting the interests of the obligee. "*Principles of International Commercial Contracts*" (PICC) [10] of 1994 by UNIDROIT - this is the most widely used reference document in Europe and many other countries in the world; the Vienna Convention of 1980 also mentions and shares similar views on this issue. Article 7.3.3 of PICC, "*Provision of breach of contract*" has permitted a party to a contractual relationship to unilaterally terminate the contract "*if there is clear evidence that the other party is in serious breach of contract*". This regulation is also intended to protect the legitimate rights

and interests of the obligee to prevent and limit possible damages. In the current context of our country, due to the requirements of international integration, it is necessary to amend and supplement the provisions of the contract law accordingly.

Therefore, it is necessary to amend and supplement Point a, Clause 7 and Clause 8 of Article 41, Decree No. 37 on the case where "*the contractor goes bankrupt*" or "*the principal has gone bankrupt*" according to the approach that permits a party to exercise the right to terminate the contract when property of the other party is proven to be seriously impaired to the extent of being unable to perform the committed obligations or the other party shows signs of bankruptcy. This is in line with the general spirit of the Civil Code and the general principles of the current international commercial contracts, thereby ensuring the legitimate rights and interests of parties involved in contractual relations.

+ According to Point b, Clause 7, "*the contractor refuses to perform contractual tasks or fifty-six (56) consecutive days of failing to perform contractual tasks*", that is a basis reason for the contractor to have the right to terminate the construction contract but that is unreasonable and unfeasible. Assuming that the contractor fails to perform the contractual tasks for 45 days, then resuming contractual tasks for 10 days, then not continuing to perform contractual tasks within 45 days. In this case, can the contractor apply the right to terminate the contract under Clause 2 of Article 41? If based on Point b, Clause 7, the contractor cannot terminate the construction contract because the basis for termination is "*56 consecutive days*". The rule 56 consecutive days is understood to be 56 consecutive days without interruption of time. The rule 56 consecutive days the contractor fails to perform contractual tasks from which the principal is entitled to terminate the construction contract, it is unreasonable and unenforceable if the contractor deliberately "*circumvents the law*" as the case analyzed above. Meanwhile, with 30 days of continuous or interruptions, the contractor's failure to perform contractual tasks may have influenced the performance of the contract, causing damage with any unforeseen consequences to the principal. Starting from the above irrationality, the provisions on this basis need to be amended in order to shorten the time the contractor does not perform contractual tasks down from the current regulations. At the same time, it is necessary to supplement the regulations that the principal shall extend to the contractor a reasonable period under the agreement for the contractor to perform the tasks, after this time limit, if the contractor still fails to perform the contractual tasks, the principal may terminate the contract, except in cases of force majeure or other parties agreed otherwise.

2.3 Compensation liability for damage due to construction contract termination

Regulating liability for damage compensation upon construction contract termination, Article 41 only regulates the liability of the party exercising the right to terminate the contract without any provision applicable to the other party - The party at fault, resulting in unreasonableness in this provision. Under Clause 2 of Article 41, "*Each party shall have the right to terminate the contract without compensation for damage in the cases specified in Clauses 7 and 8 of this article*". According to the above provisions, when there are foundations for contract termination occurring as prescribed in Clauses 7 and 8, each party of a construction contract shall have the right to terminate the contract. At the same time as exercising the right to terminate the contract, the terminating party shall not have to pay damages to the other party. This provision is one-way (only applicable to the terminating party), and unreasonable in the following cases:

+ In the first case: One party of a construction contract exercises the right to terminate the contract in accordance with the provisions of the Civil Code 2015, which does not fall into one of the cases stipulated in Clauses 7 and 8, Article 41 of Decree 37, does the contract termination party have responsible for damage compensation? If based on the provisions of Clause 2, in the case mentioned above, the terminating party does not follow the cases specified in Clauses 7 and 8, it shall have to pay damages to the other party. Whereas Clause 7 and Clause 8 provide for inadequate terms of contract termination in comparison with the general provisions of the Civil Code 2015 as stated above. Such provisions are unreasonable to the party exercising the right to terminate the contract and cause much controversy between the parties.

+ In the second case, the contractor "*fails to perform the contractual tasks for 56 consecutive days*" (an act of construction contract breach) which has caused material damage to the principal. How to solve this case? If the Clause 2 of Article 41 is applicable to this case, the principal has the right to terminate the contract without paying damages to the contractor. The unreasonableness is that the contractor violates

the contract, causing damage to the principal so the principal, of course, terminates the contract (application of contract termination right). And the law also stipulates that the principal does not have to pay damages to the contractor, but in this case, it is reasonable to require the contractor to pay damages to the principal. Moreover, if the contractor fails to perform contractual tasks for 30 consecutive days, causing damage to the principal, for which the principal terminates the contract with a basis of 30 consecutive days but not 56 consecutive days, will the principal have to pay damages to the contractor? Upon contract performance termination, it is not in all cases that the contract terminating party has to pay compensation if this termination causes damage to the other party. Normally one party terminates the contract performance because the other party violates contract obligations, the contract terminating party shall not have to compensate for damage. Explaining the provisions on damage compensation under Clause 2 of Article 41, lawmakers have based on the provisions on the right to unilaterally terminate the service contract or processing contract in accordance with Article 520 and Article 551 of the Civil Code 2015. Accordingly, the party unilaterally terminates the performance of the contract because it finds that the signed contract is not in its favor. In accordance with provisions, they will be liable for compensation to the other party if this termination causes damage to the other party. That Article 2, Article 41 say "*without compensation for damages*" is unnecessary and unreasonable if the liabilities of the parties in the construction contract relations are determined.

To be short, it is necessary to improve this provision and ensure application consistency. The paper proposes that the provisions of Clause 2 should be amended as "*each party has the right to terminate the contract and to claim damage compensation in the cases as specified in Clauses 7 and 8 of this Article*". It would be more reasonable to apply the right to terminate the contract and to claim damage compensation of each party. At the same time, Article 41 also needs to be added a provision on a principle of determining the liability of compensation for damages when the contract is terminated in the general spirit of the Civil Code 2015 such as the fault of each party, actual occurred damage, contract breach acts that are the basis for contract termination and causal relationship between contract breach acts and occurred damage.

2.4 Regulations at the time of construction contract termination

Article 41 of Decree 37 regulates a very general statement of the time of the contract termination, that is "*the construction contract is no longer valid from the time of termination*" (Clause 6), while when the time "*of termination*" is, it is not specified by the law. In comparison with provisions on the time of contract termination in Clause 3, Article 428 of the Civil Code 2015, it is specifically determined as "*the time when the other party receives the notice of termination*" (see Table 2).

Table 2. *Comparison between Decree 37 and the Civil Code regarding the time of construction contract termination*

No. 37/2015/ND-CP	Civil Code
Article 37.6: The contract shall become ineffective since the date of termination and the parties must fulfill the procedures for liquidation with a period of time as agreed in the contract but no later than 56 days since the notice about termination is issued except otherwise as agreed in the contract. After this period, if either party fails to fulfil the procedures for liquidation, the other party is fully entitled to liquidate the contract.	Article 428.3: Where the performance of a contract is terminated unilaterally, it shall terminate from the time when the other party is notified of the termination. In such case, the parties are not required to continue to perform their obligations, except for agreement on fines for violations, compensation for damage and settlement of disputes. A party which has already performed its obligation may demand the other party to make payment for the performed obligation.

Determining the time of contract termination is very important, through which the parties determine the time of rights and obligations performance termination according to the contract as well as determine the time of right and interest violation in order to determine the prosecution prescription in the case of dispute. The way to regulate the time of contract termination under Clause 6 of Article 41 will lead to an inconsistent interpretation of the time of contract termination, cause much controversy and difficulty in resolving arising disputes. Therefore, it is necessary to amend this provision in direction of specifying the time of contract termination as "the time when the other party receives the notice of construction contract termination " in accordance with the provisions of the Civil Code, which creates unity in the provisions of the law on contracts, overcoming the above-mentioned restrictions.

3. Conclusion

The events that terminate a construction contract relationship have significant legal implications for determining whether the relationship and legal ties between the principal and the contractor remains or terminates. Therefore, this will solve the related issues after contract termination such as construction contract liquidation, capital settlement, compensation for damage or works' warranty... Thus, it is necessary to improve provisions of the law on construction contract termination to create a legal basis for the consistency of law application process, minimize potential shortcomings. In order to do so, it is not only necessary to improve the law, but also respect and comply with the law and goodwill spirits of the parties in construction contract relationship. The improvement process of provisions of the law on contracts needs to improve the quality in setting legal norm to ensure consistency, transparency, rationality and feasibility. As a result, the new system of law on contract promotes effectiveness and efficiency in correcting contract relations.

References

1. Vietnam National Assembly (2014), *Construction Law 50/2014/QH13*.

2. Vietnam Government (2015), *Decree No. 37/2015/ND-CP*, detailed regulations on construction contracts.

3. Vietnam Ministry of Construction (2016), *Circular 07/2016/TT-BXD*, Guidance on price adjustment of construction contracts.

4. Vietnam Ministry of Construction (2016), *Circular 08/2016/TT-BXD*, Guidance on several contents of construction consultation contracts.

5. Vietnam Ministry of Construction (2016), *Circular 09/2016/TT-BXD*, Guidance on contracts of construction work implementation.

6. Vietnam Ministry of Construction (2016), *Circular 30/2016/TT-BXD*, Guidance on design contract - tech devices provided and construction work implementation.

7. *United Nations Convention on Contracts for the International Sale of Goods (Vienna 1980) (CISG)*.

8. Vietnam National Assembly (2015), *Vietnam Civil Code 91/2015/QH11*.

9. Vietnam National Assembly (2015), *Vietnam Enterprise Law 60/2005/QH13*.

10. Vietnam National Assembly (2014), *Vietnam Bankcrupt Law 21/2004/QH11*.

11. International Institute for The Unification of Private Law (1994), *Principles of International, Commercial Contracts (PICC)*.

12. *Scientific Commentary on the Vietnam Civil Code 2015*, Judicial Publishing House.