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## A Comparison of Information Disclosure Requirements under Vietnamese and French Contract Law

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### Abstract:

Compared with the provisions of Vietnamese law, French law has clearer and more specific provisions on the obligation to provide pre-contractual information. Within the scope of this article, the authors survey the obligation to provide information before the execution of the contract, by comparing the provisions of the 2015 Civil Code of Vietnam with the 2016 Civil Code of the French Republic. Hopefully this will result in reference information for legal research, and at the same time propose recommendations to improve Vietnamese law in this field. This paper is divided into two main parts by applying a qualitative approach to achieve the research objectives. The first part examines the theoretical framework and provides an overview of the issues raised in implementing the provisions of assess of the Obligations and contracts in Vietnam's civil code and the legal civil code in France. The second, analysing a liability to compensate for damage outside the contract due to a breach of the obligation to provide information during the contract negotiation period to propose solutions to improve the legal corridor for developing this issue in Vietnam.

**Keywords:** obligation to provide information, civil code, execution of the contract.

## 越南和法国合同法信息披露要求的比较

### 摘要:

与越南法律的规定相比，法国法律对提供合同前信息的义务有更明确、更具体的规定。在本文的范围内，作者通过比较2015年越南民法典和2016年法兰西共和国民法典的规定，调查了合同执行前提供信息的义务。希望这能为法律研究提供参考资料，同时提出改进越南法律在该领域的建议。本文通过应用定性方法来实现研究目标分为两个主要部分。第一部分考察了理论框架，并概述了在执行越南民法典和法国民法典中的义务和合同评估规定时出现的问题。第二，分析在合同谈判期间因违反提供信息义务而导致的合同外损害赔偿赔偿责任，提出解决方案，以改善在越南发展这一问题的法律渠道。

**关键词：** 提供信息的义务、民法典、合同的执行。

## 1. Introduction

France has a Civil Law legal system, which has traditionally required parties to provide each other information in the pre-contract stage. The legal basis for this obligation is the principle of honesty and goodwill during contract negotiation and performance. International law, the Unidroit Code of Conduct on International Commercial Contracts (Unidroit), the European Code of Contract Law (PECL), and the Vienna Convention on Contracts for the International Sale of Goods 1980 (CISG) indirectly provided for the obligation to provide information in the pre-contractual period, through provisions on the principles of good faith and honesty. Accordingly, the act of knowingly failing to provide information or intentionally providing inaccurate information is considered a fraudulent act. It leads to legal consequences, in that the contract will be declared invalid or the aggrieved party will have the right to declare the contract canceled. The 2015 Vietnam Civil Code, which took effect on January 1, 2017 (hereinafter the 2015 Civil Code), has new provisions in the third part "Obligations and contracts" under Article 387 (The National Assembly, 2015): "Information in entering into contracts. If a party in breach of clauses 1 and 2 of this article given below causes loss and damage, it must pay compensation.

1. Each party must notify the other party of any piece of information affecting the acceptance of the offer to enter into the contract by the latter party.

2. When a party receives any secret information from the other party while entering into the contract, it must protect that information and may not use it for its own purposes or other illegal purposes."

## 2. The Theoretical Framework of Provisions on the Obligation to Provide Pre-Contractual Information

### 2.1. Entering into a Contract and the Obligation to Provide Information in the Conclusion of a Contract

A contract is an agreement on the will of the parties that produces legal consequences between them. (Nguyen et al., 2011) to have an agreement, the subjects must express their goals in a certain form, through which the parties can recognize each other's will to negotiate to agree (Hoang, 2010). Most States consider a contract to exist only when an agreement is made between the offer to enter into the contract and the acceptance of the offer to enter into a contract (Nguyen et al., 2011). The time to determine the agreement of the parties' will is the time of entering into the contract, so the Civil Codes of Vietnam as well as of other countries reserve a separate clause on the time of contract execution.

In terms of time, entering into a contract is the result of a process with stages. The culmination of the process is the formation of a contract. Recent comparative studies call this phase of contract formation the pre-contractual phase (la phase de Négociations précontractuelles) (Xavier, 2014). The French Civil Code as amended by Ordinance No. 2016-131 dated February 10, 2016, takes effect beginning October 1, 2016. It spells out amendments to the law on contractual obligations, in the general regime of contracts. Contracts and regulations as evidence of contractual obligations (hereinafter the 2016 French Civil Code), is the first Code that officially recognizes the pre-contractual period by providing a subsection with the title "Contract negotiations" (Les Négociations) (Cartwright, 2016) in Subsection Article 1112-7, thus recognizing the term "négociations précontractuelles." The French Civil Code 2016 has made a separate adjustment for the pre-contract negotiation stage, according to the principle of agreeing first on the certainty of entering into a contract. Then, the contract is formed when an offer is made and accepted. However, there is no clear and specific formal definition of the pre-contractual stage in international legal documents and national laws.

The Civil Code of Vietnam 2015 used the term "formation of a contract" as the title for the first subsection of Section 1 on "Contract." Similar to the laws of other countries, there is no definition in the Vietnam Civil Code 2015 of "concluding a contract," and no term has had the same meaning as the term "pre-contractual negotiation" or the pre-contract phase in law in France. It can be seen that the 2015 Vietnam Civil Code does not distinguish between the contract negotiation phase, and the meeting phase of the offer and acceptance of the offer to enter into a contract, unlike like the 2016 French Civil Code.

### 2.2. Obligation to Provide Information in the Conclusion of a Contract

In France, "obligation précontractuelle d'information" is widely accepted in the case law system and many specific information obligations are covered in specialized laws, especially Consumer Law (ASEAN, 2018). In that spirit, Article 1112-1 of the revised French Civil Code stipulates the obligation to provide information and the legal consequences of a breach of the obligation to provide pre-contractual information. Article 1112-1 of the 2016 French Civil Code states:

*"The party who knows information, which is of decisive importance for the consent of the other, must inform him of it where the latter legitimately does not know the information or relies on the contracting party.*

*However, this duty to inform does not apply to an assessment of the value of the act of performance.*

*Information is of decisive importance if it has a direct and necessary relationship with the content of the contract or the status of the parties.*

*A person who claims that information was due to him has the burden of proving that the other party had the duty to provide it, and that the other party has the burden of proving that he has provided it.*

*The parties may neither limit nor exclude this duty.*

*In addition to imposing liability on the party who had the duty to inform, his failure to fulfill the duty may lead to annulment of the contract under the conditions provided by articles 1130 and following” (Cartwright, 2016).*

In Vietnam, before the promulgation of the 2015 Vietnam Civil Code, the obligation to provide information in the negotiation of a contract is an issue that has not been explored much in legal scholarship (Thi, 2018). The contractual regime in the 2005 Civil Code does not have a separate provision on the obligation to provide contractual information in general, but regulates this issue only through many specific provisions on the obligation to provide information during the implementation process for contracts of sale of property (Hai, 2019), contracts for the gift of property, insurance contracts, or obligations to provide information in the pre-contractual period for contracts where the subject matter is unenforceable (Cuong, 2006). In the absence of a general rule on the obligation to provide information, the Court applied the provisions of good faith, honesty, or deception to force the party with information to provide it to the other party (Do & Quoc, 2018).

To overcome this limitation, the Civil Vietnam Code 2015 is the first statutory enactment that stipulates the obligation to provide information in the negotiation of a contract. The legal consequences of a breach of this obligation are provided in Clauses 1 and 2, Article 387.

For a contract to be legally formed, and therefore establish the legal obligations of the parties, the agreement between the parties must comply with the basic principles of civil law. These include the principles of equality, freedom, voluntary commitment, agreement, goodwill and honesty, and the obligations not to infringe upon the national interests, the nation, the public interest, and the lawful rights and interests of others (Article 3 of the Civil Code) (The National Assembly, 2015). These basic principles govern civil legal relations in a broad sense, including the exercise and termination of civil rights and obligations of subjects. Thus, they regulate contract formation during both the pre-contractual period and the performance of the contract. A regulation to concretize the principles of good faith or honesty is the provision on the obligation to provide information in the pre-contract stage and the legal consequences of any breach of this obligation. This obligation is stated in Article 387 of the 2015 Civil Code. It can be seen that the 2015 Civil Code independently imposes the obligation to provide information during the contract formation stage and sanctions for failure to provide information arising from

principles of goodwill and honesty, and from case law. The regulation of the obligation to provide information is important because it helps the parties be more transparent in entering the contract. This is the similarity between Vietnamese law and French law on the obligation to provide pre-contractual information from a common law perspective. The similarity demonstrates the commonalities in the adjudication practice of France and Vietnam regarding the recognition of the need to share essential information in the contract formation stage, and the urgent need to require the obligation to provide pre-contractual information in the Ministry of Finance civil law. This approach of both the current French and Vietnamese Civil Codes is also the approach recognized in the European Code of Conduct on Contracts (European Union, 2002) in line with the trend of harmonizing contract law in the EU region and in the world.

### ***2.3. Information to Be Provided in the Formation of the Contract***

The French Civil Code (Cartwright 2016) has developed a formal and very specific definition of information to be provided during the contract negotiation. Article 1112–1, paragraph 3 of the French Civil Code 2016 states: *“Information of decisive importance is information that has a direct and necessary connection to the content of the contract or to the status of the parties.”* As can be seen, the French Civil Code 2016 provides that the information affecting the other party's acceptance to enter into a contract is all information that has a direct and necessary connection to the content of the contract. Especially important is information about the subject matter of the obligations arising from the contract, and the status of the contractual relationship. It is the responsibility of the courts to interpret this direct and necessary connection.

The exception to information affecting the acceptance of a contract is information about the “estimated value of benefits” derived from the contract. Paragraph 2 of Article 1112–1 of the 2016 French Civil Code has excluded information on the estimated value of benefits to be obtained from the contract, from the information of importance to be provided, by specifying “this notification obligation does not apply to the estimated value of benefit.” The provisions of paragraph 2, Article 1112–1 of the 2016 French Civil Code are also consistent with the provisions of Article 1136 of this Code, specifically, “A mistake as to value is not a ground of nullity where, in the absence of a mistake about the essential qualities of the act of performance, a contracting party makes only an inaccurate valuation of it.”

In fact, information about the estimated value of benefits the parties will receive from contract performance is also important in deciding whether or not to agree to enter into a contract. To eliminate legal uncertainty, and in response to the concerns of businesses, however, the notification obligation excludes information regarding the value of estimated

profits. The provisions in paragraph 2 of Article 1112–1 of the 2016 French Civil Code essentially codify previous precedents of the Supreme Court of France (Dissaux, 2016).

For instance, a woman who owned photographs of a famous photographer named Baldus auctioned off 50 photographs for 1,000 francs each. In 1989, this woman met buyers of the original 50 paintings and sold them a second lot of 35 and a third lot of 50, all for the same price of 1,000 francs each. Then, the woman discovered that Baldus was a very famous photographer, so she sued to cancel the contract of sale because she thought that the buyer of the photos had cheated her out of their proper value.

In 1997, the Court of Appeal of Versailles accepted the woman's petition, reasoning that the buyer knew that when he purchased new photographs for 1000 francs a picture, he entered into a contract for a price much lower than the value of the photographs in the art market. The Court held that the buyer had breached the obligation to enter into a good-faith contract due to the act of concealment of a deceptive nature, which all parties entering into a contract are forbidden to do (School of Law, 2000).

However, the above judgment was overruled by the First Civil Court of the Court of Appeal (Baldus Case), which concluded that the buyer is not obligated to inform the seller about the true value of the photographs even if he bought them cheap, and even if, had the woman known their true value, she would not have sold them to the buyer. Thus, a buyer not must provide information about the value of the property in the contract of sale, and simultaneously, the seller is not obligated to advise the buyer on the value of the property he intends to transfer.

Unlike the French law, the 2015 Civil Code of Vietnam defines very conservatively the information to be provided in the formation of a contract. Clause 1, Article 387 of this Code stipulates information affecting the acceptance to enter into a contract, but does not specifically explain the concept. A study in Vietnam that suggests that, before entering into a contract, the parties must carefully consider (Quang, 2007) and check information about the other party. They must take responsibility for their own decisions and must search for the necessary information to protect their own interests. Other recent research suggests that, in principle, the obligation to search for information for oneself already exists, as evidenced by common business practice. In some cases the Court determines that a contract is invalid due to confusion about the subject matter and the contract. The Court considers that the mistaken party is partly at fault for not understanding the subject matter of the contract himself. Simultaneously, this study argues that the obligation for each party to search for information for themselves does not exclude the possibility that each party must provide

necessary information to the other party (Do, 2017).

Beside this information, what else is there? Information evident from the terms of the contract (such as goods, quantity, or price), or indirectly related (such as information about the market).

Is unspecified by the Civil Code of Vietnam 2015. However, specifying the type of information required to be disclosed is difficult for legislators because for each type of contract, the information to be provided can be very different. Therefore, Article 387 of the Vietnam Civil Code 2015 states only the type of information necessary for the one party's acceptance to enter into a contract. One can speculate that this type of information is important to the contracting party, and its absence will lead to many conflicting views when applied to actual cases. This may cause difficulties in dispute settlement and make it harder to apply the rules on the obligation to provide information in practice. If the parties cannot agree and there is no legal basis to determine the influence of the information on the other party's decision, the final decision on the type of information required will be made by the dispute settlement body (court or arbitration) based on fairness (The National Assembly, 2015).

#### ***2.4. Conditions for the Application of the Obligation to Provide Information in the Formation of a Contract***

To apply a pre-contractual information obligation, certain conditions must be met.

First, the party obliged to provide information must actually possess the information affecting the other party's decision to enter into a contract. In practice, a party with obligatory information is usually the seller of the property. However, Clause 1, Article 387 of the Vietnam Civil Code 2015 is not so limited, providing that where one party has information affecting the acceptance of entering into a contract by the other party thereof. (Do, 2016). This leads to the converse, that if one party is unaware of information affecting the other party's decision to enter into a contract, that party is automatically excluded from the obligation to provide the information. In French law, a party's knowledge of information that affects the other party's acceptance of an offer contract is factual, not conjectural. However, under French law, professionals such as doctors or notaries cannot claim that they do not know information that affects the other party's decision to enter into a contract (Orzikh, 2016). Neither can they ignore the obligation to provide information in accordance with specialized laws. The french case law established that professionals are presumed to know information affecting the other party's decision to enter into a contract, if the information is within the expertise of the professional.

Specifically, for doctors, Article L.1111-2 of the Public Health Code stipulates that doctors must inform patients about medical information such as:“ Treatment

methods or measures, suggested precautions, their benefits, possible emergencies when applied, consequences, common risks, AND exacerbations, and other possible solutions applicable along with predictable consequences in the event of refusal to apply the proposed treatment or preventive measure” (President of France, 2020).

Second, the party having the right to request information is the party who does not have information that affecting its own acceptance of a contract. Clause 1, Article 387 of the 2015 Civil Code provides that: “In case one party has information affecting the other party's decision to enter into a contract, it must notify the other party,” without specifying that the other party does not already have such information.

The party lacking information possessed by the other party, and affecting its own decision to enter into a contract, has previously had to seek information on its own. The obligation of the party who has the information to provide it to other party does not, of course, exclude the obligation of the party without the information to still search for the necessary information for himself. Therefore, the party's lack of information affecting its acceptance of the contract must have a valid basis/cause.

Here, the French Civil Code 2016 paragraph 1, Article 1112–1 provides that the party who does not know about the information has the right to request the party having the information to provide it, but the Code still requires that before asking for this information, the requesting party must try finding out the information for himself (Cartwright, 2016). For example, Company M leases land from individual N, and later buys the land from N because it knows that metal is present in the soil. rare, N has no expertise, so he cannot know the value of the land, leading to the sale of land at a disadvantageous price. A party is also excused from not finding out the information for himself when he has “trust in the contracting party.” For example, X made a deposit to sign a contract to buy a house in a rural area to live in during the summer. Because X trusted the broker, he did not check the area surrounding the house. In fact, the house is near a cattle farm and is adversely affected by the noise and smell of manure.

### ***2.5. Agreement to Limit or Exclude Information Obligations during the Contract Negotiation Period***

Clause 1, Article 387 of the Vietnam Civil Code 2015 has a very wide scope, as it applied to "civil relations, marriage and family, business, commerce, labor," all of which are understood as civil relations in a broad sense (The National Assembly, 2015). However, for specific specialized legal areas where the contractual relationship is through a model contract, or related to a consumer contract, the contract is likely to include a clause that limits or excludes the commercial party's obligations to provide pre-contract information to the consumer. Here, it is necessary to question whether to allow such limitations on or elimination of the obligation to provide consumers pre-contractual

information. Some authors argue that Article 387 of the Vietnam Civil Code 2015 (The National Assembly, 2015) should be supplemented so that the parties cannot by agreement limit or eliminate the obligation to provide information. They contend that any such agreement should void the contract because Article 187 is designed to limit the imbalance in such a contractual relationship (The National Assembly, 2015). Especially with model contracts, and consumer contracts, it is necessary to maintain the balance on the contractual relationship between the parties.

In contrast, Article 1121–1 of the French Civil Code specifically prohibits the parties from contractually eliminating the obligation to provide information (Cartwright, 2016). It provides: "The parties to a contract cannot limit or exclude this obligation (pre-contractual information obligation)". Thus, the French Law makes it clear that its goal is to ensure the obligation to provide information under all circumstances, and to impose liability when the obligation to provide information is violated.

## **3. Liability to Compensate for Damage outside the Contract due to a Breach of the Obligation to Provide Information during the Contract Negotiation Period**

The breach of information obligations during the negotiation of the contract is a breach that occurs before the contract has been legally formed. Hence, if there is damage caused by the failure to provide information, it is impossible to apply the provisions on liability to compensate for damage caused by a breach of obligations according to Article 360 of the Civil Code 2015. The scope of damages to be compensated is the actual damage according to Clause 1, Article 585 of the Civil Code (The National Assembly, 2015), which excludes the potential benefits of the contract, including the loss of the opportunity to obtain expected profit. The basis of the liability non-contractual damages in this case results when one party breaches the obligation to provide information during the contract formation period, and the other party suffers actual damage. There must be a cause-and-effect relationship between the breach of the obligation to provide information while negotiating the contract and the other party's actual damage. However, when a breach of the information obligation occurs during the contract formation period, it can lead to two cases.

### ***3.1. The Contract Is Not Formed***

In some cases, failure to provide information during the contract negotiation period may lead to the contract not being executed. For instance: a party has been negotiating with the second party for a long time, then by chance realizes that it should have been given information. He/she has the right to refuse to enter into a contract and can claim compensation. Usually damages due to breach of information obligation result. Damages can consist of useless (already spent)

transaction costs, or lost opportunities to enter into a contract with another party, but they exclude benefits that the damaged party could have gained if the contract had been executed and performed, including the loss of the opportunity to realize the expected profit. To impose liability on the party who withholds information, the party without information should prove that he suffered actual damage from the other party's failure to provide information. In fact, this often happens in cases where a buyer pays a deposit in anticipation of a sales contract, but the contract is never executed because a buyer discovers that the seller has not provided relevant information related to the object of the sale (e.g. a house or land in dispute or in the area of clearance). In these cases, it is impossible to impose a deposit penalty on the buyer, and simultaneously, the buyer has the right to claim compensation for damage, which is an interest for the amount of deposit already delivered to the seller.

### ***3.2. The Parties Continue to Negotiate and Execute the Contract***

Here, the contract is executed, but during implementation, one party discovers that the other party has withheld information that would have affected the first party's decision to enter into the contract. According to Clause 3, Article 387 of the 2015 Civil Code, "The party that violates the provisions of Clauses 1 and 2 of this Article, and causes damage, must compensate for the other party" (The National Assembly, 2015). This provision imposes liability for damage caused by the breach of the obligation to provide information, but does not specify if it applies whether the contract void or not. The authors want to add the following two opinions to the above analysis.

First, normally, in recent practice, the party who possesses information has to provide it. For instance, referring to the earlier example of a house near the cattle farm, client X has signed a contract to buy the house and paid a deposit toward the purchase price. Here, the seller must provide information about the area around the house because that information will affect the price and, indeed, the buyer's decision whether to buy the house at all. However, the failure to provide this information is not misleading, as the cattle farm has been around for many years. Here, the signed deposit contract is not void. If X does not buy a house, X will forfeit the penalty. In case X has damage due to not being provided with information from the seller, X must prove the existence of that damage and its causal relationship to the seller's withholding of information. However, these provisions impose a comparable obligation on the buyer. Thus, if the buyer has information related to the property that affects the seller's decision to sell, the buyer must also provide the information.

Second, if the failure to provide information contains

all the elements of deception, the contract can still be invalidated on the basis of deceptive provisions, as seen in cases in Vietnam adjudicated in recent times. In Vietnam, the Court has invalidated many contracts where one party intentionally did not provide information to the other party, relying on pre-existing law prohibiting deception. For instance, Company V signs a contract to transfer a land lot to Company T according to the Land Use Right Certificate, including an area to be used to build a factory, and a part used for agricultural purposes. However, many years ago, the State changed this land plot for use, with intention of providing services and entertainment. Company V knew this, but when signing the contract, it fraudulently failed to notify the Company T of this restriction. The act of not reporting the land status to Company T was held to be a fraudulent act, invalidating leading the contract.

From a comparative legal perspective, with the above solution, it can be seen that the Supreme People's Court's solution has brought Vietnamese law closer to the French law. Indeed, according to the law of the French Republic, a contract established but has "failed consent" because of deception will be declared invalid by the Court, and the deceiving party will be ordered to pay the other party compensation for non-contractual damages, if any actual damage occurs. The final paragraph of Article 1112-1 of the revised French Civil Code states that "in addition to binding the parties to the information, the failure to perform the obligation to provide information may terminate the contract in accordance with the provisions of Article 1130 and other relevant provisions" (Cartwright, 2016). Thus, although the contract has been executed, the conditions for forming a valid contract have not occurred because the deception has prevented a true agreement as prescribed in paragraph 1, Article 1130 of the French Civil Code, as amended, according to which "Fault, deceptions, threats are instances proving that there is no agreement between the parties because in essence, without such cases, one of the parties would not have entered into a contract or would have entered into a contract but under completely different conditions" (Cartwright, 2016).

A contract formed with "defective consent" (Line, 2011) due to deception is a contract that lacks agreement and is therefore void according to Article 1131 of the French Civil Code as amended. Such a contract may be canceled "a voidable contract may be decided by the Court, unless the parties agree to object" (paragraph 1, Article 1178 of the French Civil Code as amended). If there is actual damage, the aggrieved party can claim damages in accordance with the general provisions on non-contractual liability (Cartwright, 2016).

## 4. Conclusion

The obligation to provide information during the negotiation of a contract in Article 367 of the Civil Code 2015 is a common obligation of the parties in the contract formation phase, which has a extremely wide scope, specifically to relationships: civil, marriage and family, business, commerce, and labor (The National Assembly, 2015). Information that a party to a contract is obligated to provide is any information that affects the other party's decision to enter into a contract. However, information about the estimated value of benefits from the transaction is an exception to the information that must be provided. Violating the obligation to provide information in the formation of a contract in Article 368 of the Civil Code 2015 is committed at a time when the contract has not yet been formed, so in principle, liability imposed on the party who commits this violation must be imposed by relying on provisions outside the contract (The National Assembly, 2015). The extent of compensatory damages is actual damage and excludes benefits that the aggrieved party would have been gained if the contract had been executed and performed, including the expected profit. Simultaneously, it is also necessary to be aware that professionals, even though they know information affecting the other party's decision to enter into a contract, solely because of their professionals, expertise cannot refuse to provide the information.

Compared with the provisions of Vietnamese law, French law has clearer and more specific provisions on the obligation to provide pre-contractual information. France has a Civil Law legal system, which has traditionally required parties to provide each other information in the pre-contract stage. The legal basis for this obligation is the principle of honesty and goodwill during contract negotiation and performance. International law, the Unidroit Code of Conduct on International Commercial Contracts (Unidroit), the European Code of Contract Law (PECL), and the Vienna Convention on Contracts for the International Sale of Goods 1980 (CISG) indirectly provided for the obligation to provide information in the pre-contractual period, through provisions on the principles of good faith and honesty. Accordingly, the act of knowingly failing to provide information or intentionally providing inaccurate information is considered a fraudulent act. It leads to legal consequences, in that the contract will be declared invalid or the aggrieved party will have the right to declare the contract canceled. To ensure the legal safety of contracts, Vietnamese legislators can refer to Article 1112–1 of the French Civil Code to complete Article 387 of the 2015 Civil Code on contractual obligations (The National Assembly, 2015).

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