LAC DUY & ASSOCIATES

RECOGNITION OF A CONTRACT FAILING TO COMPLY THE CONDITION OF FORM OF A CIVIL TRANSACTION– CASE LAW NO. 55/2022/AL FOR THE COURTS TO STUDY AND APPLY IN DISPUTE SETTLEMENT

GUIDANCE NO. 33/HD-VKSTC: CONCURRING SOME BASIC CONTENTS IN SETTLEMENT OF INDIVIDUAL LABOUR DISPUTES

NEWSLETTER 12/2022

PUBLISHED BY LAC DUY & ASSOCIATES

CONTACT WITH US

: http://lacduy-associates.com

: lacduy@lacduy-associates.com

: +84917275572/+842836221603

: 6th Floor, Centec Tower, 72-74 Nguyen Thi Minh Khai Street, Vo Thi Sau Ward, District 3, Ho Chi Minh

NEWSLETTER 12/2022

Dear Clients,

Lac Duy & Associates would like to send you the legal newsletter of December 2022 with some notable updates and articles as follows:

- Guidance No. 33/HD-VKSTC: Concurring some basic contents in settlement of individual labour disputes

- Recognition of a contract failing to comply the condition of form of a civil transaction– Case law No. 55/2022/AL for the courts to study and apply in dispute settlement

- Legal document in 12/2022

: http://lacduy-associates.com
: lacduy@lacduy-associates.com
: +84917275572/+842836221603

GUIDANCE NO. 33/HD-VKSTC: CONCURRING SOME BASIC CONTENTS IN SETTLEMENT OF INDIVIDUAL LABOUR DISPUTES

Recently, stemming from practical problems that have not been agreed to be resolved, on November 8, 2022, the Supreme People's Procuracy issued Guidance No. 33/HD-VKSTC on concurring some basic contents in settlement of individual labour disputes **("Guidance No. 33")**. Specifically, Guidance No. 33 has concurred to implement the following basic contents:

1. About the conditions to file a lawsuit

1.1 Legal basis: Clause 1, Article 188; Clause 2, Article 219 of the Labour Code 2019 ("**Labour Code 2019**"), Article 32 of the Code of Civil Procedure 2015 ("**CCP 2015**").

1.2 Some critical notes:

1.2.1 For individual labour disputes specified at Points a, b, c, d, dd, e, Clause 1, Article 188 of the Labour Code 2019, the disputing parties have the right to initiate lawsuits and request the Court to settle without having to going through the mediation process, including:

- Disputes over dismissal for disciplinary reasons; unilateral termination of labour contracts;
- Disputes over compensation for damage, allowances upon the termination of labour contracts;
- Disputes between a domestic worker and his/her employer;
- Disputes over social insurance in accordance with social insurance laws; disputes over health insurance in accordance with health insurance laws; disputes over unemployment insurance in accordance with employment laws; disputes over insurance for occupational accidents and occupational disease in accordance with occupational safety and health laws;
- Disputes over compensation for damage between an employee and organization that dispatches the employee to work overseas under a contract;
- Disputes between the outsourced worker and the client enterprise.

1.2.2 For individual labour disputes that must be resolved through the mediation procedure of the labour mediator, according to the provisions of Clauses 6 and 7, Article 188 of the Labour Code 2019, the Court may only accept and settle them in the following cases:

- Expiry of 05 working days from the labour conciliator receiving a request from the parties that

requested the settlement of the dispute or from a labour agency under the People's Committee but the labour mediator has not conducted the conciliation.

- The involved parties have successfully conciliated, but one of the parties has not implemented the agreements recorded in the minutes of successful conciliation.

- The parties have performed the conciliation but not successful.

1.3 For example: In the Appellate Labour Judgment No. 233/2018/LD-PT dated February 8, 2018, the People's Court of Ho Chi Minh City cancelled the first-instance judgment and suspended the settlement of the case because the first-instance Court accepted and settled the case when there were not enough conditions to initiate a lawsuit. In this case, the first- instance court considered that the matter that Mr. H filed a lawsuit requesting the Court to cancel two decisions issued during Mr. H's performance of the labour contract, Decision No. 721/2014 and Decision No. 18/2015, forcing NP Bank to compensate for damage and pay his wages is a *"dispute over the performance of labour contracts and wages"*. According to Article 201 of the Labour Code 2012 (now Clause 1, Article 188 of the Labour Code 2019), and Clause 1, Article 32 of the CCP 2015, the above dispute falls under the circumstances that must go through the conciliation procedure of the labour mediator before requesting the Court to settle.

The fact that the first-instance Court settled the case without going through the conciliation procedures of the labour mediator is a serious violation of the procedures**.**

2. Statute of limitations for lawsuits

2.1 Legal basis: Clause 3, Clause 4, Article 190 of the Labour Code 2019

2.2 Some critical notes: For the case before asking the Court to settle the labour dispute, the parties have requested the labour mediator to conduct conciliation (including the case where the labour dispute is not required to go through the mediation procedure) or the disputing parties request the arbitration council to settle the labour dispute but in the case specified in Clause 4, Clause 5, Article 189 of the Labour Code 2019, the statute of limitations for initiating a lawsuit is still counted from the date of discovering acts that each disputing party believes his/her legitimate rights

and interests have been violated; not counting from the date on which the labour mediator's unsuccessful conciliation report is issued, the expiry date of the mediation but the labour mediator fails to conduct the conciliation or does not count from the date on which the parties fail to implement the agreement in the minutes of successful conciliation, dispute settlement decision of the Labour Arbitration Board (Clause 3, Article 190 of the Labour Code 2019)

3. Regarding the determination of disputed relations in a labour dispute

3.1 Legal basis: The petition and supporting documents and evidence about the content of the event or legal act that the employee (or the employer) believes that such event or act infringes upon their legitimate rights and interests, and they initiate a lawsuit to request the Court to settle.

3.2 Some critical notes: In the Appellate Labour Judgment No. 23/2017/LD-PT dated September 29, 2017, the People's Court of DN province stated that: since Company D filed a counterclaim requesting Mr. L to pay back the money that has been paid for the social insurance, medical insurance, and unemployment insurance that by Company D during Mr. L's time studying at University E from October 2009 to September 2013 according to the Decision to send officials and employees to training issued by Company D and the Department of Home Affairs of DN province, the Court of first instance's determination that the disputed relationship was *"about social insurance"* was incorrect. The appellate Court, therefore, based on the provisions of Clause 3, Article 62 of the Labour Code 2012 (now Clause 3, Article 62 of the Labour Code 2019), revised the legal relationship in dispute in the case as *"a dispute over vocational training costs"* and declared: accept the counterclaim of Company D.

4. Regarding proof and evidence

4.1 Legal bases: Point b, Clause 1, Article 91 of the CCP 2015

4.2 Some critical notes: Employers must prove that they have properly fulfilled their obligations in terms of job guarantee, working conditions, and benefits and regimes that employees are entitled to as prescribed by law or as agreed upon; prove the legitimacy when unilaterally terminating the labour contract, applying labour disciplinary methods to employees. However, in case the employers do not acknowledge the act of unilateral termination of the labour contract but argues that the employees

arbitrarily quit the job or the employees are fired for failing to go to work, the employees are also responsible for proving that they have been unilaterally terminated their labour contracts by the employer or that they have come to the workplace according to the law.

5. Regarding the labour discipline in the form of dismissal dispute

5.1 Legal bases: Article 125 Labour Code 2019

5.2 Some critical notes:

- In case the employee is disciplined for dismissal due to failure to go to work for 5 cumulative days within 30 days or 20 cumulative days within 365 days from the first day of failure to go to work without any plausible reasons, it is recommended to be based on documents and evidence provided by both disputing parties, the testimony of witnesses or documents and evidence verified and collected by the Court such as timesheets; data of swiping cards from entering and leaving the company; data extracted from the camera in the company, labour rules, etc. to consider and evaluate employees who fail to go to work or employees who come to work but the employer does not allow them to work; reasons for leaving (if the employee leaves for a plausible reason such as a natural disaster, fire, his or her family member being sick certified by a competent medical examination and treatment facility, and other cases prescribed in the internal labour regulations, the employer's dismissal is unfounded).

- In case an employee commits an act of theft, embezzlement, gambling, deliberate infliction of injuries, or uses drugs at the workplace, etc., it must be based on documents and evidence proving the violation, and the place where the violation occurs must be "at the workplace". In case the violation does not occur at the workplace, the employer is not allowed to handle the labour discipline in the form of dismissal to the employee.

- In case the definite-term labour contract between the employee and the employer ended before the first-instance trial by the Court, but the two parties do not agree to sign a new labour contract, the employer is not obliged to accept the employee back to work. Or, if the employee had a new job and paid social insurance before filing a lawsuit or before the first-instance trial, the *"days when the employee is not allowed to work"* specified in Clause 1, Article 41 of the Labour Code 2019 is understood as the date the employee had a new job.

6. Regarding the dispute that the employer unilaterally terminates the labour contract

6.1 Legal basis: Section 3 of the Labour Code 2019

6.2 Some critical notes:

6.2.1 First, it must be determined whether or not

the employer unilaterally terminates the contract with the employee.

6.2.2 In the case of unilaterally terminating the labour contract because the employer believed that the employee regularly failed to complete the work according to the labour contract (point a, clause 1, Article 36 of the Labour Code 2019), then it is necessary to determine whether or not the employee regularly failed to complete the work *"according to the labour contract"* based on reviewing the content of the labour contract or the assignment note, the job assignment notice (job description term, requirements on progress, work performance); scoreboard, evaluation, and classification of job completion; emulation and commendation titles; specific statistical records of uncompleted jobs continuously in a certain time; regulations on criteria for evaluating the level of work completion; presentations of involved parties and related people (especially those directly assigned the task of managing and evaluating of work completion of such employee).

6.2.3 Unilaterally terminating the labour contract because the employer believed that the employee regularily failed to go to work without a plausible reason for 05 consecutive working days or more (point e, clause 1, Article 36 of the Labour Code 2019), must be based on documents and evidence on violation minutes; violation reminder minutes; time book; opinion of the company's trade union; footage extracted from the camera (if any); testimony of witnesses to determine whether the employer's grounds for unilateral termination of the labour contract are right or wrong.

6.2.4 Adefinite-term labour contract expires but the employee continues to work within 30 days from the date of expiration of the labour contract and does not sign a new contract because parties do not agree on the contents to sign a new labour contract, then the employer makes a decision to unilaterally terminate the original labour contract for the reason of the contract's expiration. This is is considered as as illegal act of the employer. It is because when a definite-term labour contract expires and the employee continues to work, within 30 days from the date the definite-term labour contract expires, the parties must sign a new contract; during the time a new contract has not been signed, the rights, obligations, and interests of the two parties shall be performed according to the signed contract. If the two parties cannot reach an agreement, they shall continue to perform the signed contract or agree to terminate the labour contract.

7. Regarding the dispute that the employee unilaterally terminates the labour contract

7.1 Legal basis: Article 35 of the Labour Code 2019 and Article 7 of Decree No. 145/2020/ND-CP

7.2 Some critical notes: For disputes where the employee unilaterally terminates the labour contract, it must be based on documents and evidence about the type of labour contract signed between the employee and the employer; the time the employee gives advance notice to the employer (in certain cases specified in Clause 2, Article 35 of the Labour Code 2019, the employee has the right to unilaterally terminate the labour contract without prior notice to the employer), thereby determining whether the employee's unilateral termination of the labour contract is right or wrong according to the provisions of law and the responsibilities of each party after the termination of the labour contract.

8. Regarding the dispute of compensation for damage upon the termination of the labour contract

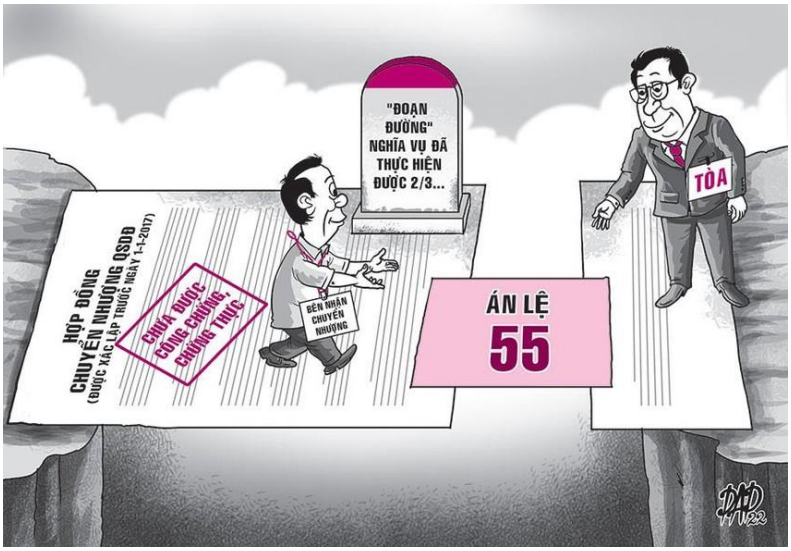
8.1 Legal bases: Point b, Clause 1, Article 32 of the CCP 2015, Article 129, Article 130 of the Labour Code 2019

8.2 Some critical notes:

8.2.1 In case a claim for property damage is machinery, working equipment, workshop, or other material property, it must be based on documents and evidence on the actual damage incurred; the relationship between the employer's or employee's fault, and the resulting damage; extent of damage and liability to compensate for damage, on-site review, request verification, property evaluation.

8.2.2 In case of claim for compensation of vocational training expenses upon the termination of the labour contract, the validity of the content of the agreement on vocational training in the labour contract or the vocational training contract or other documents must be considered; determine whether or not there is actual training to consider the employee’s compensation liability. If the employee violates the commitment of working time after being trained, the compensation for damage must be based on the actual training time with the training period in the agreement; working time commitment after training and actual working time; training costs and expenditure items, thereby determining the appropriate level of compensation.

RECOGNITION OF A CONTRACT FAILING TO COMPLY THE CONDITION OF FORM OF A CIVIL TRANSACTION– CASE LAW NO. 55/2022/AL FOR THE COURTS TO STUDY AND APPLY IN DISPUTE SETTLEMENT



According to Article 117.2 of the Civil Code 2015, where provided by law, the form of a civil transaction is one of four conditions for a civil transaction to take effect. Specifically, for some types of civil transaction, their form is requested to be in writing, notarized or authenticated.

However, in reality, there are many transactions that violate the requirement of form, especially in the fields of real estate and commerce/business, which results in many transactions/contracts not being recognized as valid, putting involved parties in "not to know whether to laugh or cry" situation. To solve the above problem, recently, the Council of Judges of the Supreme People's Court has passed Case Law No. 55/2022/AL ("**Case Law**") for courts to study and apply in dispute settlement as well as to resolve the inconsistence between the courts when considering to recognize contracts failing to comply the condition of form.

Source of the Case law: First-instance civil judgment No. 16/2019/DS-PT dated March 19, 2019, of the People's Court of Quang Ngai province on the case "Dispute on a contract of transfer of land use rights" between the plaintiff Mr. Vo Si M and the defendant Mr. Doan C; there are 05 persons with related interests and obligations.

Location of Case Law content: Paragraph 6, section "Assessment of the Court".

Summary of the Case Law content:

- **Case Law:** The contract of transfer of land use rights established before January 1, 2017 has not been notarized/certified but the transferee has fulfilled 2/3 of their obligations. Specifically, according to the provisions of Articles 116 and 129.2 of the Civil Code 2015, although the transaction of transfer of land use rights of the parties did not comply with the form specified in Article 502.1 of the Civil Code 2015, the plaintiff and the defendant continued to perform the transaction, whereby the plaintiff already paid the defendant VND 110,000,000 and the defendant assigned the land use rights to the plaintiff. This is considered as parties have performed 2/3 of obligations in the contract. Therefore, the contract is recognized as valid.

- **Legal solution**: In this case, the Court recognizes the validity of the contract.

Provisions of law related to the Case Law:

- Article 129, Clause 1, Article 502 and Point b, Clause 1, Article 688 of the Civil Code 2015;

- Point a, Clause 3, Article 167, Clause 1, Article 188 of the Land Law 2013.

LEGAL DOCUMENTS 12/2022

NO.	EFFECTIVE DATE	NAME
		INVESTMENT
1.	08/12/2022	Decree 101/2022/ND-CP stipulates conditions for investment and trading in military equipment, military equipment, military weapons, technical equipment, and specialized technology in service of national defense and security
		COMMERCIAL
1.	12/12/2022	Official Dispatch 7938/BCT-TTTN in 2022 on petrol and oil business management issued by the Ministry of Industry and Trade
2.	10/12/2022	Plan 115/KH-BCD389 in 2022 on the peak of anti-smuggling, commercial fraud and counterfeit goods on occasion before, during and after the Lunar New Year in 2023 issued by the National Steering Committee against smuggling, commercial fraud, and counterfeit goods
		EXPORT/ IMPORT
1.	07/12/2022	Official Dispatch 3405/HQTPHCM-GSQL in 2022 guiding customs procedures issued by Ho Chi Minh City Customs Department
2.	01/12/2022	Official Dispatch 5167/TCHQ-PC in 2022 on sanctioning of administrative violations due to the impact of the Covid-19 epidemic, issued by the General Department of Customs
		MONEY AND BANKING
1.	12/12/2022	Decree 102/2022/ND-CP stipulates the functions, tasks, powers and organizational structure of the State Bank of Vietnam
2.	08/12/2022	Official Dispatch 5305/TCHQ-TXNK in 2022 on banks to coordinate collection with the General Department of Customs and deploy 24/7 electronic tax payment issued by the General Department of Customs

LABOUR - SALARY

1.	09/12/2022	Decision 3612/QD-BHXH on the process of the one-time social insurance settlement, pilot application of authentication via digital signatures integrated with mobile applications by Decision 422/QD-TTg approved by Decision No. List of integrated online public services, provided on the National Public Service Portal in 2022, issued by Vietnam Social Security