THE CONCEPTS OF PUBLIC POLICY AND FORMALITY UNDER VIETNAMESE CIVIL LAW: A MILLSTONE ROUND CONTRACTING PARTIES' AUTONOMY [II]

NGUYEN QUOC VINH

CONTENTS

D. Legal prohibitions within the public policy concept
E. Solution to Case One by Japan
F. Recommendations for the CCV's provision on public policy
G. Appropriate solutions for Case Two and Circumstance One and recommendations for modification of the CCV's provisions on termination of civil transactions
H. Recommendations for an application of a more equitable judgment for cases concerning impossible performance due to changed circumstances
I. Recommendations for the improvement in Vietnam's precedent law system in dealing with cases of public policy and impossibility by changed circumstances
J. Recommendations for the unification of technical terms

Part Three – On formality

A. Formality under Vietnam's civil law: its odd functions
    * Case One
B. Formality in contract law: its history, purposes, forms and functions
C. Formality vs. public policy
D. Re-categorizing formal requirements under Vietnam's civil law
E. Recommendations for modifications of provisions concerning formal requirements in the CCV

Conclusions

ABBREVIATIONS

BGB: The German Civil Code [BÜRGERLICHES GESETZBUCH] of 1900
C.CIV: The French Civil Code [CODE CIVIL] of 1804
CCJ: The Civil Code of Japan [Minpō] of 1896
CCV: The Civil Code of the Socialist Republic of Vietnam [Bo Luat

Dan Su Cua Nuoc Cong Hoa Xa Hoi Chu Nghia Vietnam] of 1995

UNIDROIT Principles: UNIDROIT Principles of International Commercial Contracts of 1994

PART THREE

ON FORMALITY

A. Formality under Vietnam's civil law: its odd functions

Under the CCV a contract is void if it does not meet the formal requirements prescribed by law.(144) This requirement seems odd if viewed from the angle of: (1) the intrinsic elements of contract; (2) the substance of formality; and (3) the legal consequences of agreements that fail to conform with the requirement.

According to the CCV, a contract is "an agreement between the parties to the establishment, modification or termination of civil rights and/or obligations."(145) The French Civil Code has probably influenced this definition.(146) Vietnam's concept of contract does not deviate from the commonly accepted one,(147) which centers on the paramount element of agreements between the parties. Unfavorably, however, under the CCV, a contract, to be regarded valid, is subject to several essential conditions. Though the required conditions are somewhat similar to those of French contract law,(148) there is a questionable condition on formality that appears strange to other legal systems.(149) *An agreement is, under Article 139 of the CCV, considered void if it is not made in writing, notarized by a state notary public, authenticated, registered or permitted by a state authority.*(150) The rationale behind these formal requirements is that *certain agreements should be administered by the state* (emphases added).(151)

Case One: (152)

A party known as X, a land use right holder of a plot of land,

agreed to convey his land use right to a party called Y,[153] and the agreement was made orally. Y received the land, paid two-thirds of the agreed price and promised to pay the rest three months later. On Y's default, X sued Y for the unpaid sum. The court of first instance held the agreement void, and party X appealed. The appellate court dismissed the judgment of the court of first instance, upholding the verbal agreement. Then Y made an appeal to the Supreme Court. The Supreme Court confirmed the judgment of the court of first instance, rendering the agreement invalid on the ground that it was not in conformity with the requirement of form compulsorily provided in the Law on Land.[154]

B. Formality in contract law: its history, purposes, forms and functions

The Vietnamese conception that a contract is valid only when it conforms to formality is problematic. The following analysis will present the status and functions of formality in traditional legal systems. Although in some countries formal requirements also do exist, their functions are different from those of Vietnam while in other countries, formality is deemed a trivial concept.

Whether the requirement of form is mandatory or not depends on the particular model of civil law in each country. For example, in Germany, Austria and Switzerland the principle of freedom of form is recognized.[155] The English model adopted the Statute of Frauds (1677), which required certain agreements should be made in writing.[156] The French approach is rather ambiguous as the requirement of form remains unclear when it is explained as a proof of legal transactions.[157] Most scholars hold that the requirement of form under the French model is indirect. Contracts, under Japanese law, are free from formality except in some circumstances.[158] There are exceptions, for example, in gift contracts. According to Article 550 of the CCJ, either party may revoke a gift contract that is not concluded in writing.[159]

In countries which adopt the concept of formal requirements the

latter exists in various forms. Such formality can be as a note or a memorandum that provides written evidence of the transaction.(160) In addition, it can be further required by signatures of the parties or in the notarial form,(161) or it must be contract by deed.(162) However, in those countries whichever form formal requirements may bear, formality plays specific functions other than that of Vietnam. Those functions are:

First, the most evident function of formality is as John Austin puts it: "the evidence of the existence and purport of the contract, in case of controversy."(163) Form relieves the court of an inquiry whether a legal transaction has been intended or not. For the purpose of evidentiary function, formality can be manifested under writing, attestation or certification by notary public.

Secònd, formal requirements help prevent inconsiderate engagements.(164) Through fulfillment of formal requirements the parties are reminded of the significance of their commitments. This function also is called cautionary or deterrent function.(165) These two functions of formality let the parties bind themselves with certainty and know what they are bound of.

Third, Lon Fuller believes that formality plays another function named as channeling function. "The seal," he said, "not only ensures a satisfactory memorial of the promise and induces deliberation in the making of it. It serves also to mark or signalize the enforceable promise; it furnishes a simple and external test of enforceability..."(166)

In addition, Japanese scholars opine that a contract document may facilitate better management of information concerning the activities of a business.(167)

Furthermore, the functions of formality can be better understood if we trace back its history. In the seventeenth century, its primary goal was to reduce perjurious acts. The lawmakers once believed that formality helped prevent perjury and subornation in contracts that were vulnerable to fraudulent practices.(168) In addition, there are other policies behind the requirements of form, most noticeably in gift contracts and conveyances of land. Gift acts are treated by law more strictly than onerous transactions because they are deemed suspicious acts

in their covered motives. For instance, sometimes gifts are offered to the detriment of the family members or creditors; and gifts create dangers to moral persons.(169) In cases involving conveyances of land most countries require contracts be made in a formal fashion.(170) The reasons for this requirement are explained (i) that land is the most valuable part of a person's property;(171) (ii) that it is of great social importance, and a natural foundation for a stable rural population.(172)

Apart from the above-mentioned contracts, there is another type of contracts that requires formality that is called "standard form contracts". These are contracts between an employer and an employee or between a giant supplier and a consumer.(173) However, due to the difference in nature in this type of contracts, it needs not be mentioned in this Part.(174)

Above is a brief answer to the functions of formality and their common expressions. Formality is a proof of the existence of a contract, a deterrent tool for careless contracts, a reminder of exchanged promises and a means of better management. Formality contains in itself various expressions, and it may be writing, signatures, notarization, deeds and so on.

C. Formality vs. public policy

Formality is indeed a statutory requirement for certain contracts in countries that adopt the formality concept. The question becomes what is the status of contracts that do not observe formal requirements? In other words, what are the legal consequences arising out of agreements in which the parties have failed to make them in the formal fashion required by law? Are those contracts considered void as those concerned with statutory prohibitions referred to in the previous part?

The answer is: those contracts (contracts that fail to follow formal requirements) are classified enforceable contracts yet subject to requirements not necessarily or not naturally associated with the transaction.(175) The elements extrinsic to the transaction, i.e., formalities are proof evidencing the existence of the contract.(176) The

effects of a failure to comply with formality do not make the contract void or voidable but merely unenforceable against a party who has not signed or not made good the requirement.(177)

For example if B, a contracting party, has not yet signed on the contract and the contract is still executory, A, the other contracting party, is ineligible to ask the court for B's performance. In this case, the contracting parties have to fulfill formal requirements if they want to make the contract enforceable. However, formal requirements are not applicable to executed or partially performed contracts.(178) It means that though the contract has been orally made, either A or B or both have substantially performed their obligations then the contract is regarded as already existing. This distinguishes contracts made in the absence of formalism from void contracts due to violation of statutory prohibitions. The latter is given no remedy by law. Such contracts are never considered as existing no matter whether they are made in writing or not; executory or executed, or partially performed. Thus, the distinctive difference between formality and public policy is, in short, when a contract falls into the ambit of the former it is kept alive while the latter usually nullifies it.

Applying the above analyses on formality and public policy to Case One of this Part, we can envision the following four possible situations and the should-be rulings of the court.

Situation One: If X and Y only orally agreed to sell and buy the plot of land and both had not performed their obligations then the contract would be considered unmade or unenforceable. The parties are not bound by such oral agreement. If they want the agreement to be binding, they have to conform with formal requirements.

Situation Two: If they, though, agreed orally, that X had conveyed the land to Y and the latter had paid two-thirds of the contract price, in turn, the contract would be considered already made. Both parties should make good requirements of formality and Y has to pay the remaining sum of money in completing the contract.

Situation Three: The facts are similar to Situation Two, but X refused to have the formality done. In fact, X wished to void the contract on the ground of inconformity with formal requirements. The

court in this case cannot void the contract. Instead, it should force X to fulfill his obligation of formal completion. The same is true if Y refused to pay the rest of money and claimed the contract void with the same ground (inconformity with formal requirement), the court would force him to complete his obligations.

Situation Four: The facts are similar to Situation Two, but both X and Y agreed to ignore the requirement of registration of land. In this case the court should apply the testing method introduced in Part Two. In fact, the requirement of registration does not aim to prohibit the transaction of land sales. The true purpose of such a requirement is the state's management of property of special value.(179) Accordingly, the contract should still be considered valid while both parties are subject to criminal or administrative punishments.

D. Re-categorizing formal requirements under Vietnam's civil law

The confusion of the scope as well as functions of formalities and public policy has probably caused problems in Article 139 of the CCV. Vietnamese lawmakers have erroneously attributed formal requirements to the ambit of public policy. In this article, Vietnam's lawmakers have make a mistake in incorporating the requirements of writing, notarization, authentication, registration and permission into one group that are called requirements of form.(180) From the standpoint of function, these requirements should have been divided into two groups:

The first group consisting of requirements of writing, notarization and authentication belongs to formal requirements, while the second group consisting of registration and permission is of the reach of public policy.

A contract either authenticated by state officials at district level or notarized by notary public is, under Vietnamese law, of the same effect, and though the terms are differently employed, their functions are similar.(181) Notarization and authentication are mandatory to certain transactions.(182) However, the author believes these requirements fall under the coverage of formality instead of under that of public

policy for the following reasons. *First*, according to the legislation on notarization and authentication, notarized or authenticated documents are acknowledged to play the sole evidentiary function.(183) The purpose of such legislation is not to prohibit or prevent some transactions but only to recognize a legal event.(184) In this event, the contracting parties assume obligations and enjoy rights and their commitments are embodied in paper and certified by a third party: the notary public. *Second*, the fact that Article 139 of the CCV allows the parties to complete the requirement of notarization and authentication only further consolidates this paper's stand. A contract that violates public policy is, as explained in section C of this Part, never given any remedy by law and never recognized legally.

The second group belongs to public policy limitations or, more precisely, to types four and five of types of acts regarding public policy.(185) The requirement of registration and permission is set up to prohibit or control certain transactions.(186) In Case One of this Part, an important point that should be mentioned is that the requirement of land title registration is the mandatory provision not the requirement of notarization or authentication.(187) However, it is worth reminding the reader that not every mandatory provision is a prohibitive provision.(188)

In the interpretation of Article 139 of the CCV, Vietnam's courts have, as lamented by court officials, been tied "foot and arm" in protecting the good faith party and preventing the malicious party.(189) In many cases, *mala fide* parties have taken advantages of this provision to nullify the contracts and profits thereupon.(190) Take a land transfer contract as an example. When the land price goes up, the conveyor easily invokes the provision to ask the court for avoidance of the contract if it has not fully fulfilled formal requirements. Conversely, if the price of land declines the conveyee will take an action against the conveyor. One of the reasons that the buyer in Case One case refused to pay the unpaid sum is, perhaps, at that time the price of land dropped.(191)

E. Recommendations for modifications of provisions concerning formal requirements in the CCV

In closing this Part, this paper suggests some following modifications concerning formalities to the Civil Code of Vietnam.

First, paragraph 4 of Article 131 (formalities as a prerequisite for the validity of a contract) should be repealed. Formalism is only an extrinsic element not naturally associated with a contract. One cannot deny that a contract does not exist in the absence of formality if the contract is based on free intentions of the parties and not against public policy.

Second, Article 139 should be redesigned in the direction that: (1) writing, notarization and authentication belongs to formal requirements. If the contract is executory, it cannot be enforced against the party who has not signed or fulfilled the requirements. If the contract is executed or partially performed, the contract is deemed existing and the contracting parties have to complete the formal requirements. In the second circumstance, if a party is reluctant to fulfill the requirements then the court orders the party to do so. (2) Requirements of registration and permission are mandatory rules. Therefore, they have been in principle, regulated by Article 137 (concerning public policy) and specifically regulated by separate legislations or in other parts of the CCV. These requirements should be removed from the [new] Article 139. (3) Paragraphs 4 and 5 of Article 403 (the time when a contract is concluded) that state: "[w]ith respect to contracts that shall be notarized by a state notary public, authenticated, registered, or permitted, the moment at which a contract is entered into shall be the moment at which the contract is notarized, authenticated, registered, or permitted" should be repealed. As this Part has so far explained, many contracts are still *de facto* existing and binding in the absence of formalities or mandatory rules.

CONCLUSIONS

Conscious of the significance of contract law in bringing about economic development and social justice to the country, Vietnam has made remarkable efforts in adopting a comprehensive set of rules in its Civil Code. However, vestiges of the traditional legal systems can still be found here and there in this legislation. Although it is unreasonable to expect a perfect system, contract law in Vietnam has been affected severely by those remnants. They afflict contract law with its basic foundations, as a result, place superfluous burdens on the free movement of the society's resources and causing hardship to the concerned parties. This paper has therefore set its aims on shedding light upon the causes of the problem and proposes some changes to the present Civil Code of Vietnam. It is a hope in this paper that its findings can modestly contribute to the making of civil law jurisprudence in Vietnam and help courts deal with some outstanding problems that they are presently facing in relation to contract law.

Part One of this paper refers to the remnants of the Vietnamese traditional legal systems that attacked seriously the provision on validity of a contract. The contract under the Civil Code of Vietnam is valid when it, among other things, does not violate public policy and conforms to formality. However, the conception of public policy and formality among Vietnamese lawmakers and courts is problematic.

Part Two brings an analysis to the concept of public policy. At first, Part Two presents a skeleton of the concept through generalizing and classifying its typical expressions into five categories. This Part later introduces a testing method that helps the court handle cases concerning public policy, especially concerning prohibitive provisions of law. The testing method assists the court in deciding if a contract is void or not on the ground of violating prohibitive provisions. It consists of three testing steps in which the court has to define the provision in dispute is: (i) mandatory or non-mandatory; (ii) even if the provision is mandatory whether it is prohibitive or merely a

regulatory; and (iii) even when the provision is defined prohibitive whether it directly prohibits such contract or the contract is accidentally bothered. Only when the provision in question answers fully the above three requirements can the court judge the contract is void due to infringement of a statutory prohibition.

In addition, Part Two draws a line between the concept of public policy and that of impossibility in performance due to changed circumstances (changes in law). If a contract falls under the purview of public policy the court never recognizes it as legal and gives no remedy, while the latter (a contract of impossibility in performance due to changed circumstances) has been recognized as legal and given remedies. In dealing with cases regarding impossible performance due to changed circumstances, this Part introduces a more equitable settlement to such cases. This novel approach replaces the total loss burdened by one party based on the rule of risk assumption with the loss apportionment by the court to both parties. At this point, Part Two suggests two modifications to the Civil Code of Japan. This Part proposes: (i) the revocation of Article 534 "Assumption of risk by obligee"; and (2) the amendment to Article 536 "Assumption of risk by obligor" in the direction that in certain cases, upon the decision by the court, the obligor is entitled to ask for compensation to expenditures its has been enduring.

Moreover, by realizing the paramount role of the court in dealing with cases of void contracts due to violation of public policy and contracts impossible by law in bringing fair and just judgments, Part Two requests a meaningful enhancement in the fledgling system of law precedents in Vietnam. Finally, it recommends a unification of technical terms that are employed differently by Vietnamese lawmakers. For all those terms denote only to the term "public policy", they should be uniformly understood, and consequently expressed in the same wording.

Part Three gives an analysis to the concept of formality. While a contract under the Civil Code of Vietnam is deemed void if it does not meet the formal requirements, this Part proves this provision is a serious mistake of the code. Formality plays the following four

main functions: (i) evidentiary; (ii) cautionary or deterrent; (iii) channeling; and (iv) recording. These functions make formality an extrinsic element not necessarily or not naturally associated with contract. Formality is a requirement by law but it is not a prohibitive provision under the purview of public policy. Therefore, a contract that fails to conform to formalities is not void or voidable. Following this argument, this Part presents four situations and settlements when both parties fail to fulfill formal requirements.

In addition, Part Three divides the current formal requirements under the Civil Code of Vietnam into two categories. The first category consisting of writing, notarization and authentication belongs to formality. The second category containing registration and permission are in the reach of the public policy concept. The division of these requirements helps Vietnamese courts apply different remedies to each type of violations, avoiding the present simple solution (voiding the contract) that is currently applied. Formality and public policy, then, will be put in their right place within their original functions and remedies for each.

ENDNOTES

(144) *See* text carrying *supra* note 45.

(145) The CCV art. 394.

(146) The C. CIV. art. 1101 defines "a contract is an agreement by which one or more persons obligate themselves to one or more other persons to give, to do or not to do, something." And the CCV has, in Article 285 (civil obligations), further explained that a civil obligation is "... according to provisions of law, an obligor or obligors shall do or omit to do an undertaking for the interest of an obligee or obligees."

(147) The generally accepted concept denotes contract an agreement or exchanged promises for economic interest between the parties and breaches of the agreement is remedied by law. *See* Hōritsu yōgo jiten [Legal Dictionary of Essential Terms] 350

(Yuuhikaku publ., 1993). And judging from psychological angle, contract is formed as a result of the meeting of will (will theory) of the parties through their outward expression. *See* THOMAS WILHEMSSON, *Questions for a Critical Contract Law: Protection of Consumers' Economic Interests by the EC, in* PERSPECTIVES OF CRITICAL CONTRACT LAW 16 n.12 (describing the dominance of will theory in contract law analysis).

(148) *See supra* note 47 and accompanying text.

(149) For example conditions required in French law are: consent, capacity, certain object and licit cause; those of German law are: consent, capacity, and possibility; and of English law are: agreement, intention, capacity and consideration. *See* P.D.V. MARSH, COMPARATIVE CONTRACT LAW: ENGLAND, FRANCE, GERMANY 41－57 (1994).

(150) The full text of Article 139 is as follows "[i]n circumstances where the law stipulates that a civil transaction shall be invalid if it is not expressed in writing, notarized by a state notary public, authenticated, registered or permitted, a court or another state authority, upon the request of one of the parties or all the parties, may decide to order the parties to implement the provisions on the form of the transaction within a certain period of time; if not implemented within the above period of time, the transaction shall then be invalid. The party at fault which makes the transaction invalid must compensate for damage."

(151) *See* Research Paper on Invalid Contracts, *supra* note 55, at 23.

(152) The case has been extracted from the Research Paper on Invalid Contracts pp. 31－34. The judgment of the Justices' Committee of the Supreme Court was numbered 51-UBTP-DS and handed down on September 13, 1999. The case has been simplified for discussion in this paper.

(153) It is worth mentioning that in Vietnam the entire land belongs to the state. The state gives or leases land to individuals and organizations on a long-term basis or borrowing contract. Therefore, the borrower or tenant is called land use right holders.

See generally HIEN PHAP NUOC CONG HOA XA HOI CHU NGHIA VIET NAM 1992 [The 1992 Constitution of The Socialist Republic of Vietnam] arts. 17 & 18; LUAT DAT DAI 1993 [Law on Land of 1993 of Vietnam] arts. 1 & 3.

(154) Law on Land of 1993 of Vietnam art. 31 requires that the procedures for conveyance of land use rights be conducted at a given people's committee.

(155) *See* VON MEHREN & GORDLEY, *supra* note 72, at 900. However, it should be noted that in the BGB some agreements are enforceable only if they are made in writing or in the notarized form. *See, e.g.*, Article 311 (transfer one's present property), 313 (transfer or acquisition of ownership of land), 766 (suretyship contracts) and 518 (gift contracts) etc.

(156) It is worth mentioning that the US, while is still under the domination of the Statute of Frauds, has developed itself the parole evidence rule. The rule denies all prior agreements contradicting or varying the present written contract if the present contract is deemed final and complete. The featured distinction between the statute of frauds and parol evidence rule is that the former makes certain oral contracts unenforceable by action, if not evidenced by a signed memorandum; the latter protects a completely integrated writing from being varied and contradicted by parol. *See* ARTHUR LINTON CORBIN, 3 CORBIN ON CONTRACTS: A COMPREHENSIVE TREATISE ON THE RULES OF CONTRACT LAW 381 (West Publishing Co. 1960).

(157) *See* the C. CIV. arts. 1315 & 1316 which state that a party who wishes to claim performance of an obligation has to prove it and the kinds of proofs are written proof, proof by witness, presumptions, acknowledgment by a party, and oaths.

(158) *See* SHIGERU KAGAYAMA, KEIYAKU NO IPPAN GENSHOKU [General Principles of Contract], at http://www.nomolog.nagoya-u.ac.jp/~kagayama/civ/contract/compare/ver2/compare.

(159) It should be added that though Japan recognizes the principle of freedom of form, it obligates the parties to other requirements rather than formality. For example, within the CCJ, a

loan for use becomes effective when one of the parties receives a thing from the other party (Article 593); a promise to make a loan for consumption shall cease to be effective if one of the parties has subsequently been adjudged bankrupt (Article 589); bailment becomes effective when one of the parties receives a certain thing (Article 657). These are extraneous conditions for certain contracts to be effective. The position of these requirements remain unclear. Interview with Shigeru Kagayama, *supra* note 117 (June 30, 2002).

(160) For example the Statute of Frauds or the Installment Sales Act (Kappu hanbai hō), the Door-to-Door Sales Act (Hōmon hanbai tō ni kansuru hōritsu) require only the simple writing of the contract.

(161) It seems that civil law systems prefer these kinds of form to simple writing common in the Anglo-Saxon system.

(162) A requirement that a contract is executed only when it is "signed, sealed and delivered". A contract by deed is common in English law with regards to conveyances of land and gratuitous payment to a charity. *See* BEATSON, *supra* note 70, at 76－79.

(163) John Austin, *Fragments － On Contracts*, in 2 LECTURES ON JURISPRUDENCE 907 (5 ed., Campbell, 1911).

(164) *Id.*

(165) Lon Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800－805 (1941).

(166) *Id.*

(167) *See* Kitagawa, *supra* note 75, at 1－34.

(168) Both French and English law systems devise the philosophy of formality on this ground. *See* E. Rabel, *The Statute of Frauds and Comparative Legal History*, 63 L.Q. REV. 174, 176 (1947); CORLEY ET AL., *supra* note 69, at 249; VON MEHREN & GORDLEY, *supra* note 72, at 907. However, it should be noted that there is one more reason for the introduction of the Statute of Frauds that is the mistrust of the society to the juries.

(169) *See* VON MEHREN & GORDLEY, *supra* note 72, at 906. *But see* HILLMAN, *supra* note 135, at 14 (expressing the viewpoint on

gift contracts of theorists of consideration theory that those contracts are unilateral since it lacks consideration from the recipient).

(170) For example, Article 313 of the BGB makes a contract of rights transferred in real property unenforceable if it is not embodied in a notarial form; Section 2(1) of the Law of Property Act 1989 of England provides that contracts for the sale or other disposition of an interest in land "can only be made in writing and only by incorporating all the terms..."

(171) However, it should be noted that at present other properties such as securities which are considered more valuable than land are transferable (for example in Germany) without formal requirement.

(172) *See* VON MEHREN & GORDLEY, *supra* note 72, at 902－903. Besides, English scholars view the contracts dealing with land are especially important because they often involve acceptance of a complexity of rights and duties. *See* BEATSON, *supra* note 70, at 81.

(173) *See further*, Hoshino, *supra* note 76, at 23－26.

(174) Standard form contracts are devised to protect the party who is in the weaker bargaining position. They are under the ambit of the provisions on public policy. *See supra* note 80 and accompanying text.

(175) *See* VON MEHREN & GORDLEY, *supra* note 72, at 894－895.

(176) *See, e.g.*, Kitagawa, *supra* note 75, at 1-34-1-35 (explaining that a notarized contract is deemed public document (kōbunsho) and, as such, is presumed to be genuine. A private document is sealed or signed by contracting parties they are also presumed genuine). *See also* the C. CIV. art. 1315 (stating that a person demanding performance of an obligation must prove it); BEATSON, *supra* note 70, at 85.

(177) *See, e.g.*, THE JAPANESE LEGAL SYSTEM: INTRODUCTORY CASES AND MATERIALS, *supra* note 77, at 136; BEATSON, *supra* note 70, at 85. *But see* BEATSON, *supra* note 70, at 86 (reminding that under the Law of Property Act 1989 a contract involving land

transfer not complying with the requirements of Section 2 (mentioned in *supra* note 162) is void. Nevertheless, it should be noted that the failure to comply with formality does not make the contract simply remediless by law. The underlying reason for replacement of part performance (acknowledgement of existence of a contract by part performance of a party) is to enable justice to be achieved between the parties through the application of the doctrine of estoppel and restitution not state administration).

(178) For example the CCJ art. 550 provides that an unwritten gift contract is deemed already existed if the performance has been completed; the BGB art. 766 says a contract of suretyship not in writing becomes enforceable when the surety fulfils his obligation; ATIYAH, *supra* note 5, at 173; CORLEY ET AL., supra note 69, at 250.

(179) *See* text accompanying notes 173 & 174.

(180) For the full text of this article, *see supra* note 150.

(181) Para 1 Article 2 of Decree No. 75/2000/ND-CP by the Government, dated December 08, 2000 defines a notarial act as "a certification as to the authenticity of a contract, transaction... conducted by a notary office..." and para. 2 of the same article defines an authentication as "a confirmation and duplication (xac nhan sao y) of a paper, contract... conducted by people's committees at district or communal level... " The Decree has failed to individualize the legal nature of notarization and authentication of contracts that are statutorily required to be notarized or authenticated. In fact, the legal effects of these two acts (notarization and authentication) are the same. According to paragraphs 2 and 3 of Article 14 of Decree No. 75/2000/ND-CP, both notarized and authenticated documents are regarded as evidence and para. 3 of the same article adds that the notarized and authenticated contracts have binding effect on the contracting parties. Furthermore, Article 23 on territorial jurisdiction of the notary office and district people's committee with regard to real estate contracts provides that a notary of-

fice has the territorial jurisdiction over specified areas of a province. District people's committees are in charge of the remaining areas. The definition of the two acts is therefore believed to serve the only purpose of naming the documents (notarized documents or authenticated documents) established by notary office and people's committee. *See also* Tuan Dao Thanh, Hoan thien ve phap luat cong chung, chung thuc o Viet Nam hien nay: ly luan va thuc tien [Improving existing legislations on notarization and authentication in Vietnam: theoretically and practically] (unpublished LL.M thesis, Hanoi University of Law, 2001), (on file with author).

(182) Under the CCV, certain contracts must be notarized or authenticated namely: (1) pledges of property (Article 330); (2) mortgages of property (Article 347); (3) suretyship (Article 367); (4) sale and purchase of residential houses (Article 443); (5) purchase of house for other purposes (Article 451); (6) exchange of property (Article 459); (7) gifts of immovable property (Article 463); (8) property lease (Article 477); (9) lease of residence houses with the term of more than six months (Article 489); (10) lease of houses for other purposes (Article 502); and (11) lease for exploitation, enjoyment of fruits, income from such property as land, forest, unexploited water surface etc. (Aticle 506). Requirement of notarization or authentication also find in other legislations such as: (1) sales of marine ships in Vietnam (Article 27) and pledges and mortgages of marine ships in Vietnam (Article 29) of the Law on Marine of Vietnam (1990); (2) agreements on division of common property between the husband and the wife (Article 6) and agreements on restoration of common property of the husband and wife (Article 9) of the Decree No. 70/2001/ND-CP dated October 03, 2001 by the Government on guiding the implementation of the Law on Marriage and Family (2000). Other contracts need only notarization requirement such as legal services contracts (Article 25) of the Ordinance on Lawyers (2001).

(183) *See* para. 2 Article 14 "Legal effects of notarized and authen-

ticated documents" of the Decree No. 75/2000/ND-CP. It should be noted that paragraph 3 of the Decree has added another function i.e., *executing value* to the contracting parties (literally translated). However, this argument is unconvincing. It has accidentally excluded the binding force (executing effect) of every non-notarized or non-authenticated contracts which is, as considered the sanctity of contract, the most fundamental foundation of all kinds of contract In fact, the binding effect of contract (or in Latin maxim *Pacta Sunt Servanda*) has been placed at Article 7 (Principle of freedom and voluntariness of agreement) of the most significant chapter (Chapter I "Fundamental principles") and repeated at Article 404 "Legal effects of civil contracts" of the CCV.

(184) *See* Research Paper on Invalid Contracts, *supra* note 55, at 23; Research Paper on the Interpretation of the CCV, *supra* note 12, at 32－33.

(185) *See* text carrying *supra* notes 83 & 84.

(186) The author has to admit that its inclusion of the requirement of registration in the coverage of public policy is questionable. But it seems inappropriate too if this kind of requirements is put into formality. The nature of registration requirement is rather ambiguous. In an individual country in some instances it belongs to the ambit of formality while in the others it is of the purview of public policy. Registration is also treated differently in accordance with a single country's policy. For example, the requirement of land registration with a state agency is mandatory according to Vietnamese laws while it is only for the purpose of declaring property ownership against a third party under Japanese laws (the CCJ art. 177). In the case of Vietnam, while the common understanding of registration requirement is mandatory or even prohibitive the placement of registration requirement to the coverage of public policy seems practically more appropriate. Nonetheless, in dealing with cases concerning public policy the court should adopt the above given testing method.

(187) It should be noted that in Japan there are some circumstances in which notarization is also required. For example, Shakuchi shakkahō [Land and House Lease Act] (Law No. 153 of 1999) requires the contract be notarized if the landlord wishes to terminate the contract after a 50 year term. However, if the parties fail to fulfill the requirement, the court will allow them to do. If, for example, the lessee refuses notarization, the court will force him to fulfill. Interview with Kagayama, *supra* note 117 (June 28, 2002); Interview with Yasunori Honma, Professor, Nagoya Graduate School of Law (July 09, 2002). It should also be noted that though one may think it [notarized contract] is a requirement it is, in reality, a lax of the very burden that Japanese landlords must have borne. The Act has freed the landlord from the compulsory requirement that he must have had a "just cause" to terminate the contract when it expired. If not, the contract would have been automatically renewed. It is said that Japanese tenants are overprotective. *See* Tokyo Tatemono Co., *Tokyo Real Estate Report Vol. 9: Impact on The Real Estate Investment Market of Implementation of the Limited-term Lease System*, at http://www.tokyo-ab.com/report2000a1.html.

(188) *See* text carrying *supra* notes 85－93.

(189) Research Paper on the interpretation of the CCV, *supra* note 12, at 33; Research Paper on Invalid Contracts, *supra* note 55, at 23.

(190) Research Paper on Invalid Contracts, *supra* note 55, at 22.

(191) It is noteworthy that the problems of formalities have also been widely recognized. Formalities, *inter alia*, cause social mistrust among the parties, are traps to inexperienced parties while welcome aid to chicaneries, hinder the free movement of commercial activities and heighten cost of transactions. Therefore, the general trend has been towards freedom of form. *See generally* VON MEHREN & GORDLEY, *supra* note 72, at 900－902.