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**LAW ON STANDARD BUSINESS TERMS- THEORETICAL AND  
PRACTICAL ISSUES**

*Field of study : Economic Law*

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**ABSTRACT OF DOCTORAL THESIS ON LAW STUDIES**

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- 1) National Library of Vietnam;
- 2) Library of Hanoi Law University

## INTRODUCTION

### 1. Justification

In the development of commodity manufacturing and of trade in services, standard business terms (abbreviated as SBT) are applied not only to customers, but also applied in the relationship between traders. Lack of legal provisions that provide protection to the interests of enterprises in unequal standard business terms serves as hot topic for the debate between researchers. Practical implementation of standard business terms also shows the need to protect enterprises, especially the small and medium ones, from the unequal standard business terms. In the recent years, in EU, there is a strong reaction on the lack of legal mechanism to protect contracts concluded between enterprises using standard business terms. In Vietnam, the protection of enterprises before the unequal SBT so far has not been studied in details.

Contract law contains in itself complicated legal issues. The SBT is even more complicated issue because of the differentiated notions and approaches on freedom of contract and law of equity applied to the contract. The research aiming at making clearer the basic theoretical issues on SBT, at identifying causes of the legal control of ver the application of SBT in contractual relationship, at recognizing core substance of legal provisions governing SBT, and comparing all those with the current legal provisions of Vietnam with the view to make proposals on amending or supplementing law governing contracts which effectively apply SBT is an urgent need of the country. This is especially true in circumstances, where Vietnam is gradually completing its Civil Code and integrating into global community.

### 2. Objective and task of the thesis

Objective of the thesis is to ensure that the research on SBC could be carried out comprehensively and systematically on theoretical aspects of the SBT, and that logical justification could be proposed to identify appropriate approach on legal regulation of SBT in the current multi-approach situation. Based on evaluation of the current legal regulations on SBT, the thesis shall propose solutions on completion of the Vietnamese

law in this field, accompanied with accurate justification on its theoretical and practical aspects.

With such a research objective, the thesis will focus on the following research tasks: to clarify the origin of the SBT as an economic phenomenon which should be regulated by the law; to provide definition and legal nature of the SBT; to clarify advantages and disadvantages of the implementation of the SBT; to identify basis for the legal intervention to the SBT and thus, to identify key content of the legal provisions regulating SBT; to analyse actual situation of the current legal provisions on formed civil contracts, SBT in the consumer contracts and actual implementation of legal provisions on SBT in Vietnam in certain sectors (finance-banking and house trading). Through the research, actual situation of the application of SBT with its shortcoming, disadvantages, together with their causes will be clarified; attention will also be paid on legal regulations of countries having long-standing experience on regulating SBT and their contemporary issues and lessons for Vietnam; thesis also identifies direction and proposes solutions to develop Vietnam's legal regulations on SBT in condition of overall legal system development and development of contract law.

### **3. Scope of the research**

To meet requirements on research objectives and tasks at doctoral level, the thesis will put its focus on study of theoretical matters. Actual situation of legal regulations and of law implementation will be limited within the jurisdiction of Vietnam. With respect to the actual implementation of legal regulation on SBT, due to the fact that SBT is implemented in many different business sectors, then, within the scope of the thesis, author selects only two sectors from Vietnamese practice, namely finance-banking and house trading as samples for discussion. Case law of foreign jurisdictions is out of the scope of the thesis, however, it could be addressed as reference of used as evidences for comparative researches or as illustrations. The comparison or reference of legal provisions shall be limited within countries having long lasting legal tradition in this matter, and mainly law of member-countries of the EU.

### **4. Methodology and research methods**

Thesis had been conducted applying dialectical and historical materialisms. It also based on Marxism-Leninism standpoints and Ho Chi

Minh thoughts on state and law, and also on policies, directions of the Communist Party and the State of Vietnam on legal system development in general and on contract law in particular. During the research, the author of thesis also applies analysis, synthetic, comparative, historic approaches to clarify each of the issues with the view to reach to the set objective of the thesis.

### **5. New academic contributions of the Thesis**

*Firstly*, starting from different approaches by different scholars on notion of SBT, the thesis introduces definition of the SBT that covers all of its symptoms and forms;

*Secondly*, based on economic and legal theories, the thesis analyses philosophic basis of the legal control over SBT, clarify causes of the legal control so as not to interfere into the freedom of contract principle. From which, the thesis formulates content of legal regulations on SBT and ensures that legal regulation on SBT is not only matter of consumer protection law as traditionally thought. Content of the law on control over transactions between companies and relevant persons include regulations on recognition of SBT, principles applied to SBT (when SBT becomes a part of contract), interpretes SBT and control unequal SBT; and how it is applied to all contracts that use SBT in their conclusion.

*Thirdly*, the thesis is the first research that universally and systematically assesses in detail actual situation of legal regulation on SBT in Vietnam, pointing out irrationalities of current legal regulations as well as their implementation in certain sectors.

*Fourthly*, the thesis proposes precised directions and solutions for completion of legal regulations on SBT to meet development of a healthy business environment of the integrating market economy of Vietnam. Solutions include proposal to complete contract law, proposal to complete mechanism to control unequal SBT and proposal to enhance feasibility of the implementation of law in these fields.

### **6. Structure of the Thesis:**

Besides the Overview, Conclusion and List of References, content of the Thesis consists of 4 chapters as follows:

*Chapter 1:* Overview on researches on topic

*Chapter 2:* Basic theoretical aspects of the SBT and legal regulations on SBT

*Chapter 3:* Vietnamese law on SBT and its implementation in certain fields

*Chapter 4:* Completion of the legal provisions on SBT in Vietnam.

## **CHAPTER 1**

### **OVERVIEW ON RESEARCHES ON TOPIC**

#### **1.1. Researches on topic in and out of Vietnam**

##### ***1.1.1. Researches in Vietnam***

In Vietnam, before the promulgation of the Consumer Protection Law of 2011, SBT was mentioned quite occasionally from both actual legal regulation and scientific research. Until the candidate start the thesis, most outstanding among published researches on this topic is an article by Prof. Dr. Nguyen Nhu Phat in 2003 and some master degree researches such as “*SBT in international trading and its application in Vietnam*” in 2008 by Le Thanh Ha, University of Foreign Trade, “*Vietnamese law on consumer protection in integrating contracts*” in 2010 by Lo Thi Thuy Linh, Hanoi Law University, and most recently, “*Contract law on uniformed civil transactions in the world – lessons for Vietnam*” in 2011 by Nguyen Thi Ngoc Anh, University of Foreign Trade.

Among the mentioned researches, only work done by Prof Dr Nguyen Nhu Phat addressed the SBT from most direct and systematic manner. However, it only proposed issues for further studies, but not made any significant conclusions.

##### ***1.1.2. Researches outside Vietnam***

While research circle in Vietnam does not pay proper attention on the SBT topic, from international perspective, there are many different researches on SBT and uniform contract, from diversified standpoints. Hereunder are some of those:

***Firstly***, article “*Contract of Adhesion- Some Thought about Freedom of Contract*” by Friedrich Kessler. This is one of the earliest researches on SBT and integrating contract. Based on economic analysis of the formulation of SBT, author addressed shortcomings and confusing in the

courts in developing precedents on interpretation of integrating contract based on freedom of contract.

**Secondly**, article “*Standard Form Contracts and Democratic Control of Lawmaking Power*” by W.David Slawson. Like Friedrich Kessler, W.David Slawson pointed out 2 key reasons of the formation of SBT as proposed task of the courts in modifying conducts of the contracting parties based on equality principle. However, as differ from Friedrich Kessler, W.David Slawson sees legislative intervention as a protection of the economically disadvantaged party in society.

**Thirdly**, article “*The Law of Standard Form Contracts: Misguided Intuitions and Suggestions for Reconstruction*” by Shmuel I. Becher & Esther Unger-Aviram. This article explain that customers do not often read contract because of its length, because they want to save time and because of their limited opportunity to change contract terms. Therefore, customers are those who often bear disadvantages from abusing terms proposed by the contract drafters. Based on such analysis, author of the article is of opinion that legal control that requires contract to be clearly printed, using proper fonts size, etc. is not crucial because it does not change the nature of causes of customers not to read contract. Author of the article suggests that there should be a separate set of legal regulations, especially in the field of customer protection.

**Fourthly**, article “The Australian Unfair Contract Terms Law: The Rise of Substantive Unfairness As a Ground For Review of Standard Form Consumer Contracts” by Jannie Paterson. Author points out shortcomings in all legal regulations on unfair contract terms of Australia. Like Shmuel I. Becher & Esther Unger-Aviram, Jannie Paterson thinks that notion of equality in the formulation of contract is not sufficient to control fairness in the consumer contracts because introduction of uniform contract can not change the practice that customer do not read contract. Therefore, author is of opinion that the fairness should be sustentative fairness, meaning to allow the law to intervenes into the pre-designed unfair contract terms, not just to intervene into the formalities to form contract.

**Fifth**, article “*The implementation of the Unfair Contract Terms Directive in the United Kingdom*” by Dr. Christian Twigg-Flesner. This article analyses conflicts in legal regulations between case precedents and

Unfair contract terms Act 1977 and Decree on consumer contract of 1994 and 1999.

**Sixthly**, article “*China: New Chinese Rules Penalize Fraudulent or Unfair Contracts*” by Maarten Roos. This article introduced new provisions of Chinese law since promulgation of Regulation on control and dealing with illegal contracting practice that come into legal effect since 13 November 11, 2010, and emphasise the need for imposing fines on unfair contract terms.

**Seventhly**, article “Principles of the German law on standard terms of contract” by Prof. Dr. Thomas Zerres. This article interprete articles 305 to 310 of Civil Code of Germany on SBT.

**Eighthly**, article “*Fixing Unfair Contracts*” by Frank and Bernice Greenberg. The article analyses and proposed 3 solutions on legal regulation of unfair contract terms, of which emphasis is made on solution to bring contract terms into most suitable condition. This article introduces a completely new approach compared to previous researches on unfair contract terms. Author tried to explain and made suggestions to fill the gap when unfair contract terms are invalidated.

**Ninethly**, article “*Unfair Terms in Contrats Between Business*” by Martijn Hesselink, professor of Amsterdam University, Holland. The article quoted Directive on unfair contract terms in consumer contracts - The Directive 93/13/EEC of 1993 of EU that interpretes that the former Directive is applied only to contract between businesses to consumer contract (B2C) and does not mention about its application to B2B contracts.

Researches of the above mentioned authors put before the candidate many issues to address, of which, the key issue that the candidate is trying to find proper answer is why there should be separate set of legal regulations to govern contracts using SBT and uniform contract while there are already general legal provisions on contract? Could the legal intervention be seen as violation of the freedom of contract recognized by the law? Because uniform contracts and contracts using SBT at the end of the day are also based on freedom of contract without any duress, undue influence or forge? Why law on SBT has very different approaches in different jurisdictions, with the two main schools: apply to all contracts, and apply only to consumer contracts? What is the actual cause for the law



to protect the party who do not draft the contract? Is that because they are the disadvantaged party economically or socially? Which development direction is suitable to Vietnamese practice?

## **1.2. Assess the relevance of researches to content of the thesis – new content of the thesis**

### ***1.2.1. On formulation of the SBT***

Study of mentioned researches gives candidate the opportunity to conclude that SBT has economic basis, it is a natural product of the developed production, economy. SBT brings about certain values in saving expenses and time of transactions and it is also a standardization of long lasting and repeating business rules. Based on inheritance of researches, the new contribution of the candidate is to provide justification and conclusions for further research by candidate, according to which, SBT is a social economic phenomenon which exists objectively in many business sectors, not only in the consumer fields.

On the other hand, candidate also analyse social economic basis for formulation of SBT in certain business sectors in Vietnam in the scene of transforming economy, where demand-supply imbalance is not because of monopoly, for example real estate market, insurance market, etc. From this characteristics of Vietnam, it is for sure that the protection of freedom of contract based on current law is not sufficient. The lack of fairness principle in contract law clearly reduces effectiveness of the regulatory role of the law to protect party, who is not involving in the draft of contract.

### ***1.2.2. On notion an legal nature of the SBT***

Candidate compares and clarifies relation between SBT and uniform contract and tries to find complete answer to question whether SBT should be an issue of the consumer protection? Should the uniform contract be used only in relation to consumers? Is contract law the law on SBT? Based on addressing those questions, the candidate will clarify legal nature of the SBT. The address of those questions also serves as preposition for the candidate to identify content of legal regulations on SBT, then the candidate will analyse current law of Vietnam in the field. Based on such, the candidate will make proposals and solutions on completion of law on SBT with comprehensive theoretical and practical justifications.

### ***1.2.3. On philosophic basis of legal regulation on SBT***

This is new contribution of the thesis compared to the other researches. Author of thesis tries to provide initial justification on economic basis, on deep causes of the approach to apply legal regulation on SBT based on economic and legal theories. The research will find answers to questions why there should be separate law on SBT besides contract law? Is legal regulation equal to the violation of the freedom of contract? Do legal regulation of SBT have the only objective to protect the disadvantaged party who is the party that not participate in the draft of contract and at the same time the party that have weaker economic status? From the outcome of the research, together with assessment of current law and its actual implementation as well as actual implementation of law on SBT in Vietnam, the candidate will have direction on legislative solutions in this field.

#### ***1.2.4. On historical formulation of law on SBT and identification key content of the law on SBT***

The study of the historical formulation of law on SBT is one of the basis for author to work out conclusion on identification of key content of legal regulations in this field. Besides, author will also apply historical approach of foreign authors to research of formulation of law on SBT in Vietnam. Author also synthesises researches of foreign scholars to compose a comprehensive and clear picture of the key content of law on SBT, and thus, to compare with the current law of Vietnam to discover the latter's shortcomings and gaps.

#### ***1.2.5. On mechanism to control unfair SBT***

Researches of foreign scholars show different analyses relating to the effects of SBT in different jurisdictions, mainly between common law and civil law traditions. Based on that, candidate synthesizes issues into theoretical level on the topic. Researches already analysed means to protect weaker party in contractual relationship, who are mostly consumers, against pre-designed contract terms of the goods/service providers. Contribution of the candidate is to synthesize researches onto theoretical level on legal regulation governing the unfairness in the pre-designed contract terms. This is a news in the researches in Vietnam. Based on combining comparative study to some jurisdictions as Germany, China, England and EU, author

will summarize some learned lessons for completion of Vietnamese law on this topic.

#### ***1.2.6. On adjustment of unfair SBT***

Which experience could Vietnam learn from the dealing with the invalidated SBT? Which school thought would be suitable to the actual legal situation of Vietnam? Those are questions that will be addressed by the author. Besides the mentioned new points, candidate also selects actual legal regulations of some jurisdictions such as EU and some outstanding ones like England, Germany, China to draw out lessons for Vietnam and in so doing, candidate is the first researcher in Vietnam who conduct comprehensive and systematic study current law of Vietnam on SBT, and from that, points out shortcoming that should be overcome, and thus, contribute to the completion of law in Vietnam.

### **1.3. Theoretical basis and research hypotheses and research questions**

#### ***1.3.1. Theoretical basis of the Thesis***

Economic theory applied to the research is Coase Theorem. This theorem suggests that if outing factors could be exchangeable and transaction fee could be nominal (zero), then there should not be regulation on who should do what, the market shall decide such issue.

Legal theory applied to the research is doctrine of procedural justice of Werner Flume (a famous German scholar in the field of lawyering) and doctrine about substantive justice of Karl Larenz (also a famous German author) in the field of contract law.

Those theories are basis for the candidate to suggests justifications on logical and philosophic ground of legal regulation on SBT, and thus, to clearly identify the content of law on SBT.

#### ***1.3.2. Hypotheses of the research***

The Thesis proposes the following hypotheses:

- If there are no differences in economic and legal natures between SBT in consumer contracts and in other business sectors, then there should be no rational justification to conclude that protection of contracting parties who do not draft SBT (weaker party) is due to the fact that consumers are weaker party in the uniform contract transactions.

- Although SBT and uniform contract are not similar legal terminologies, but the legal regulation of uniform contract or of SBT are in their nature the regulation of the implementation of the pre-designed contract terms in the contract, where one party does not have right to negotiate, draft and suggest alteration to pre-designed contract terms. Therefore, the parallel existence of law governing uniform contract and law governing SBT is an irrationality.

### ***1.3.3. Research question***

The thesis put forward and will try to get answers to the following research questions: What is SBT? Legal nature of the SBT? Are SBT and uniform contract the same thing? What is basis for the law to intervene into the implementation of SBT in contract? Why law of foreign jurisdictions have different approach of this same issue? Is Vietnamese law that have regulations on both uniform contract and on SBT in consumer protection field rational? How the law on SBT in Vietnam should be improved?

## **Conclusion on Chapter 1**

1. SBT is an inevitable phenomenon of developed economy. The research of law on SBT, therefore, was conducted quite early in legal science of developed nations. However, in Vietnam, research on law on SBT appears just recently, together with the appearance of pressing demand to protect rights and interest of the customers against the illegal SBT. Notwithstanding of that, SBT is an economic phenomenon that existed in many different business fields, and is applied not only in relationship with customers, but also in relationship between businesses. Problem here is whether the law also should regulate the application of SBT in the B2B contracts as widely addressed in legal science of different countries over the world in recent years.

2. In Vietnam so far there is no scientific research on the mentioned questions. Research questions proposed by candidate were also not answered completely, from both theoretical and practical perspectives. In Science of gradual completion of law, especially contract law with the view to meet the challenges of the global economic integration, the theoretical research to clearly identify causes of developing law on SBT is a new approach, firstly done in Vietnam.

## **CHAPTER 2**

### **THEORETICAL BASES OF GENERAL BUSINESS TERMS**

#### **2.1 Overview on general business terms**

##### ***2.1.1 Origins of general business terms formation***

The findings of this thesis show that general business terms is not a phenomenon of the modern society, but, actually were widely used during the industrialization in the 19<sup>th</sup> century in Europe, resulting from mass production and services. Only in the monopolistic economy with abusive use of general business terms did they become a phenomenon creating many challenges to law intervention. However, legal control of general business terms in order to limit monopoly is an issue of the past. Even in a competitive market economy, general business terms are still formed naturally as a result of transaction cost reductions.

##### ***1.1.2 Definition and legal nature of general business terms***

As defined by the author of this thesis “General Business Terms (GBT) are items and clauses written in different forms issued by one party for multiple uses in contract transaction which are not negotiable by the other party to change them”. GBT, uniform contract and accession contract are not the same but they are inseparable and have close ties. In fact, in legal amendment, changes in uniform contract, accession contract, serial contract etc. are various approaches in prepared contracts, which, in the end, is adjustment in contract agreement using GBT. In terms of legal nature, GBT is unilateral will of the issuing party while the other party has no other choice but to enter into the contract. In other words, GBTs are requests for specific contract agreements.

##### ***1.1.3 Pros and cons of GBT***

Although GBT is a product of limiting the principle of free contract, it is the inevitable result of a developed economy and not all of its aspects are negative with unfair rules and misuse. The application of GBT in social life has advantages and disadvantages in both legal and economic terms. An important benefit of GBT is that it helps shorten negotiation time, reduce transaction costs for the contract parties. The main drawback is that GBT can result in asymmetric information. The selection of items to be included in GBT is carefully considered with anticipation of market changes which

may affect the deals. The party to apply GBT then will become more dependent and have less information as it is not them who conduct market research and prepare the contract clauses, therefore may suffer great losses in case of risks.

## **2.2 Legal overview of GBT**

### ***2.2.1 Philosophical bases of legal control and legal recognition of GBT***

The intervention of parties in freedom and will of other parties is a complicated issue which needs thorough explanations. Based on the famous economist Coase's economic theories, the author of this thesis suggests that the economic reason for legal control of GBT is to regulate justice value, control asymmetric information and collapse of market. Therefore, it aims to protect the party without information, limiting abuse of unfair prepared contracts. It not only helps protect the weaker party but also mainly protect consumers.

#### ***2.2.2 Legal content of GBT***

Legal content of GBT consists of three main contents as follows.

First of all, it is necessary to identify when one party is bounded by GBTs (notice of GBT and identification of when a term imposed unilaterally by one party becomes part of the contract and binding to the other party (or, in other words, incorporation).

The second content is the vague explanation of contract terms when one party does not participate in the contract preparation (or, this can be called the issue of interpretation)

The third most important content is the control of unfair standard terms control

#### ***2.2.3. History of legal formation on GBT and legal models of GBT***

Europe is considered the birthplace of GBT. Then, most countries initiated the issuance of specific rules in such sectors where GBTs were early formed and widely used as transportation and insurance (these are called sectoral solutions). Some other countries tried to adapt by general rules of contract laws. In the 20<sup>th</sup> century, many legal systems establish general mechanism for standard terms in contract hoping to replace individual solutions in specific laws. Poland pioneered in setting general rules for application of GBTs as of Clause 71 of Law on Duty in 1933

followed by Italy with Clause 1341 of Civil Law in 1942. So far, laws on GBT in Europe in particular and in the world in general has adopted a diversified approach.

In legislative history, there have been 4 legal models of GBT:

- i/ No Particular Problem Model
- ii/ Standard Form Contract Model
- iii/ Consumer Protection Model
- iv/ General Fairness Model

However, after the issuance of Directive 93/13/EEC, countries' laws on GBTs tend to be formed in two legal trends. The first trend is adjustment of standard terms for all contracts regardless of whether the contractors are consumers or businesses ("collective litigation") The second trend considers GBT a legal issue of consumer protection. This trend focuses on adjusting standard consumption contract aiming to protect consumers as the "weaker" party ("individual litigation")

## **1.2 EU and some other countries' laws on GBT- experience and lessons for Vietnam.**

Through studies of EU and other countries' laws, some lessons and experience can be drawn for Vietnam to improve its laws on GBTs as follows:

First, no single country denies that GBT are a legal matter of contracts. Whether the design of its form is in the Civil Law or in a separate Contract Law needs to be considered with each country's social and legal context. Second, the method is applied to only those GBTs which seem unfair in consumer contracts with problems. Third, no country in the world has both regulations on standard contracts and on GBTs.

## **Conclusions on Chapter 2**

GBTs is a legal economic phenomenon commonly exists in developed economies. The role of legal control acknowledges the existence of GBTs imposing uniform rules to avoid disorders and at the same time creating a reasonable mechanism to ensure justice for the free contract principle. The legal control approach is based on theories of fairness in procedures and nature of contract law, through which differences in legal subject scopes can be seen. The hypothesis of advantage of one party has driven the law

towards the protection of consumers, who account for the majority of the market. The hypothesis of transaction costs aims at balancing benefits of parties due to imbalances in information resulting from reducing transaction costs. However, the underlying purpose of legal control is to prevent the market from collapsing as a result of asymmetric information.

GBTs set and issued by one party tends to create unfair issues between the two parties. Thus, unfairness has become the criterion for legal control of most countries in re-establishing parties' interest taking account more of the protection of the party which is not able to participate in preparing the contract. Although different countries have different approaches and different legal solutions, the ultimate goal is to protect the principle of free contract and fairness.

Legal practice in different countries has shown that adjustment approaches to GBTs can be different but tend to follow two major trends namely adjusting GBTs in all contracts and adjusting GBTs in consumption sector to protect consumers. However, practice has shown that the first trend is more suitable as it can help overcome the limitations of adjustment from the point of consumer protection laws.

Standard contract terms which seem to be unfair and abusive will not be recognized by laws and thus be considered legal. Laws have different ways of legal control of unfair GBTs. Nevertheless, the establishment of an effective mechanism to amend unfair GBTs is still an open issue and needs further study.

### **Chapter 3**

#### **VIETNAM LAW ON SBT**

#### **AND ACTUAL IMPLEMENTATION IN SEVERAL SECTORS**

#### **3.1. Actual situation of legal regulation on SBT in Vietnam**

##### ***3.1.1. Legal provisions on definition of SBT***

Vietnamese law on SBT is a fragmented, scattered one which could be found in provisions on uniform contract in 2005 Civil Code, in provisions governing SBT and uniform contract in consumer field in Consumer



Protection Law 2011 and in other regulations on issuance of uniform contract, regulations on compulsory contract terms in some specified sectors as house trading, insurance trading, etc. Looking at the issue from each perspective, as mentioned in Chapter 2, Vietnamese law already covers all content of to be regulated matters in this field. However, because of the fragmented and scattered and insystematic law, then the shortcomings in each sectors could be seen quite clearly. Namely: i) there is overlaps and unclear between notions of SBT and uniform contract; ii) the issue of when SBT become a part of contract law is dealt with only from the consumer protection perspective; iii) interpretation of SBT is not conducted in a uniformed principle; iv) protection of weaker side in unfair SBT is still not effective.

### ***3.1.1. Legal provision defining the SBT***

Vietnamese law introduces different approaches on SBT in different legal normative acts. Consumer protection Law 2011 defines SBT, uniform contract in consumer sector; besides, 2005 Civil Code also defines uniform contract. The parallel existence of many different definitions in different legal normative acts show that the legal regulation in Vietnam is so unclear and confusing.

In the end, current legal provisions of Vietnam on definition of SBT contain the following shortcomings that should be overcome: i) notion of SBT as pre-designed contract term that could be drafted in many different forms and be used many time in contracting relationship, giving other contracting party no chance for negotiation should be approached in a very comprehensive manner; ii) overlaps in notion of uniform contract SBT and the unclear differences between them should be cleared out.

### ***3.1.2. Legal provisions on application of SBT***

The issue of when SBT become part of contract is not addressed uniformly in Vietnamese law. The 2005 Civil Code contains no provision on principle for application of SBT and principle to choose SBT in case all parties use them in their contracts. The detailed shortcomings of law could be listed as follows: *firstly*, the law lists too many compulsory unnecessary provisions on contract, and thus, reduces the actual effect of legal regulations; *secondly*, issuance of uniform contract in many sectors is not based on any actual unified legal principle; *thirdly*, it seems that there is a

confuse when the state at the same time promulgate compulsory uniform contract and request businesses to register for their own uniform contract. In addition, it could be seen that besides the internal shortcoming of the legal system, Vietnamese law still lacks of legal provisions on choice of SBT in case there is conflict between uniform contract terms. This kind of provision should be added into the legal regulations on SBT.

### ***3.1.3. Legal provisions on interpretation of the SBT***

Protection to party who does not draft the contract against unclear contract terms in Vietnam, is similar to the same in many other countries in the world. However, Article 407 of 2005 Civil Code which specifies that interpretation should be in favour to drafter of contract with regard to interpretation of unclear contract terms is still not able to create a sufficiently strong legal mechanism to avoid unfairness, especially when Vietnam is a civil law country, where judges decide cases based only on legislations without power to interpret them in given specific circumstances.

### ***3.1.4. Legal provisions on unfair SBT***

Lack of legal provisions on fair principle in contract law, together with inconsistency of legal regulations in providing protection to party who does not draft the contract against abused pre-designed contract terms show that we still don't have sufficiently strong legal tool to deal with unfairness in contract. Besides the lack of fairness principle in contract law, current legal regulations on protection of weaker side against abuse of the drafter of contract also find different expressions in 2005 Civil Code and 2011 Customer Protection Law. This, in turn, creates inconsistency, irrationality in legal regulations.

## **3.2. Thực tiễn áp dụng pháp luật về điều kiện thương mại chung ở một số lĩnh vực**

SBT is applied in many different business sectors. Within the scope of the thesis, candidate selects finance-banking and house trading sectors as examples to review and assess practical implementation of law on SBT in Vietnam. Practical implementation of law in finance-banking and house trading sectors show that although law already provide detailed provisions to control abuse of contract drafter, however, in fact, provider (of good or service) still intentionally put aside such provisions. On the other hand,

the outrageous unfairness as symptom of exploitation based on imbalance of information could hardly be totally controlled if there is no fairness principle in contract law, because judges will have no effective legal tool to assess each given situation put before them for decision.

### **Conclusion on Chapter 3**

From the research of Chapter 3, the following conclusions could be drawn out:

1. Law on SBT in Vietnam is lack of consistency and systematization. Legal provisions on SBT are there in many different regulations on uniform contract, on SBT in customer protection field and in some uniform in several specified business sectors. It could be seen that Vietnam is one of the countries and support the approach to regulate SBT from the customer protection perspectives.

2. Law on SBT in Vietnam already has regulations identifying illegal SBT in customer protection field and begin to develop an disadvantaged party in customer contracts. However, shortcomings and irrationalities in both legal regulations and in their implementation should be overcome soon in order to ensure effectiveness of legal regulation on SBT and their implementation.

## **CHAPTER 4**

### **IMPROVING LAWS ON GBT IN VIETNAM**

#### **4.1 Directions for improvement of laws on GBT in Vietnam**

##### ***4.1.1 Ensuring uniformity to improve feasibility of laws on GBT***

Legislation building needs uniformity without conflicts, repetition and mismatch in each rule and among the rules themselves. To reach this end, the author suggests that the 2005 Civil Law of Vietnam as the original code of laws on contracts needs to be comprehensively improved regarding items on GBT to meet the requirements of uniformity of contract laws and to ensure the freedom of business in commercial activities. The implication is that it is important to amend laws on GBT for all contracts using GBT in transaction regardless of whether it is a consumer contract or not.

***4.1.2 Ensuring to the largest extent the protection of consumers' interests harmonizing this with the interest of businesses.***

In addition to uniformity of contract laws, the improvement of laws on GBT also needs to take account of special features consumer's protection. However, besides protecting consumers' interests to the largest extent possible, it is necessary that legal improvement aims at harmonizing the benefits of businesses.

***4.1.3 Learning foreign experience which is suitable for Vietnam, ensuring harmony between national laws and international laws in the context of international integration.***

International integration makes countries closer in every aspect including the legal sector. This process requires that each country harmonize their own legal issues to suit internationally recognized standards and their own socio-economic situations.

In the process of transition to market economy and international integration, the legal framework for different market development continues to be built and improved. This is also a prerequisite for advancing trade relations followed by GBT set by foreign groups and businesses. Therefore, a harmony between national laws and international laws in building rules for GBT is necessary.

**4.2 Solutions to improving laws on GBT**

***4.2.1 Adding the rule of fairness to contract agreement using GBT***

The principle of freedom and voluntary agreement is reflected throughout the Civil Law, which recognizes freedom of choice of business partner, content and transaction methods without threats, force, mistakes or frauds. As for contracts using GBT the principles of honesty and goodwill are reflected in the stipulation that the issuer of the standard contract is not allowed to create "extreme imbalance in the rights and duties between parties". The addition of this rule of fairness serves as a legal tool for judges to be more flexible in making verdicts on unfair GBTs.

***4.2.2 Developing stipulations in Civil Law on contract agreement using GBT***

Standard contract stipulations in the current Civil Law is not effective enough and proves to be unsuitable for the socio-economic life in Vietnam overlooking many legal-economic shortcomings which are causing a number of problems in business practice. This requires an improvement of rules for clearer standard contracts with more information on GBT.

Laws on contract agreement using GBT will include stipulations on definition of GBT, rules for GBT application or conditions for GBT to become part of the contract, rules for explanation of GBT, unfair GBT and legal consequences. These rules are applicable for all contracts regardless of whether the contract is of civil, trade or consumer type.

#### ***4.2.3 Strengthening rules on consumer protection via the establishment of consumer contracts***

Laws on consumer protection must take account of overcoming shortcomings of the contract agreement with consumer approach mentioned above. The Civil Law only encourages businesses to register for GBT, but in the consumption sector there is a need for more appropriate rules on standard contracts with consumers which are to be registered as well as information on registration procedures and other related issues. Besides, it is important to develop rules for indirect sale transactions/ online sales.

#### ***4.2.4 Improving stipulations on civil procedure***

To facilitate bodies to practice their right of taking legal action effectively in reality, legislations must include specific rules for legal process and procedures of shortened sue , collective sue, as well as making clear the representative procedure role of the agencies protecting consumers' interests in the sue of this type. In addition, this should be taken as civil procedures not a civil case and court fees should not be imposed according to cost levels because there is no basis to estimate court fees in the event of the plaintiff claiming GBT void

#### ***4.2.5 Improving rules in specific laws on respective sector of goods and services***

Specific legal documents should be developed with amendments to suit the needs of individual business sector. For sectors in need of standard contracts, the State will issue specific standard contract conforming to rules stated in the Civil Law. General rules on contract will apply the Civil Law while omitting those contents which are repetitive or violate the Civil Law to ensure uniformity and consistency of laws on contracts. In the business sector, examples of "exploitation" may occur in areas such as real estate, housing etc. therefore, it is necessary to strengthen the control of unfair standard contracts though the State's imposing more specific rules on contract content instead of simply listing the terms as is done at present. At

the same time there needs to be specific stipulations for cases where a standard contract is different or violates the stated rules. Then these contents will be considered void and the contract will be applicable according to laws.

#### ***4.2.6 Entitling the court to the right of legal interpretation and acknowledging case laws as a source of contract laws.***

The author of this thesis suggests that entitling judges to interpret and acknowledge case laws as a source of laws in Vietnam still needs further study to ensure feasibility. However, from the research viewpoint, this is considered to be an important solution to improve the feasibility of ensuring the principle of justice of contract laws. This has been evidenced in legal practice of developed countries over hundreds of years and become a necessity for most foreign court systems. For case laws to become sources of contract laws, there should be combination of a number of activities including improving the quality of judges and other factors to enhance the quality of trials and thus judges will be really impartial in their jobs.

### **4.3 Measures to enhance effectiveness of application of laws on GBT**

#### ***4.3.1. Raising consumers and businesses' awareness of compliance with laws on GBT***

Raising the awareness of consumers and businesses of the purpose and necessity to control unfair contract terms is a factor which helps laws to be put into social life effectively creating a healthy business environment. Unless individuals and businesses are aware of the value of being treated equally in the business environment, the application of laws will be less feasible and appear to be superficial.

#### ***4.3.2 Enhancing awareness and capacity of judges in dealing with requests for making GBT void***

The court and the trial capacity of judges play very important role in determining whether a standard contract is void or not and in dealing with the consequences of the void transaction. This is an effective tool to control unfairness and to protect the party unable to participate in preparation of the contract. Thus, besides improving legal procedures, enhancing the court activity and independence of judicial bodies as well as professional capability of judges has a decisive role in law enforcement process.

### ***4.3.3 Enhancing the role of control rules and improving physical liability regulations***

Enhancing control rules on unfair contract terms is considered an assisting tool to ensure feasibility of laws on GBT. The improvement of physical liability regulations on violations has great significance in coercive enforcement of laws on unfair contract control. It does not only mean fines but also compensation for unfair benefits that businesses receive from unfair contracts

### **Conclusions on Chapter 4**

1. The issuance of improved and uniform laws on GBT in Vietnam is essential and these must meet the requirement of uniformity, comprehensiveness and feasibility of laws on contracts at the same time ensuring harmony in consumer protection and protection of business bodies complying with foreign laws in the context of international economic integration. Amending laws on GBT from the angle of contract laws in order to create an equal legal mechanism for protection of bodies with non standard written contracts against unfair standard contracts regardless of whether they are consumers or other bodies is suitable for the socio-economic situation in Vietnam in the process of economic transition with estimates for a long term sustainability and efficiency of the amendments.

2. Specific solutions to developing laws on GBT include: i/ Adding the principle of fairness as a basic rule to laws on GBT; ii/ Developing regulations on contract agreements using GBT including definition of GBT, applicable rules, void GBT and consequences of void GBT; iii/ Stipulations on special features of consumers' interests protection in the Law on Consumer's Interests Protection to avoid repetition of similar contents of the Civil Law; iv/ Establishing procedures for shortened sue and collective sue to enhance the effectiveness of suits for removal of void GBT; v/ Improving specific laws in individual sector of goods and services provision on standard contracts and bidding terms in contracts; vi/ Entitling judges to legal interpretation and recognition of law cases as sources of contract laws to enhance the ability of contract laws in justice protection.

3. In addition to building uniform legislations on GBT, it is necessary to improve other synchronous solutions such as raising the awareness of

people and businesses of complying with laws on GBT as well as enhancing awareness and trial capability of judges in dealing with cases of void GBT. It is also important to strengthen control rules and to improve physical liability regulations applicable for businesses and leaders of businesses using GBT.

## **CONCLUSION**

1. SBT is a legal economic phenomenon that exists quite widespread in developed economy. Regulatory role of the law is to recognize objective existence of SBT, to introduce principle to be uniformly implemented to avoid discretion, and at the same time to create proper mechanism to ensure fair application of freedom of contract. Economic cause of the legal intervention is to protect market against being collapsed due to the imbalanced information. Therefore, addressees of the legal protection should not only be consumers, but also other contracting parties.

2. Being a part of contract law, the law on SBT is also a very sophisticated legal sector that contains many different approaches. However, laws of foreign countries belong to one of the two key directions: to regulate SBT in all contracts, and to regulate SBT only in consumer contract with the view to protect customers. However, actual regulation shows that the first approach is more sufficient because it could avoid shortcomings of the second approach;

3. Law on SBT in Vietnam could be found in provisions on civil uniformed contract of 2005 Civil Code, regulations on condition of general transactions in customer protection field and in regulations on contract in several specific business sectors. Although being scattered and fragmented, content of law on application, interpretation, control of SBT could be found in different forms in different current laws and therefore, it could be useful in protecting weaker side in consumer contracts. However, there are still many shortcomings and limitation that could be dealt with soon to ensure the regulatory effectiveness and legal implementation of SBT provisions;

4. Based on some theoretical and practical analysis, the thesis introduces some solutions to complete law on SBT, including: i) add in principle that fair is needed in contract using SBT; ii) develop legal institution on



conclusion of contract using SBT, including definition of SBT, applicable principles, invalidated SBT and its legal consequences; iii) regulate specific application of customer protection in Consumer Protection Law, avoid overlaps with similar provisions of the Civil Code; iv) complete procedural regulations to enhance effectiveness of suing to request the invalidation of unfair SBT; v) complete specific legal regulations in each separate sector such as provision of goods, services on uniform contract, on compulsory terms of the contract; vi) allow judges to interpret compulsory terms of contract and recognize case law as source of contract law to enhance chances to protect equity in contract law. In addition, the improvement of awareness of businesses and of the public on strict implementation of legal regulations on SBT, improvement of awareness and adjudication capacity of judges, and enhance role of supervising institutions as well as complete regulations on material sanctions applied to businesses and their leader in case of their use of SBT are all solutions that should be implemented in order to ensure feasibility implementation of law on SBT.

Within the scope of the thesis, some theoretical issues such as legal control over unfair SBT and especially issue of adjustment of unfair SBT are addressed by the author limitedly, with the vision that there should be further research on those topic in the future to further clarify the issue./.

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