

APPENDIX f

Sample of examination papers

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1. Samples of 2 Oral exam questions and answer key

CIL6060- COMPARATIVE CIVIL PROCEDURE

ORAL EXAM QUESTION Master's Degree in civil law and civil procedure Code No. 3

Question 1: 5 points: Analyze the main features of the inquisitorial civil procedure model.

Question 2: 5 points: Analyze the trend of convergence between the inquisitorial model and the adversarial model in the world today and its implication for Vietnam?

ANSWER KEY

Question 1: (5 points) Main features of the inquisitorial civil procedure model

Students need to analyze at least the following 5 points:

- The active role of judges
- The less passive role of the parties and their lawyers
- Only one judge and no jury; if there is a lay judge, usually he/she is an expert relevant to the field of the dispute. The role of lay judges is different than the jury's role in finding facts.
- The civil process includes multiple continuous hearings, and the main hearing is short, not a concentrated one like a trial in the common law system.

Question 2: (5 points)

Students need to address at least 4 points regarding the trend of convergence between the inquisitorial model and the adversarial model in the world today:

- The inquisitorial model adopts the adversarial elements
- The adversarial model: judges play a more active role in controlling the time schedule, guiding the self-represented litigants.
- Explain why there is the convergence trend in contemporary civil procedure: cost and delay, each model has advantages and disadvantages...
- Make reference to Vietnam's civil procedure development in recent years: more adversarial

Note: if the student can answer well the two questions, he/she can only get 8 points. The student can only get more points if he/she can answer additional oral questions from the professor relating to the two main questions.

CIL6055 INTELLECTUAL PROPERTY DISPUTE RESOLUTION
ORAL EXAM QUESTION
Master's Degree in civil law and civil procedure
Code No. 11

Question 1: 5 points: Name the methods of resolving intellectual property disputes, and analyze the difference, advantages and disadvantages of those methods.

Question 2: A company took the image of the movie “Ve nha di con” (Go home, my child) to print on the company’s advertisement leaflet to advertise its products. The producer of the movie requested that the company stop using this image due to copyright infringement. The company argued that image in the TV show is not protected as a trademark; therefore it can print such image on the leaflet. Do you agree with this argument? If the company does not stop using the image, what can the movie producer do?

ANSWER KEY

Question 1: (5 points) Methods of resolving intellectual property disputes

- Dispute resolution at government bodies: civil litigation in court, request competent government agencies to handle intellectual property infringements.
- Dispute resolution through ADR mechanisms: negotiation, mediation, arbitration

Differences, advantages and disadvantages of these methods : students should compare the methods based on the following criteria

- Jurisdiction
- Enforceability of the dispute resolution outcome
- The party autonomy
- Confidentiality
- Time and cost

Question 2: (5 points)

Student needs to apply copyright law to the facts in this case to resolve the dispute:

- Movie is a type of copyrighted work and the movie is still in the time of copyright protection.
- Movie producer is the copyright owner who has the exclusive right to make copies of the work.
- Taking an image from a movie is also a copy of cinematographic work.
- The company copied without permission of the copyright owner and this use does not fall into any circumstances of fair use (copyright limitation).

Therefore, the company infringed on the movie producer’s copyright and must stop using the image of the movie. If it fails to stop, the movie producer can file a lawsuit in civil court or request a competent government agency to handle the infringement through administrative mechanism.

Note: if the student can answer well the two questions, he/she can only get 8 points. The student can only get more points if he/she can answer additional oral questions from the professor relating to the two main questions.

2. Samples of 2 Written Exams, Keys, Rubric and Exam papers

COPYRIGHT LAW EXAM QUESTIONS
Master's Degree in civil law and civil procedure
Exam Questions - Code No. 1
Duration: 90 minutes
(Open-book exam)

Question 1: Please explain the principles of copyright limitation.

Question 2: On November 13, 2017, Mr. T and his girlfriend bought tickets to see the movie Co Ba Saigon at Lotte Cinema in Vung Tau city. The cinema was almost empty, Mr. T uses his iPhone 7 to live stream movies directly on a fanpage Movie + specializes in movies on which he and his friend are administrators. While he was livestreaming, he was caught by a movie theater employee. He then deleted the video at the same time, and later sent a message apologizing to the producer. In consideration that this is a copyright infringement that causes economic damage and reduces the revenue of the film producer, actress Ngo Thanh Van has filed a request with the police to investigate. Two days later, Mr. T went to the police station of Ba Ria Vung Tau province to write a report admitting that he had distributed the film on social networks.

Please comment on this situation in the light of the law on author's rights.

COPYRIGHT LAW EXAM
ANSWER KEYS
Master's Degree in civil law and civil procedure
Exam Questions - Code No. 1
(Open-book exam)

Question 1: Please explain the principles of copyright limitation (5 points)

- Explain why copyright is subject to limitation (balance of interest between copyright holders and the public): 1 point
- Under Vietnamese law, copyright limitations apply only to published works: 0,5 point
- A person can use a copyrighted work without authorization and compensation (fair use) in certain circumstances but he/she is not allowed to invade moral rights of the authors: 1 point
- Use of a copyrighted work in copyright limitation circumstances cannot prejudice the normal exploitation of the author's work, does not affect the interests of the author. 1 point
- List and analyze each circumstance of fair use. 1 point
- Give some specific examples of fair use under Vietnamese law: 0,5 point

Question 2: Answer:

1. Mr. T has infringed on Ngo Thanh Van's copyright to the movie (1 point)

Because:

- The movie is a copyrighted work which is still in the duration of copyright protection (0,5 point)
- Ngo Thanh Van is the movie producer, so she is the owner of copyright (0,5 point)
- Livestreaming is a way of copying and communicating the work to the public, which is the exclusive right of the copyright owner.(1 point)
- Mr. T livestreamed without permission of the copyright owner. (0,5 point)
- T's livestreaming does not fall into any circumstances of copyright limitation. (0,5 point)

2. Because Ngo Thanh Van is the copyright owner, so she holds economic rights to the work and can claim damages for copyright infringement. To claim damages, Ngo Thanh Van must prove actual damages caused by the infringement (Lost profit, lost of business opportunities, cost to prevent and cure the loss...), and the causation (connection between the infringement and the loss). (1 point)

Note: the student's work will receive the maximum point for each question if it shows thoughtful, convincing analyses and have examples to support the analyses. The student knows how to apply copyright law to the facts and use the facts to analyze and reach a sound conclusion.

STUDENT'S WORK:

Question 1: the principles of copyright limitation

1. Copyright limitations apply only to published works.

The right to publish or to permit others to publish is the right of the author and the copyright owner to publish the works to the public in a large and reasonable amount to meet the needs of the public, according to the nature of the works. This is performed by the copyright owner, or by another organization or individual with the consent of the author or the copyright holder. Publication does not include a theatrical, cinematic, or musical performance; reading in public a literary work; broadcasting literary and artistic works; exhibiting artworks; constructing buildings from architectural works.

One of the most important roles of publishing works is to change the legal value of the works, to clarify the limitation of copyrights.

2. Do not invade moral rights relating to the works

Moral rights relating to the work include:

- To give titles to their works.
- To attach their real names or pseudonyms to their works; to have their real names or pseudonyms acknowledged when their works are published or used.
- To publish their works or to authorize other persons to publish their works.
- To protect the integrity of their works; and to forbid other persons to modify, edit or distort their works in whatever form, causing harm to the honor and reputation of the author.

Moral rights are an integral part of copyright. Only the author has the right to give titles to the work. Anyone who impersonates the author to publish the work without permission, publishing or distributing a work of joint authors without permission from the co-authors; to edit, mutilate or distort the work in any way that harms the honor and reputation of the author... are determined to be an infringement of moral rights.

3. Does not prejudice the exploitation of the author's work, does not affect the interests of the author.

For each work being created, it is not only a product of the author's creativity and intellectual investment, it is also a valuable work. The author can fully exploit the value of the work through the distribution of the work for a profit. Therefore, the exploitation and use of the work must not infringe the rights of the author.

4. Fair use of the work in certain circumstances.

To balance the interests of copyright and the common interests of the community, the law provides some cases of copyright restriction for certain acts of using and exploiting copyright. In detail:

Cases when published works may be used without having to seek permission or pay royalties or remuneration (Article 25 of the IP law 2005)

a) Published works may be used without having to seek permission or pay royalties or remuneration in the following cases:

- Making one copy of the work of an author for scientific research or teaching purposes;
- Reasonable quoting from a work in order to comment on or illustrate one's works, without misrepresenting the author's views;
- Quoting from a work to write an article published in a newspaper or periodical, in a radio or television broadcast or a documentary, without misrepresenting the author's views;
- Quoting from a work in school or university for lecturing purposes without misrepresenting the author's views and not for commercial purposes;
- Copying of a work by a library for archival and research purposes;
- Performing a stage work or other art work in mass cultural, communication or mobilization activities without collecting fees in any form;
- Audio-visual recording of a performance to report current events or for teaching purposes;
- Photographing or televising plastic art; or an architectural, photographic, or applied art work displayed at a public place to present images of such work;
- Transcribing a work into braille or characters of other languages for the blind;
- Importing copies of another's work for personal use.

In the application, please note that the use of the work must not prejudice the normal exploitation of the work, the author's copyrights; information about the author's name and the source and origin of the work must be provided.

b) When published works may be used without having to seek permission but royalties or remuneration must be paid

- A broadcasting organization which uses a published work to make a broadcast which is sponsored contains an advertisement or which collects fees in any form shall not be required to seek permission but must pay royalties or remuneration to the copyright holder following regulations of the Government or the court's judgments.
- The number of royalties or level of remuneration shall be agreed upon by the parties. In case this agreement could not be formed, the regulations of the Government shall be applied, or the parties may file a petition to the relevant court to settle this.
- A broadcasting organization that uses a published work to make a broadcast that is not sponsored contains an advertisement or which does not collect fees in any form shall not be required to seek permission but must pay royalties or remuneration to the copyright holder per regulations of the Government.

Question 2:

For Mr. T's behavior, Mr. T used his iPhone 7 to live stream the movie "Co Ba Saigon" on his fan page. This is an infringement of copyright according to the provisions of Clause 6, Clause 10, Article 28 of the Intellectual Property Law 2005. Specifically, he violated

- Make a copy of the movie without permission.
- Communicating the works to the public through live-streaming on fan page without permission of the copyright owner.

Regarding claims for damages:

Assumption 1: Ngo Thanh Van is both an author and an investment producer in the movie "Co Ba Saigon". Then Ngo Thanh Van has the right to request him to compensate for material

damage according to the provisions of Article 204.1.a of the Intellectual Property Law, including loss of property, loss of profit income; loss of business opportunity; reasonable cost to prevent remedial damage.

Assumption 2: Ngo Thanh Van is only the author who holds the moral rights of the movie "Co Ba Saigon". Then only the production investor who holds the economic rights has the right to demand compensation from him. Material damage includes the above-mentioned expenses.

The proof of damages rests with the investor and the author. In fact, it is very to prove the damage that occurs when there is an infringement of copyright. The determination of the level of compensation for damage also has no specific basis for the determination. This is an issue that needs to be clarified.

COMPARATIVE CIVIL PROCEDURE EXAM
Master's Degree in civil law and civil procedure
Exam Questions - Code No. 1
(open-book exam)

Question 1: 6 points: Compare the role of the judge in the inquisitorial and adversarial models. From your comparison, analyze and comment on the role of judges in civil procedure in Vietnam.

Question 2: 4 points: In your opinion, how to improve the institution of People's Jurors (Lay judges) in Vietnamese civil proceedings based on comparative civil procedure study?

COMPARATIVE CIVIL PROCEDURE EXAM
ANSWER KEYS
Master's Degree in civil law and civil procedure
Exam Questions - Code No. 1

Question 1: 6 points: Compare the role of the judge in the inquisitorial and adversarial models. From your comparison, analyze and comment on the role of judges in civil procedure in Vietnam.

- Analyze the active role of the judge in the inquisitorial model (call witness, ask questions at trial, collect evidence, prepare the case records...): 2 points
- Analyze the passive role of the judge in the adversarial models (neutral, impartial role, no interference in the taking and collection of evidence, not call witness, not prepare the case records, not ask questions at trial...): 2 points
- Analyze the active role of the judge in Vietnam's civil procedure and the trend of changing role of the judge towards adopting some elements of the adversarial model: 2 points

Question 2: 4 points: In your opinion, how to improve the institution of People's Jurors (Lay judges) in Vietnamese civil proceedings based on comparative civil procedure study?

- Highlight the significance of People's Jurors and compare the People's Jurors in Vietnamese civil proceedings with the jury in the adversarial model: 1 point
- Present some limitations of People's Jurors in Vietnamese civil proceedings: 1 point
- Propose some solutions to improve the operation of People's Jurors: 2 point

Note: the student's work will receive the maximum point for each question if it shows thoughtful, convincing analyses and have examples to support the analyses.

COMPARATIVE CIVIL PROCEDURE
Master's Degree in civil law and civil procedure
Exam Questions - Code No. 1

STUDENT'S WORK

Question 1: Compare the role of the judge in the inquisitorial and adversarial models. From your comparison, analyze and comment on the role of judges in civil procedure in Vietnam.

The adversarial system is a procedural model in countries with a common-law tradition such as the United Kingdom, the United States, and Australia. This model is based on the principle that both parties are free to advocate before the court. In the common law system, the judge is impartial and does not comment until all the evidence has been presented by both sides. The common law system originated in the UK and spread to Australia, Canada, the USA, and other Commonwealth countries. This legal system emphasizes the importance of case law. In this system, the most important source of the law is precedent formed by the judge's decision. Judges in the common law system can actively create new rules to ensure consistency in trials, and lower-level courts shall be bound by the higher court's decision, which is called the stare decisis principle. The judge's role in the adversarial system is: when participating in the hearing, he is only responsible for listening to determine the issues raised by the two parties. The judge maintains a neutral position and does not engage in discussion or making arguments, only slightly asking witnesses when there are irrelevant facts and preventing unnecessary repetition. Therefore, in this litigation model, the presentation of evidence and the calling of witnesses will be completely decided by both parties. The judge has no power to request or recommend any evidence to be brought before the court. The advantage of this model is that the judge does not comment until he has heard all the evidence presented by both sides. This will make the judge more impartial because he/she will only issue a verdict when the evidence is fully presented. The disadvantage of this is that the search for evidence will completely rely on the resources of the two litigants, which can easily lead to unfairness. This is because the judge is not actively looking for evidence, and the judge is also often passive.

The inquisitorial system (interrogation) is a model of proceedings in countries with a civil law tradition such as France and Germany. In this model, the burden of proof rests on the public prosecutor and the judge while lawyers only play a secondary role. The civil law system is characterized by strong codification, i.e. statutory law is given great importance. While statutory law is the main source of law covering all possible situations. Judges in the inquisitorial model are limited because they can only settle the case by applying the provisions of the law. Therefore, the decisions of high-level courts, even in a similar matter, is for reference only and are not binding on the lower. The judge in the inquisitorial model acts as the person who determines the objective facts of the case and applies the corresponding legal provisions. The judge directs the entire proceedings. The judge will be directly involved in witness questioning, evidence evaluation, and controlling the trial. If the evidence is not sufficient, the judge has the right to request the two parties to hand over more documents. The advantage of this is that the judge plays an active role in civil proceedings, determining the issues to be resolved in the case, oversees the collection of evidence, and is responsible for ensuring that the necessary evidence is adequately obtained. However, the disadvantage is that as the evidence is collected by the judge, so it is considered that the inquisitorial system goes against the principle of impartiality and objectivity. There is a possibility that the situation of "pre-decided verdict" is due to many reasons or because the court is overloaded.

In reference to Vietnam

Vietnam is one of the countries under the socialist legal system - originated from civil law and then adjusted in accordance with the ideology in the Marxist-Leninist doctrine. The role of Vietnamese judges is relatively similar to that of their counterparts in the civil law system. Vietnamese judges must always strictly comply with the provisions of the statutory law when settling cases. In the collection of documentary evidence, Vietnamese judges are also active in collecting and ensure to supervise all activities. The judge has the role of directing all activities at the court hearing from the beginning to the end of the trial. But there is a difference for Vietnamese judges that even though the lower court's decision is independent of the high-level court's decision when facing difficult-to-solve legal problems, the lower court still seeks guidance from a higher court.

Question 2: In your opinion, how to improve the institution of People's Lay Assessors (Lay judges) in Vietnamese civil proceedings based on comparative civil procedure study?

People's Jurors are elected or appointed according to the provisions of law to perform the task of hearing cases under the jurisdiction of the court. Theoretically, People's Jurors participate in handling according to Article 11 of the 2015 civil procedure code and this principle is considered as a basic principle, showing legal ideology when handling civil cases. The role of the People's Jurors in Vietnam is to strengthen the relationship between the court and the people, contributing to improving the efficiency of supervision work, ensuring accuracy and transparency in the process. It protects democracy, promoting teamwork in conducting the hearing to ensure a fair trial. People's Jurors is meant as the voice of the people and give the voice of the people in hearing and also in propagating the law.

From the perspective of comparative law, while the common law system has juries, the Vietnamese system has People's Jurors. Both these institutions aim to place the court under public scrutiny, but there are 3 differences. First, while juries are chosen randomly among the public, People's Jurors are carefully elected and promoted. Jury draws to join the case while People's Jurors are chosen by the chief judge of a court following his/her will. One only has the right to participate in the expression of people's feelings at the beginning of the handling process, while the other side can participate in the whole proceedings, and even can decide on the case. Due to the increasingly complex cases, the People's Jurors need to be well-informed in their profession and firmly grasp the provisions of the law and the documents guiding the application of the law of the competent state agency and also have social understanding and experience. For a better quality of hearing and solving cases in courts, the improvement of the People's Jurors shall be taken under some goals. People's Jurors' legal knowledge shall be standardized. The selection of the People's Jurors to vote or elect shall not be as easy as in the past. The appropriate number of People's Jurors participating in the hearing should also be considered. People's Jurors should also be provided with a decent salary structure; coordination between the courts, the responsible bodies of the armed forces, and the jurors should also be strengthened.

3. Final essay topics CIL6042 Comparative Contract Law QH2021

FINAL ESSAY TOPICS

Course: COMPARATIVE CONTRACT LAW

(Students can choose one of the following topics)

1. Compare the approach of civil law system and common law system on advertisement and goods displayed in shops. Comment on relevant provisions of current Vietnamese contract law based on that comparison.
2. Comment regulations on mistakes in Vietnamese contract law from a comparative perspective.
3. Compare the approach of civil law system and common law system on specific performance.. Comment on relevant provisions of current Vietnamese contract law based on that comparison.
4. Compare regulations on liquidated damages in contract law of the common law legal system and regulations on penalty in contract law of the civil law legal system. Comment on relevant provisions of current Vietnamese contract law based on that comparison.

Requirements:

- The required length for the final essay is from 5 to 10 pages of A4 size paper with Vietnamese font Times New Roman; Unicode, black letter; 13 to 14 font size; line space 1,5 line; page setup: top and left margin from 2 to 2.5 cm, left margin from 2.5 to 3 cm, right margin from 1.5 to 20 cm.
- Footnotes are required to all reference content. A list of references must be displayed on the last page of the essay.
- Academic integrity will be taken seriously. Students will be charged with plagiarism if they copy other student's paper or copy verbatim from the references. Papers of similarity from 50% with received a zero for their marks. Papers of similarity from 30% to 49% will be deducted half of their marks.
- Students must submit their essays (soft copy, PDF) to instructor by using this email address: **k26.luathdss@gmail.com**
- File name: Student number. Student's name
- **Deadline: before 11 pm 11/8/2021**

Head of Civil Law Department

(signed)

Dr. Nguyen Bich Thao

4. Final essay CIL6042 Comparative Contract Law QH2021-Grading rubric

CIVIL LAW DEPARTMENT- SCHOOL OF LAW VIETNAM NATIONAL UNIVERSITY

ANSWER KEYS AND GRADING INSTRUCTIONS FOR FINAL ESSAY

Course: COMPARATIVE CONTRACT LAW

Topic 1: Compare the approach of civil law system and common law system on advertisement and goods displayed in shops. Comment on relevant provisions of current Vietnamese contract law base on that comparison..

Answer key:

- Analyze the nature of advertisement and display of products in civil law system's contract law: 2 points
- Analyze the nature of advertisement and display of products in common law system's contract law: 2 points
- Compare and explain the difference in approaches to advertisement and display of products in the civil law and common law systems: 2 points
- Analyze the provision on offer made to the public in the 2015 Civil Code of Vietnam: 3 points
- Compliance with formality and citation requirements: 1 point

Topic 2: *Comment regulations on mistakes in Vietnamese contract law from a comparative perspective.*

Answer key:

- Analyze the nature of mistake and conditions to avoid a contract based on mistake in civil law system's contract law: 2 points
- Analyze the nature of mistake and conditions to avoid a contract based on mistake in common law system's contract law: 2 points
- Compare and explain the difference in approaches to mistake in the civil law and common law systems: 2 points
- Analyze the development of the provision on void civil transactions due to mistake in the 1995, 2005 and 2015 Civil Codes of Vietnam, identify gaps in

the current provision on mistake and propose solution to address the gaps: 3 points

- Compliance with formality and citation requirements: 1 point

Topic 3: Compare the approach of civil law system and common law system on specific performance. Comment on relevant provisions of current Vietnamese contract law based on that comparison.

Answer key:

- Analyze the nature and conditions to apply specific performance in civil law system's contract law: 2 points
- Analyze the nature and conditions to apply specific performance in common law system's contract law: 2 points
- Compare and explain the difference in approaches to specific performance in the civil law and common law systems: 2 points
- Analyze the nature and conditions to apply specific performance in the 2015 Civil Code of Vietnam, identify gaps and propose solution to address the gaps: 3 points
- Compliance with formality and citation requirements: 1 point

Topic 4: Compare regulations on liquidated damages in contract law of the common law legal system and regulations on penalty in contract law of the civil law legal system. Comment on relevant provisions of current Vietnamese contract law based on that comparison.

Answer key:

- Analyze the nature and conditions to apply liquidated damages in common law system's contract law: 2 points
- Analyze the nature and conditions to apply penalty in civil law system's contract law: 2 points
- Compare and explain the difference in approaches to penalty/liquidated damages in the civil law and common law systems: 2 points
- Analyze the nature and conditions to apply penalty in the 2015 Civil Code and the 2005 Commercial Law of Vietnam, comment on the liquidated damages clause in contract from Vietnam's substantive contract law and judicial practice: 3 points
- Compliance with formality and citation requirements: 1 point

Note:

- The grading lecturer must follow these answer keys and grading scale stipulated in Article 4 of the Temporary Regulation on final essays at School of Law, Vietnam National University (issued together with Decision No. 73/QD-KL dated 24/2/2021 of the Dean)

Head of Civil Law Department

(signed)

Dr. Nguyen Bich Thao

5. Final essay CIL6042 Comparative Contract Law (LeNgocCam)-translated

FINAL ESSAY

Course: Comparative contract law

Student Name: **LE NGOC CAM**

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Master of civil law and civil procedure program – K26

TOPIC

Compare regulations on liquidated damages in contract law of the common law legal system and regulations on penalty in contract law of the civil law legal system. Comment on relevant provisions of current Vietnamese contract law based on that comparison.

CONTENT

I. INTRODUCTION

In the legal science, liquidated damages and penalty for breach of contract are no longer unfamiliar issues. Liquidated damages are considered a relatively familiar regulation of contract law in common law of countries. Similarly, influenced by Roman law, penalty for breach of contract has long been incorporated into contract law of civil law countries. Although there are certain differences in the approach of and interpretation on the nature and basis of these two regulations, in the trend of unifying contract law, model laws had proposed solutions to reconcile those differences. [12, p. 14].

However, in Vietnamese law, it seems that legislators so far are still struggling to find a suitable solution to solve the relationship between the regulation on damages (including issue relate to liquidated damages) and regulations on penalty for breach of contract.

Within the scope of this essay, the author will first comment on the regulation on liquidated damages in common law legal system, then analyze regulation on penalty for breach of contract in civil law legal system. Based on these analyses, the author will comment on the corresponding provisions of current Vietnamese contract

law and give personal recommendations.

II. REGULATIONS ON LIQUIDATED DAMAGES IN COMMON LAW LEGAL SYSTEM

Regulation on liquidated damages in nature is a pre-agreement of parties to a contract to estimate the amount of money that one party must pay to the other party when the contract is breached. Liquidated damages usually take the form of a fixed amount of money or formula(s) to make it easier for the parties to determine a specific amount of money. [1, p.18]. Common law system considers this as a solution to eliminate uncertainty in contracts. Specifically, liquidated damages helps parties to know in advance the amount of compensation they need to pay if they breach the contract, thereby making a plan to sign and perform the contract accordingly. An example is the calculation of price and allocation of liability to insurers. [2, p. 368]. In addition, when there is an agreement on liquidated damages, the aggrieved party is also relieved of the obligation to prove his/her actual damage. [3. p.226]. It can be seen that liquidated damages makes it easier and more effective to claim damages and also avoids prolonged disputes. [1, p.18]

However, parties are not completely free to agree on the amount of liquidated damages. Common law system allows courts to control the content of liquidated damages clause. Specifically, liquidated damages clause is considered effective only if parties have agreed on the anticipated amount of compensation based on reliable assessment of the possible loss due to a breach of contract. Otherwise, liquidated damages clause will have no effect. Furthermore, the clause will be considered as a penalty clause. The basis of this approach is that common law system argues that the nature of civil remedies is to compensate the aggrieved party, not to punish the in breach party. As a result, punitive terms will not be allowed. [2, p.368]. Thus, common law courts must find criteria to distinguish between liquidated damages clause and penalty clause.

Initially, common law courts distinguished liquidated damages clause from penalty clause based on parties' will at the time that they enter into the contract. If the parties have made good efforts to assess probable loss, the clause will be classified as liquidated damages clause. In contrast, if the clause is designed to punish the violating party, then it will be a penalty clause [2, p.368].

However, courts might face with difficulty when using the above mentioned criteria to distinguish between liquidated damages clause and penalty clause, therefore courts in practice have made constant efforts to develop principles to distinguish these terms. Some rules that common law courts use to distinguish between liquidated damages clause and penalty clause can be listed as follow [2, p.369]:

- An amount of money agreed by the parties will be considered as a penalty if that amount is too unreasonable or unethical compared to the maximum amount of damage that can be proved caused by the violation of one party;

- The breach of contract is the failure to pay a sum of money but the liquidated damages clause sets a higher amount of money;

- A clause will also be considered as a penalty clause if the amount of compensation remain unchanged regardless of the seriousness of the breach;

Despite the first three principles, the fourth principle clearly states [2, p.369]:

- There is no limitation on parties to agree on a pre-agreed amount of money in case of breach of contract because it is difficult to estimate accurately the actual loss. The nature of liquidated damages is just an amount of money agreed by parties to a contract, therefore so as long as parties make their agreement on the basis of a real assessment of possible damage when the contract is breached, the clause will still be accepted. Acceptance is the provision of compensation for foreseeable damages.

It should be further noted that in case merchants dispute over these two types of clause, courts will be more reluctant to conclude that there was an agreement on penalty clause between parties as courts avoid to “rewrite the contract” and interfere with parties’ freedom of contract. In *Philips Hong Kong Ltd v A-G of Hong Kong* (1993) 61 Build LR 41, the court concluded that merchants are capable of protecting their own interests, thus, it is hard to assume that one merchant is more dominant than the other in contractual relationship. When negotiating with each on liquidated damages clause, merchants knew about the level of responsibility as well as risks they might face when entering into a contract. If one party (merchant) found that the amount of liquidated damages proposed by the other party had a punitive nature or unsatisfactory, he or she could refuse and asked for renegotiation. [2, p.369 - 370].

In practice, except cases where one of the parties to a contract can dominate the other over the choice of contractual terms, courts are usually reluctant in identifying an

agreed amount of money as a penalty even though that clause may lead to the result that the aggrieved party will receive a larger amount of money than his/her actual damage. As long as the agreed amount of money does not excessively exceed the reasonably foreseeable damages, the clause may still be considered as liquidated damages. [2, p.369 - 370].

III. REGULATIONS ON PENALTY IN CIVIL LAW LEGAL SYSTEM

Due to the influence of Roman law, the laws of civil law countries often recognize the validity of the penalty clause. For example:

Article 339 BGB reads as follows: “ *Where the obligor promises the obligee, in the event that he fails to perform his obligation or fails to do so properly, payment of an amount of money as a penalty, the penalty is payable if he is in default*”. In addition, BGB also contains provisions on penalty when failing to perform obligations and improperly performing obligations in Articles 340 and 341 [5].

Article 1226 of the French Civil Code reads: “*A penalty is a clause by which a person, in order to ensure performance of an agreement, binds himself to something in case of non-performance.*” Moreover, Article 1229 French Civil Code regulates: “*A penalty clause is a compensation for the damages which the creditor suffers from the non-performance of the principal obligation*” [6].

It can be seen that, according to civil law system, penalty clause has two functions: On the one hand, this clause serves as a means to give pressure to parties to properly perform the contract. On the other hand, this clause helps reduce the burden of assessing and proving damage to the aggrieved party when the other party breaches the contract. [4, p. 95]. From this perspective, penalty clause both serves as a shield to reduce contractual violation and an anticipated compensation.

Similarly, the Principles of European Contract Law do not distinguish between a penalty clause and liquidated damages clause. Article 9:509 (a) PECL states “*Where the contract provides that a party who fails to perform is to pay a specified sum to the aggrieved party for such non-performance, the aggrieved party shall be awarded that sum irrespective of its actual loss*” [7].

Although all recognize the effect of the penalty clause, France and Germany

contract law and the PECL all agree that this clause will not take effect if it clearly force the violating party to pay an unreasonable amount of money [3, p. 226]. Specifically:

Article 343 BGB stated: *“If a payable penalty is disproportionately high, it may on the application of the obligor be reduced to a reasonable amount by judicial decision. In judging the appropriateness, every legitimate interest of the obligee, not merely his financial interest, must be taken into account. Once the penalty is paid, reduction is excluded”* [5].

Article 1152 of the French Civil Code *Điềù 1152 CC* allows judges to increase or decrease the amount of money in penalty clause if that amount of money is obviously too high or too low.

In the same line, Article 9:509 (b) PECL states: *“despite any agreement to the contrary the specified sum may be reduced to a reasonable amount where it is grossly excessive in relation to the loss resulting from the non-performance and the other circumstances”* [7].

It can be seen that, due to the differences in legislative histories and viewpoints, there are differences between common law system and civil law system regarding liquidated damages clause and penalty clause. Accordingly, common law countries allow liquidated damages but forbid penalty clause. Meanwhile, civil law countries do not distinguish between these two terms.

However, both legal systems consistently allow courts to adjust a agreement on pre-agreed sum of money in the event that pre-agreed sum of money is deemed unduly high compared to the actual damage. In particular, when considering the restraint of common law courts in interfering with parties’ agreement, especially with transactions between traders, it can be seen that although the theoretical background and approach are different, the nature and legal consequences of applying these terms in practice are not too much of a difference between the two systems. Perhaps for this reason, the Unidroit principles of international commercial contracts (PICC) used a relatively neutral term to replace penalty or liquidated damages, which is *“Agreed payment for non-performance”*. Accordingly, Article 7.4.13(1) PICC states: *“Where the contract provides that a party who does not perform is to pay a specified sum to the aggrieved party for such nonperformance, the aggrieved party is entitled to that sum*

irrespective of its actual harm” [8].

Besides, Article 7.4.13(2) PICC give judges the power to reduce the amount of compensation if it is too unreasonable: *“However, notwithstanding any agreement to the contrary the specified sum may be reduced to a reasonable amount where it is grossly excessive in relation to the harm resulting from the non-performance and to the other circumstance”* [8].

IV. COMMENT ON RELEVANT PROVISIONS OF CURRENT VETNAMESE CONTRACT LAW

1. Regulation on liquidated damages under Vietnamese contract law

Many Vietnamese scholars base on Articles 13 and Article 360 of the Vietnamese Civil Code 2015 to affirm that Vietnamese law allows parties to agree on the amount of damage to be compensated as well as the time to agree on that amount, even at the time parties enter into contract [12, p. 13].

According to Truong Nhat Quang (lawyer), so far in Vietnamese law, parties’ freedom of contract on damages under Articles 13 and 360 of the Vietnamese Civil Code 2015 *“cannot be interpreted as allow contractual parties the right to agree on liquidated damages”* [13, p. 598 - 599]. The author agrees with lawyer Truong Nhat Quang on this point for three reasons:

- *Firstly*, according to Articles 419 and 361 of the Vietnamese Civil Code 2015 as well as Article 302(2) of the Vietnamese Commercial Law 2005, Vietnamese contract law only explicitly acknowledges the compensation for actual damage and expected damage when there is a breach of contract. Particularly, the Vietnamese Commercial Law 2005 limits compensation to direct damage if the type of damage to be compensated is actual damage.

- *Second*, until recently there is no legal regulation or clear guidance from the Supreme People’s Court on the recognition of liquidated damages [1, p. 22].

- *Third*, in practice, Vietnamese courts do not recognize the validity of liquidated damages or only considers it as an agreement on penalty for contractual violation and applies provisions on penalty clause to adjust those agreements [14, 15].

2. The relationship between liquidated damages and penalty for breach of contract under Vietnamese contract law

The Vietnamese Civil Code 2015 and the Vietnamese Commercial Law 2005

both have provisions on damages and penalty. However, there are some differences in how these two legal documents approach damages and penalty:

In the Vietnamese Civil Code 2015, damages is a mean to protect civil rights [9, Article 11] and is also considered a type of civil liability of the in breach party [9, Article 360]. Although the Vietnamese Civil Code 2015 provides a definition of penalty for breach of contract, it does not explicitly state the nature and purposes of this clause.

Inheriting Article 422 of the Vietnamese Civil Code 2015, Article 418 of the Vietnamese Civil Code 2015 stipulates the relationship between damages and penalty for breach of contract: *“The parties may reach an agreement that the violating party has to pay only a fine for violations and is not liable to any compensation for damage, or has to pay both a fine for violations and a compensation for damage. In case the parties have an agreement on fines against violation which does not specify that the violating party has to pay both a find for violations and a compensation for damage, then the violating party has to pay only the fine for violations.”*

Thus, in principle, if one party violates the contract and causes damage to the other party, according to the 2015 Civil Code, the following cases will occur:

	No agreement on damages	Agreement on damages
No agreement on penalty	The violating party has to pay damages	The violating party has to pay damages
Agreement on penalty	The violating party has to pay for the sum of money according to penalty clause	If agreed by parties, the violating party both have to pay damages and pay for the sum of money according to penalty clause. If there was no agreement on this matter, the violating party only has to pay for the sum

		of money according to penalty clause
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Inherit from the approach of the the Vietnamese Civil Code 2005, members of the drafting committee of the the Vietnamese Civil Code 2015 believe that the nature of penalty clause is the civil liability of the violating party rather than a means to secure transactions [12, p. 12]

The Vietnamese Commercial Law 2005 has a relatively different approach. Accordingly, penalty for breach of contract and damages for breach of contract are both commercial remedies [10, Article 292]. The Vietnamese Commercial Law 2005 clearly distinguishes between functions of penalty for breach of contract and damages for breach of contract. Penalty for breach of contract is a fine imposed on the violating party to a contract [10, Article 300] while damages is a compensation to aggrieved party for losses caused by the breach of contract [10, Article 302]. With this regulation, penalty for breach of contract is known as a measure to prevent contractual violation, distinguished from the damage compensation function of damages. [12, p.12]

According to the Vietnamese Commercial Law 2005, in order to claim damages only three conditions need to be met: (i) there is a breach of contract; (ii) there is actual damage; (iii) the breach of contract was the direct cause of the damage [10, Article 303]. Meanwhile, in order to claim penalty for breach of contract, parties must previously agreed on penalty clause [10, Article 300]. Thus, according to the Vietnamese Commercial Law 2005, penalty for breach of contract and damages for breach of contract can be combined even if the parties do not specify this combination, while the Vietnamese Civil Code 2015 only allows this combination if the parties expressly agree on that matter.

Perhaps because the legislator did not have a consistent approach to the functions of penalty for breach of contract and damages for breach of contract, there is a difference in the approach of the Vietnamese Civil Code 2015 and the Vietnamese Commercial Law 2005.

3. Court’s role in adjusting the amount of damages for breach of contract or the amount of money in penalty clause

Although Vietnamese law does not explicitly allows courts to intervene in the

amount of damages for breach of contract or the amount of money in penalty clause, in fact, it is not difficult to come across judgments where court adjusts the amount of damages for breach of contract or the amount of money in penalty clause to ensure that:

(i) The amount of damages applied in the contract is within the extent of actual damage and expected damage in accordance with Vietnamese contract law depending on the nature of the transaction. For example Article 419 and Article 361 of the Vietnamese Civil Code 2015 or Article 302(2) of the Vietnamese Commercial Law 2005; and

(ii) The sum of money in penalty clause does not exceed the limitation set by relevant legal statutes. For example, penalty clause in commercial transactions must not exceed 8% of the value of the obligation in breach. [10, Article 301].

4. Author's comments and proposition of solutions

When compared with regulations of common law countries on liquidated damages clause and regulations of civil law countries on penalty clause as well as compared with the provisions of the Vietnamese Civil Code 1995, the Vietnamese Civil Code 2005 and the Vietnamese Commercial Law 2005, the author believes that the Vietnamese Civil Code 2015 has a few notable changes when it comes to provisions on damages, specifically:

- *Firstly*, the Vietnamese Civil Code 2015 recognizes types of loss: Actual loss and expected loss;

- *Secondly*, the Vietnamese Civil Code 2015 allows parties to agree on damages to ensure the principle of freedom of contract.

However, due to the fact that current Vietnamese civil law does not explicitly recognize agreement on liquidated damages, the aggrieved party is not exempt from the obligation to prove the amount of damage when claiming damages. Once the obligation to prove the amount of damage is still imposed on the aggrieved party when claiming damages, it is meaningless to give the parties the right to agree damages. The result is:

- The parties will agree with each other regardless of legal provisions to have a mechanism to resolve dispute when there is a breach of contract. If there is a dispute, it is not possible to apply the amount of compensation agreed by the parties, the

aggrieved party will have to make a lawsuit with the burden of proving actual damage to claim damages; or .

- Parties to a contract have no incentive to agree on the amount of damages in advance. Instead, the parties will wait until there is a breach to determine the damages base on their actual loss.

As for regulations on penalty clause, the current approach of the Vietnamese Civil Code 2015 is considered to be in line with international practices [12, p. 14] because of penalty clause has two functions: prevention of violations and compensation when there are violations of contract. However, the author believes that the provisions on penalty for breach of contract in the the Vietnamese Civil Code 2015 have three limitations, including:

- *Firstly*, there is no consistency between the approach of the Vietnamese Civil Code 2015 and the Vietnamese Commercial Law 2005 on damages and penalty for breach of contract as analyzed above;

- *Secondly*, although penalty for breach of contract itself has compensate function, the law still allowed parties to apply both penalty for breach of contract and damages, which could lead to the overlap of remedies for one act of violation; and

- *Thirdly*, if consider only civil transactions and not commercial transactions, the Civil Code only sets limits to damages but not limits to penalty clause. As a result, Vietnamese civil law does not have a solution to avoid the scenario where one party is more powerful than the other party and imposes unreasonable level of penalty to the other party.

V. CONCLUSION

It can be seen that, despite its effort to learn from the experience of legal systems in the world, Vietnamese contract law still many limitations and overlaps in its current provisions of on damages and penalty for breach of contract.

On the basis of comparing regulations of common law countries on liquidated damages clause, regulations of civil law countries on penalty clause with current provisions of Vietnamese contract law as well as court practices on relevant issues, the author believe that Vietnamese contract law on this matter need to be amended and supplemented to be more suitable and compatible with current trend in the world:

- *Firstly*, allows parties to agree in advance on an amount of money to be paid

when there is a breach of contract. Distinguish between damages and penalty for breach of contract is not necessary;

- *Secondly*, allow courts to intervene to readjust agreements on a pre-agreed amount of money that are excessively unreasonable or unfair compared to the actual damage caused by the breach of contract.

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