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CONTRACTUAL AGREEMENTS AND RISK TRANSFER TIMING IN BUSINESS CONTRACT EXECUTION

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Abstract

Contract formation and risk transfer are essential stages in any civil transaction. The Civil Code of 2015 and the Commercial Law of 2005 have established a fundamental legal framework to regulate issues arising from contractual relationships, ensuring the legitimate rights and interests of the involved parties. However, to ensure appropriateness and enhance the effectiveness of application, protecting the legal rights and interests of the parties in contract formation as well as determining the point of risk transfer during contract execution, it is necessary to analyze relevant legal provisions regarding the regulation of contract formation and the determination of the risk transfer point during contract execution. This analysis aims to propose solutions for improvement and supplementation to create a comprehensive, robust, and practical legal basis for the formation and execution of business contracts.

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1. Introduction

In the context of Vietnam's vigorous economic development across diverse sectors and fields, activities such as exchange, sale of goods, provision of services, investment, and trade promotion are becoming increasingly frequent, vibrant, and on a large scale. Consequently, the demand for contract formation is also rising, leading to the need for the contracting parties to ensure high levels of good faith and honesty in contract performance to maintain stability in these operations. This necessitates a robust and flexible legal mechanism to effectively control commercial activities in particular and contract formation in general. According to the provisions of the Civil Code 2015 Viet Nam (CC 2015), a contract serves as a solid foundation to establish rights and obligations as stipulated in Articles 8 and 275 of the CC 2015 for the parties involved in signing, while also serving as an important basis for parties to protect their rights and interests when the other party fails to perform or improperly performs the contract.

Due to the complex nature and significant value of business transactions, reaching agreements and forming the content of contracts is the first and most crucial step in ensuring the proper execution of the obligations undertaken, as well as providing an important basis for resolving disputes that arise during contract performance. However, the laws on contracts regulated by the CC 2015 and the Commercial Law Viet Nam 2005, amended and supplemented in 2017 and 2019 (CL 2015), still contain many inconsistencies in contract formation and performance in practice, failing to ensure fairness in the rights and obligations of the parties in the contractual relationship. Therefore, amending and supplementing the deficiencies of the current contract law is extremely necessary to ensure economic order and balance the interests of the parties in the contractual relationship, thus reducing the rate of contract disputes.

In the context of international integration, the conclusion of business contracts by entities is increasingly transcending the borders of a single nation. Therefore, the issue of contract formation and determining the timing of risk transfer in contract performance is an urgent matter deserving attention. Hence, the reality prompts the need for research to further refine the system of regulations governing contract formation and performance in business.

2. The legal status of contract formation in business

According to the regulations from Chapter II to Chapter VI of the 2015 Commercial Law, amended and supplemented in 2017 and 2019, the commercial law only governs specific types of contracts concluded and performed between merchants or between merchants and related parties. The purpose is to establish, change, or terminate the rights and obligations of the parties in particular cases, such as the sale of goods, provision of commercial services, and commercial promotion, etc., without going into detailed provisions on the methods of contract conclusion. As the general law governing all types of civil contracts, the Civil

Code stipulates the principles for concluding and performing civil contracts. These are also the general principles of commercial contracts—a type of civil contract with specific characteristics (Lawyer Pham Thi Phuong Thanh, 2024). Therefore, the author focuses on analyzing the provisions on contract conclusion in the 2015 Civil Code to identify shortcomings and propose solutions for improvement.

2.1. Effectiveness of the acceptance response notification of contract proposal

According to the provisions of Article 394(2) of the Civil Code 2015: "In case the acceptance notification of contract formation is delayed due to objective reasons that the proposing party knows or must know about, the acceptance notification of contract formation shall still be valid, except when the proposing party immediately responds disagreeing with that acceptance by the proposed party". Accordingly, when the deadline for responding to the acceptance of contract formation expires, but if due to objective reasons that the proposing party knows or must know about, then that acceptance notification still has effect, except when the proposing party immediately responds disagreeing with that acceptance by the proposed party. Therefore, the author believes that this issue is not specifically reasonable as follows:

Firstly, according to the provisions of Clause 2, Article 386 of the 2015 Civil Code, the party proposing the contract is only bound by the responsibility for that proposal within the stipulated time frame. This reflects the intention, voluntariness, and goodwill to enter into a contract with the proposed party within the allowed period without affecting their own interests (Associate Professor Dr. Nguyễn Văn Luyện, Associate Professor Dr. Lê Thị Bích Thọ, Dr. Dương Văn Sơn, 2011). Therefore, the legal requirement that binds the proposing party to the contract proposal during the period in which the acceptance notice is delayed due to objective reasons, as stated in Clause 2, Article 394 of the 2015 Civil Code, is unreasonable. This is because responding to accept the contract proposal is both a right and an obligation of the proposed party, and the additional time taken by the proposed party to respond falls outside the initial intention of the proposing party.

Secondly, the law grants the proposed party the right to withdraw the acceptance notification of contract formation, if this withdrawal notification is sent before or at the same time as the proposed party receives the acceptance response notification of contract formation as prescribed in Article 397 of the Civil Code 2015. Thus, the acceptance notification of contract formation of the proposed party is only effective when the proposing party receives that notification before the proposed party receives the notification of withdrawal of acceptance, not at the time the proposed party sends the acceptance notification. Therefore, before the proposed party receives the acceptance response notification of contract formation, it can be

considered that the proposed party has no responsibility to perform its obligations regarding the acceptance notification of contract formation. Contrasted with the provisions of Article 394(2) of the Civil Code 2015 stipulating "if the proposing party knows or must know about the objective reasons leading to the delayed acceptance notification of contract formation, then this notification is still valid", the author believes that in a certain extent, the law is leaning towards protecting the interests of the proposed party. Because according to the provisions of Article 397 of the Civil Code 2015, the withdrawal of acceptance notification is the time period from when the proposed party sends the notification until the time the proposed party receives the notification without excluding the case where the acceptance notification of contract formation is delayed due to objective reasons. Therefore, in case the acceptance notification of contract formation is delayed due to objective reasons that the proposing party knows about, the proposed party must fulfill its obligations regarding the proposal for contract formation, but conversely, the proposed party has the right to send the notification of withdrawal of acceptance at any time due to objective reasons, so the proposing party has not yet received it.

Thirdly, according to the provisions of Article 394(2) of the Civil Code 2015, if the proposing party immediately responds disagreeing with that acceptance by the proposed party, then the delayed acceptance notification of contract formation due to objective reasons shall not be effective. The issue is that the proposing party "immediately responds" disagreeing with the acceptance notification counts from the time when the proposing party receives the acceptance notification or from the time the proposing party knows or must know about the delayed acceptance notification of contract formation due to objective reasons. On the other hand, the law does not clearly stipulate when responding disagreeing with the acceptance notification by the proposing party becomes effective, whether it is from the time when the proposing party sends the acceptance notification or at the time when the proposed party receives that notification.

From the above analysis, the author believes that lawmakers need to completely remove the responsibility of the proposing party after the deadline specified in the proposal for contract formation in all cases. Because according to the principle of equality, voluntariness, and goodwill in contract formation, the proposing party is responsible for the proposal for contract formation within the time frame determined by itself, which is in line with the intention of the proposing party. After this time, any issues arising are beyond the initial expectation of the proposing party, so stipulating the responsibility for the proposing party when the deadline in the proposal for contract formation ends is unreasonable, and conversely, the proposed party must notify the proposing party of any arising issues and must be accepted by the proposing party.

2.2. Responsibilities of the Party Proposed to Enter into a Contract When Receiving an Indefinite Offer Response Time

Firstly, based on the provisions of Article 394.1 of the 2015 Civil Code, "in cases where the proposing party sets a response deadline, the acceptance response is only effective if made within that deadline, and if the proposing party does not set a deadline, the acceptance response is only effective if made within a reasonable time." According to this provision, it can be understood that the law opens up a pathway for parties regarding the response time for accepting contract offers depending on specific conditions of the contract, such as the contract's subject, value, etc.

However, the legal ambiguity regarding the acceptance response time poses difficulties in determining the deadline when the proposing party does not specify a response time, thereby lacking a basis to determine when the acceptance response to the contract offer becomes effective. This ambiguity could potentially harm the legal rights and interests of the parties. For example, if the proposing party sends a contract offer without specifying a response time, and the receiving party receives the offer but needs additional time due to the substantial value of the contract, delaying their acceptance response, it could result in uncertainty. Despite the delay, they may still wish to accept the offer. Based on these analyses, the author believes that the law needs to impose certain responsibilities on the party receiving the offer in cases where the proposing party genuinely intends to enter into a contract. The receiving party should notify the proposing party of receiving the offer and set a reasonable deadline for response to protect the legal rights and interests of the proposing party while ensuring the principle of good faith and honesty in contract formation.

Secondly, the essence of a contract proposal stems from the voluntary and good-faith intention to enter into a contract with the proposed party. The proposing party must be bound by this proposal until there are grounds to terminate the contract proposal under Article 397 of the 2015 Civil Code. In the Vietnamese legal system, the purpose of civil transactions is acknowledged. Accordingly, Article 118 of the 2015 Civil Code states: "The purpose of a civil transaction is the benefit that the subject expects to achieve when establishing that transaction." A contract proposal put forward by the proposing party reflects their intent to engage in a specific contractual relationship with the proposed party. When that purpose cannot be realized, the proposing party will proactively withdraw the contract proposal (Pham Vien Hong Thao, 2018).

In this context, the issue can be understood as follows: a contract proposal only takes effect for the

proposing party, and only when the proposing party receives a notice of acceptance of the contract proposal does the initial purpose of entering the contract get fulfilled, as stipulated by Articles 393 and 397 of the 2015 Civil Code. Therefore, the response time for a contract proposal can only be considered reasonable if it does not harm the legal rights and interests of the proposing party. For example, due to the nature of certain goods that can only maintain quality for a limited time, the proposing party selling goods may set a response deadline for the proposed party. In such cases, the responsibility binding the proposing party to their proposal should be lifted due to the urgency of selling the goods, and the seller must find a customer as soon as possible (Nguyen Hien Phuong, 2022).

On this basis, the author believes that if the proposing party makes a contract proposal, whether with or without a set deadline for acceptance, the law should allow the proposing party to withdraw the proposal if the proposed party has not yet provided a notice of receipt or acceptance of the proposal.

2.3. Changing or Withdrawing a Contract Offer When Specific Conditions Stated by the Proposing Party Arise

Based on the provisions of Point b, Clause 1, Article 389 of the Civil Code 2015, it is stated that: "The party proposing to enter into a contract may change or withdraw the offer if the proposing party clearly states the conditions for changing or withdrawing the offer in the proposal and those conditions have arisen." However, the Civil Code 2015 does not specify a precise period during which, once those conditions arise, the proposing party can change or withdraw the offer. This issue, from a certain perspective, fails to fully protect the legal rights and interests of the offeree. For instance, in cases where the parties agree that silence is considered acceptance of the offer, specifically: If the offeree does not respond within the stipulated period, it is considered as acceptance of the offer according to Clause 2, Article 393 of the Civil Code 2015. Therefore, after the expiration of the aforementioned period, if conditions leading to the change or withdrawal of the offer arise, according to the law, the proposing party is entirely within their rights to change or withdraw the offer pursuant to Point b, Clause 1, Article 389 of the Civil Code 2015, since the law does not restrict this right to a specific period. Meanwhile, according to the agreement, the contract has already been concluded as per Clause 2, Article 393 of the Civil Code 2015.

On this basis, the author believes that any changes or withdrawals of the offer by the proposing party should only be effective before the offer to enter into a contract expires as stipulated in Article 391 of the Civil Code 2015, which includes the offeree's acceptance of the offer. Accordingly, once the proposing party has accepted the offer, the contract is considered concluded, and the conditions set forth by the

proposing party can only be regarded as conditions to amend the contract according to Clause 1, Article 421 of the Civil Code 2015 or to terminate the contract if the parties agree under Clause 2, Article 422 of the Civil Code 2015. Therefore, the legislator should supplement provisions that the proposing party may only change or withdraw the offer when the stated conditions arise before the offer to enter into the contract expires according to the law.

Additionally, according to Point b, Clause 1, Article 389 of the Civil Code 2015, the law does not specifically stipulate the timing and form of the conditions leading to the change or withdrawal of the offer to enter into a contract that the offeror proposes to the offeree. The question arises as to when the notice of change or withdrawal of the offer to enter into a contract takes effect and whether the form of this notice must comply with the form of the previous offer. (Nguyen Ba Binh, 2021). The notice of change or withdrawal of an offer in international trade is similar to the offer to enter into a contract under the Civil Code 2015. International law stipulates that the notice becomes effective when it reaches the offeree (Article 24, CISG).

In comparison with Point a, Clause 1, Article 389 of the Civil Code 2015, the notice of change or withdrawal of the offer takes effect if it reaches the offeree before or at the same time as the offer to enter into the contract. In this case, the offeror can withdraw or change the offer without any conditions. This provision does not clearly define the moment the notice of change or withdrawal becomes effective, whether it is when the notice is "sent" or when it "reaches" the offeree. Additionally, the offeror can include additional notices stipulating conditions leading to the change or withdrawal of the previous offer, which can be considered as a notice of change of the offer if it meets the conditions of Point a, Clause 1, Article 389 of the Civil Code 2015.

Based on the above analysis, it is clear that the offeror can apply both cases leading to the change or withdrawal of the offer to enter into a contract as stipulated in Clause 1, Article 389 of the Civil Code 2015 within a single offer to extend the period during which they can change or withdraw the offer to the offeree. This is because the law does not set a specific time when the offeror must clearly state the conditions for changing or withdrawing the offer according to Point b, Clause 1, Article 389 of the Civil Code 2015. This creates an absolute legal advantage for the offeror and violates the principle of freedom of expression of will in contract formation (Tran Vo Nhu Y, 2018).

Moreover, according to Point b, Clause 1, Article 389 of the Civil Code 2015, when the conditions for changing or withdrawing the offer as stated by the offeror actually occur, the offeror may indeed change

or withdraw the offer. However, compared to the situation where the law stipulates that the offeror can change or withdraw the offer as per Point a, Clause 1, Article 389 of the Civil Code 2015, in this case, the offeree must be notified by the offeror regarding the changes or withdrawal of the offer. This clearly demonstrates the offeree's intention, and also serves as the basis for the offeree to understand the contents of a new offer if the offeror modifies the terms of the offer according to Clause 2, Article 389 of the Civil Code 2015. Therefore, if the conditions specified by the offeror indeed occur, the offeror "may" change or withdraw the offer to enter into a contract. This entirely depends on the offeror's discretion, as the law does not compel the offeror to change or withdraw the offer when the specified conditions arise, inadvertently placing the offeree in a passive position due to the lack of legal mechanisms limiting the power of the offeror in this scenario. Furthermore, it is essential to consider the scenario where the offeree may not be aware of the conditions specified by the offeror that have actually occurred. In this case, the offeree proceeds to accept the offer and prepares to fulfill their obligations. Consequently, the offeree may suffer losses if the offeror decides to change or withdraw the offer to enter into a contract.

Additionally, the law stipulates that the offeror can change or terminate the offer to enter into a contract when specific conditions occur, provided that these conditions have been "clearly stated" by the offeror. The issue arises as to how "clearly stated" should be interpreted for the offeror to exercise the right to change or withdraw the offer, specifically whether the offeror only needs to specify the conditions that may arise, or if the offeror must specify which conditions lead to changing the offer and which lead to withdrawing it. Moreover, it is necessary to clarify the content of the provision "the offeror must clearly state" at Point b, Clause 1, Article 389 of the Civil Code 2015, in terms of requiring the offeror not only to specify the conditions that may lead to changing or withdrawing the offer to enter into a contract but also to specify which conditions lead to changing the offer and which lead to withdrawing it. In the event that the offeror does not notify the offeree of the changes or withdrawal of the offer to enter into a contract, but the offeree has already received a notice of acceptance of the offer as per the legal provisions, the notice of acceptance of the offer remains effective.

3. Current Legal Regulations on the Time of Risk Transfer in Business Contracts

3.1. Risk Transfer in International Sales Contracts for Goods in Transit

According to Article 60 of the Commercial Law: "Unless otherwise agreed, if the subject matter of the contract is goods in transit, the risk of loss or damage to the goods is transferred to the buyer from the time of contracting." Based on this provision, it can be understood that the purchase of goods in transit can

only be determined from the moment the parties enter into the contract. At this point, both parties are aware that the goods are still in transit. In other words, the buyer has accepted all risks associated with the transportation process, so in principle, the law assigns the responsibility for risk to the buyer from the moment the goods are handed over to the carrier (Harold J Berman and Monica Ladd, 1988). From the above analysis, it is important to understand that the seller has provided all information about the goods within the seller's knowledge, and the buyer still accepts the contract. This means the seller still has a responsibility to provide all information and the condition of the goods to the buyer before entering into the contract, demonstrating honesty in contract formation according to the provisions of the Civil Code 2015.

However, according to the provision in the Commercial Law 2015, if there is no other agreement, the buyer must bear all risks associated with goods in transit at the time of contracting. This fails to clarify the seller's responsibility to notify the buyer of any defects in the goods, ensuring the principle of good faith in contract formation. In contrast, Article 68 of the 1980 Convention still defines the transfer of risk at the time of contracting. However, the Convention also stipulates that the responsibility remains with the seller at the time of contracting if the seller knew or should have known at the time of contracting that the goods were lost or damaged and failed to notify the buyer about it (Manuel Gustin, 2011). Based on this, the author suggests that lawmakers should reconsider the provisions regarding the responsibility of the seller in certain cases concerning the formation of contracts for the sale of goods to ensure the interests of the buyer, especially if the seller intentionally fails to notify the buyer of defects in the goods, such as loss or damage, before entering into the contract.

3.2. Risk Transfer in Goods Transportation

According to Article 67 of the CISG, there are two situations to determine the moment of risk transfer between the seller and the buyer. First, when the sales contract specifies the transportation of goods and the seller is not obliged to deliver at a particular place, the risk transfers to the buyer once the goods are handed over to the first carrier for delivery to the buyer under the sales contract. To utilize this provision, the seller must first not be obligated to deliver at a specified place, and the parties must have specific agreements on the carriage of goods from the moment the seller hands over the goods to the first carrier, specifically, "the risk is transferred to the buyer once the goods are handed over to the first carrier for delivery to the buyer under the sales contract." Therefore, it is evident that handing over to the first carrier in this case must also be clearly agreed upon by the parties in the sales contract, as a condition for the seller to reference in fulfilling their obligation to deliver the goods to the first carrier before transferring the risk to the buyer.

Comparing this provision with Article 58 of the LTM: "Unless otherwise agreed, if the contract involves the carriage of goods and the seller is not obliged to deliver at a specific location, the risk of loss or damage to the goods passes to the buyer when the goods are handed over to the first carrier", generally, this provision is quite similar to the 1980 Convention on the Moment of Risk Transfer in the Carriage of Goods (Quach Minh Tri, 2023). Specifically, the LTM 2015 does not require parties to have prior agreements on carriage when the seller is not obliged to deliver at a specific location; in other words, the seller will default to transferring risk at the time the seller hands over the goods to the first carrier when there is no obligation to deliver at a specified location.

In a certain aspect, this issue may harm the legitimate interests of the buyer when there are no binding provisions regarding the obligation to hand over the goods to the first carrier in cases where the seller is not obliged to deliver at a specific location. Compared to the provisions of Article 67 CISG, it can be seen that the provisions of the LTM 2015 have some drawbacks and difficulties in the contract implementation process as well as the buyer's interests not being guaranteed after the moment of risk transfer. Therefore, the buyer cannot control the delivery of goods because the seller transfers the risk to the buyer when the goods are handed over to the first carrier, and the law does not require parties to agree in the contract, providing the basis for the seller to hand over to the first carrier.

Moreover, “If the seller is obliged to deliver goods to a carrier at a designated place, the risk is not transferred to the buyer until the goods have been handed over to the carrier at that place (Article 67, CISG). According to the regulation, there are two conditions that must be met for the seller to transfer the risk to the buyer, specifically: i) the seller is obliged to deliver goods to a carrier at a designated place, ii) the goods have not been handed over to the carrier at that place. Therefore, when the seller is obligated to deliver goods to a carrier at a designated place, the risk will be transferred to the buyer if the goods have been delivered to the carrier at that place. Thus, it can be understood that in the case where the seller is obliged to deliver goods to a carrier at a designated place, there is only one entity, the carrier at that place, who, upon receiving the goods from the seller, determines the moment of risk transfer. Compared to the provision of Article 57 of the LTM 2005: “Unless otherwise agreed, if the seller is obligated to deliver goods to the buyer at a specific location, the risk of loss or damage to the goods is transferred to the buyer when the goods are delivered to the buyer or the person authorized by the buyer receives the goods at that location,” the author observes that in cases where there is a specific place of delivery, the Commercial Law 2005 and CISG have consistent similarities regarding the moment of risk transfer. However, unlike CISG, LTM 2015 does not specify, bind the obligation to deliver goods on the seller, specifically LTM still allows the seller

to choose to deliver goods directly to the buyer or the person authorized by the buyer. Based on this foundation, the author believes that the moment of risk transfer should only be determined under specific circumstances, granting the seller the right to choose the entity to deliver the goods in all cases may affect the interests of the buyer when at that time the buyer does not meet the conditions to receive the goods from the seller. From the above analysis, the author believes that lawmakers should stipulate that if the seller is obligated to deliver goods to the buyer at a specific location, the risk of loss or damage to the goods is transferred to the buyer when the goods are delivered to the buyer, and in the case where the seller authorizes another person to receive the goods, the moment of risk transfer is when the person authorized by the buyer receives the goods."

4. Conclusion

In the era of economic development, business contracts have become an important tool to enhance competitiveness and provide a foundation for protecting enterprises from disputes. Therefore, in the contract negotiation phase, businesses are increasingly investing and focusing because this is the stage to establish and form the rights and obligations of the parties in the contract. In this phase, making proposals for contract formation, acceptance deadlines for proposals, withdrawal, replacement, and cancellation of contract formation proposals are all associated with certain legal responsibilities of the parties, although this time has not yet been formed. Therefore, perfecting the shortcomings in the regulations regarding contract formation is an important basis for the parties to fulfill their obligations correctly and ensure the legitimate interests of the parties from the time of making the proposal to the time of terminating the contract formation proposal according to Article 391 of the 2015 Civil Code, which is an urgent issue, aiming to balance and bind the legal responsibilities of the parties in contracting and performing contracts on the principles of good faith, honesty, contributing to maintaining stable economic development in the current practical context.

Additionally, during the contract implementation process, the time of risk transfer is the moment to determine the transfer of obligations regarding the subject matter of the contract, serving as the basis for identifying which party is responsible for any damages that occur during the entire contract performance process. Accordingly, in some special cases, the transfer of risk does not coincide with the time when the seller delivers the goods to the buyer, but the law has specific provisions on the timing of transfer in each specific case as stipulated in Articles 57, 58, 59, 60, etc. Therefore, to balance the interests of the parties, the law needs to clarify the responsibilities of the parties in fulfilling their obligations to ensure the rights

and legitimate interests of the other party according to agreement or legal provisions as prerequisites for determining the time of risk transfer in the process of the parties implementing agreements in contracts.

Conflicts of Interest

The author has disclosed no conflicts of interest.

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