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CIVIL OR COMMERCIAL LAW GOVERNING CONTRACTS?

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Understanding the nature of a transaction that the parties are establishing will help them maximize the benefits of its terms and minimize risks, especially those related to liability for damages or contractual penalties. Currently, transactions between individuals are understood to be civil transactions, which are considered easy to identify. However, for transactions involving enterprises, determining whether it is a civil or commercial transaction to which civil or commercial law should be applied is not always easy for the parties involved, and even legal professionals can make mistakes about the applicable law. To better understand this issue, this article will share some things to keep in mind when determining whether a transaction is civil or commercial, as well as the differences in some important terms.

1. WHEN IS A CONTRACT GOVERNED BY CIVIL LAW?

Civil law, or more precisely, the provisions of the Civil Code, is the general law that serves as the foundation for the development and application of specialized laws. Accordingly, laws such as Commercial Law, Labor Law, and Enterprise Law are promulgated and applied based on the general principle of regulating specific subjects in detail without contradicting the Civil Code.

Civil law will be applied to govern the relationships and transactions of the parties when the legal issue is not specifically regulated by specialized laws, or there are regulations but when specialized laws refer to the applications of the regulations of the Civil Code, or in cases where specialized laws contradict the general provisions of the Civil Code.

2. TERM OF FRANCHISE CONTENT

Commercial law is applied to govern commercial activities, where commercial activity is understood as an activity for profit, including buying and selling goods, providing services, promoting trade, and other activities for profit. The Commercial Law also applies to non-profit activities of one party in a transaction with a merchant carried out on the territory of Vietnam, where the parties agree in the contract to choose the Commercial Law as the governing law. Therefore, the parties must rely on the nature of the contract, the participating parties' capacity, and the profit motive to determine whether the contract they establish will be governed by commercial or civil law. Similar to the Civil Code, the Commercial Law also lists several types of contracts, such as Service contracts, Sale and purchase contracts, and Transportation contracts.

However, determining the applicable law will not be based solely on the type of contract but on the full identification of the factors mentioned above. This is because even civil law also lists the names of types of contracts similar to those in commercial law.

3. TERM OF TRADEMARK MANAGEMENT AND USE

As mentioned above, the Civil Code is a general law, while the Commercial Law is a specific law that cannot contradict the provisions of the Civil Code, except in cases where the Civil Code has open regulations in the form of "unless otherwise provided by specialized law." Here, specialized law can be understood as the provisions of commercial law.

What are the consequences of misunderstanding the law applicable to a transaction that the parties are negotiating? The first impact to consider is the regulation on penalties for breach of contract. It is understood that one of the important factors in enforcing compliance with the agreed-upon content of a contract and binding the parties' responsibilities, besides goodwill, is the penalty for breach of contract. According to commercial law, the penalty for breach of contract in any case cannot exceed 8% of the value of the obligation breached. Specifically:

***Article 301**. Penalty for Breach of Contract*
The penalty for breach of contractual obligation or the total penalty for multiple breaches shall be agreed upon by the parties in the contract, but shall not exceed 8% of the value of the breached contractual obligation, except as provided for in Article 266 of this Law."
In contrast, civil law does not impose any restrictions on this issue. The parties to a civil transaction can agree and specify the penalty in the contract, and this penalty may be higher than the 8% mentioned above. This is stated in Article 418 of the Civil Code 2015 as follows:

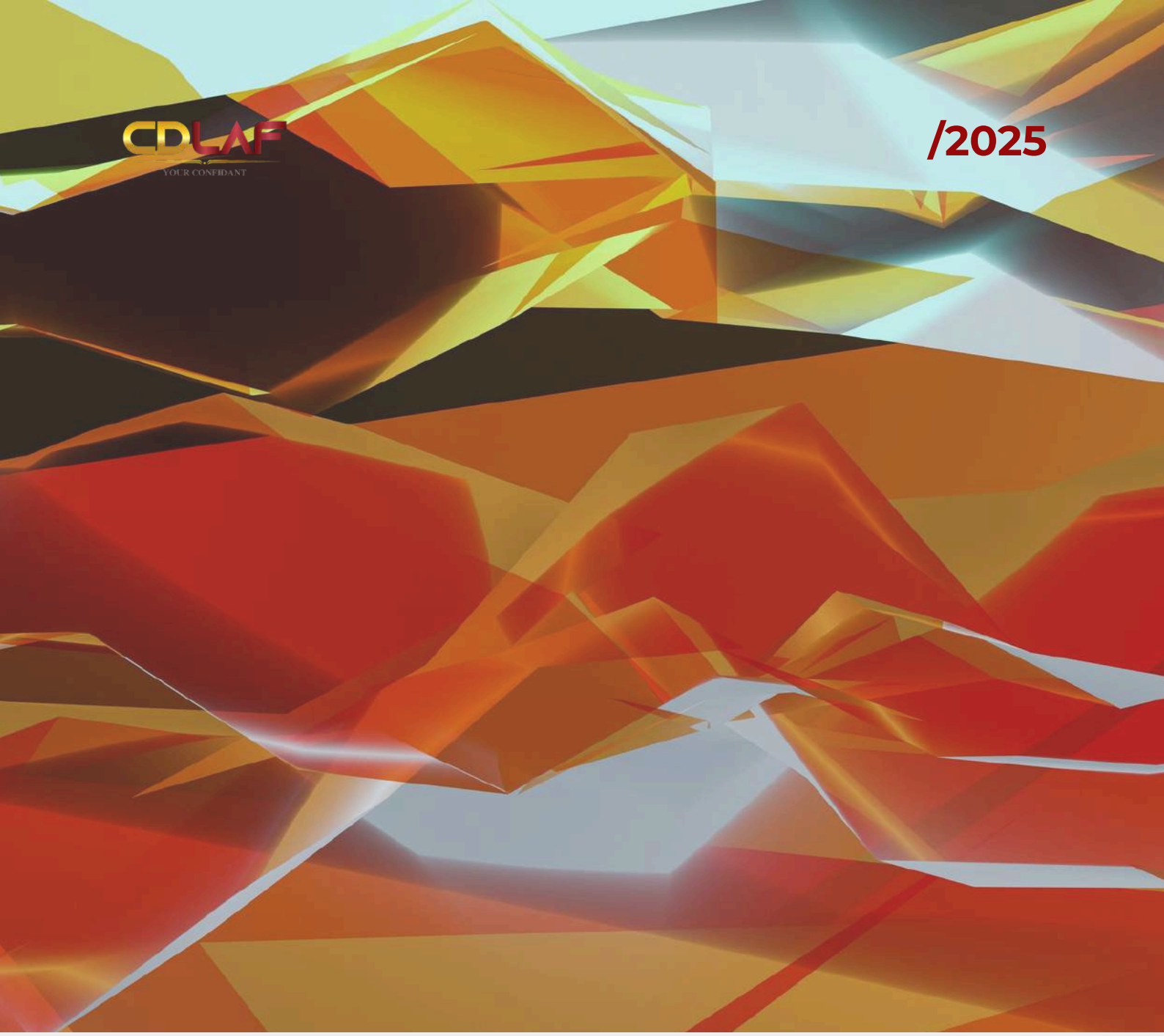
***Article 418.** Agreement on Penalty for Breach of Contract*
"A penalty for breach of contract is an agreement between the parties to a contract, under which the party in breach of obligation must pay a sum of money to the party not in breach.
The amount of the penalty shall be agreed upon by the parties unless otherwise provided by law.
The parties may agree that the party in breach of obligation shall only be subject to a penalty and not be liable for damages, or that the party in breach of obligation shall be subject to both a penalty and damages. If the parties agree on a penalty but do not agree that the party in breach of obligation shall be subject to both a penalty and damages, the party in breach of obligation shall only be subject to the penalty."

Accordingly, the penalty for breach of contract in civil law will be agreed upon by the parties. In practice, the 8% penalty under commercial law is not enough in some cases to deter or make the other party hesitate to breach the contract. Therefore, there are many cases where one party chooses to breach the contract because they find that fulfilling the contract will cause them more damage. If the transaction between the parties is a commercial transaction, the parties will inevitably be subject to the 8% penalty limit in the contract. However, if the transaction between the parties is a civil transaction or is allowed to choose to apply civil law, the application of the penalty clause under civil law will make the parties more cautious because the penalty for breach of contract, as mentioned above, is not limited.

Therefore, if the parties are mistaken in identifying the type of transaction and understand that their contract is a commercial contract, leading to the misapplication of the penalty, they will be forced to apply the penalty recorded in the contract, because the "penalty" under civil law is based on the agreement of the parties.

Regarding the punishment of "compensation for damages", there is a clear difference between civil law and commercial law. Under commercial law, the compensation for damages will be applied regardless of whether the parties have regulated it in the contract. However, conversely, for contracts governed by civil law, the compensation damages will only be applied if the parties have agreed to apply it in the contract. Therefore, if in a civil contract, the parties agree to apply a penalty but not to apply compensation damages, then when one party breaches the contract, only the penalty will be applied and no compensation damages.

The article contains general information which is of reference value, in case you want to receive legal opinions on issues you need clarification on, please get in touch with our Lawyer at info@cdlaf.vn



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