

## VIETNAMESE LAW ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AND SOME RECOMMENDATIONS

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### **Abstract**

*Contracts for the international sales of goods present the most common type of contract in international business. This category of contract is specifically regulated at both national and international levels. In Vietnam, international sale of goods contracts are governed by the 2015 Vietnamese Civil Code and the 2005 Commercial Law. This article will provide an overview of international sales of goods contracts, analyze Vietnamese regulations pertaining to these contracts, and offer proposals for improving Vietnamese law in this area.*

**Keywords:** *International sale contracts, sale of goods, contract law, Vietnamese law.*

### **Pháp luật Việt Nam về hợp đồng mua bán hàng hóa quốc tế và một số kiến nghị**

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### **Tóm tắt**

*Hợp đồng mua bán hàng hóa quốc tế là loại hợp đồng phổ biến nhất trong kinh doanh quốc tế. Loại hợp đồng này được quy định cụ thể ở cả pháp luật quốc gia và pháp luật quốc tế. Tại Việt Nam, hợp đồng mua bán hàng hóa quốc tế được điều chỉnh bởi Bộ luật Dân sự Việt Nam năm 2015 và Luật Thương mại năm 2005. Bài viết này sẽ phân tích tổng quan về hợp đồng mua bán hàng hóa quốc tế cũng như các quy định của pháp luật Việt Nam về hợp đồng mua bán hàng hóa quốc tế, và từ đó, đưa ra một số kiến nghị nhằm hoàn thiện pháp luật Việt Nam về loại hợp đồng này.*

**Từ khóa:** *Hợp đồng mua bán hàng hóa quốc tế, mua bán hàng hóa, pháp luật hợp đồng, pháp luật Việt Nam.*

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### **Introduction**

In international business, the purchase and sale of goods constitute one of the most significant and prevalent business activities due to the necessity of exchanging goods among countries. Contracts for the international sales of goods serve as a legal instrument that enables corporations to conduct cross-border sales of goods which help contracting parties not only to fulfill their rights and obligations but also avoid legal risks that may arise during sale

transactions. Both international law and national laws provide specific regulations for this type of contract. In Vietnam, international sales contracts are governed by the 2015 Civil Code and the 2005 Commercial Law. Understanding the law governing contracts for the international sales of goods is vital for contracting parties to comply with the law. Also, it is necessary for Vietnamese legislature to improve the law on international sale contracts in its effort to harmonize national and international laws in this field.

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## 1. An Overview of International Sale of Goods Contracts

### 1.1. Definition of International Sale of Goods Contracts

In terms of terminology, in practice, many different terms have been introduced and used in international commercial activities such as: foreign trade contracts, import-export contracts, contracts for the sale of goods with foreign business entities (named according to Article 80 of the old Vietnamese Commercial Law 1997). Although there are such many different names, in some circumstances, they have same meaning and can be used exchangeably with the term “international sale of goods contracts”.

In Vietnam, the 2005 Vietnamese Commercial Law serves as the legal framework governing both domestic and international sale transactions, yet this legal document neither provides any definition of the term contracts for sale of goods nor define international sale of goods contracts. Instead it clarifies the meaning sale of goods under Clause 8, Article 3 of the Vietnamese Commercial Law 2005 which stipulates that sale of goods mean “commercial activities whereby the seller is obliged to deliver goods, transfer ownership of goods to the purchaser and receive payment; the purchaser is obliged to pay to the seller and receive goods and the ownership thereof as agreed”. Besides, an international sale of goods contract is in essence a type of a civil contract, which is defined under 2015 Vietnamese Civil Code as an agreement between the parties in relation to the creation, modification and termination of civil rights and obligations. Hence, a contract of sale can be understood as an agreement between parties in which the seller is obliged to deliver goods, transfer ownership to the buyer and receive payment, the buyer is obliged to pay the seller, receive goods and ownership of the goods.

Unlike domestic international sales contracts, international sales contracts are a type of contract that contains international elements (or foreign elements). Foreign elements are often understood differently depending on the legal perspective of each national law and international treaties. According to Vietnamese law, in the past, Article 80 of the Vietnamese

Commercial Law 1997 only based on one element to determine the foreign element in a contract for sale of goods with foreign traders, which is the nationality of trader, so an international sale of goods contract is a contract signed between a Vietnamese trader and a foreign trader. However, this viewpoint would make the scope of understanding of the concept of international sale of goods contracts with foreign traders to be narrower than the concept of international sale of goods contracts because in current practice, Vietnamese traders having commercial headquarters abroad are increasingly common, so there have been a significant number of contracts for the sale of goods signed between Vietnamese business entities having commercial headquarters located in different countries. Therefore, the concept under the old law is no longer appropriate.

Until the Vietnamese Commercial was revised and amended in 2005, such new law still did not directly regulate the international element of the concept of international trade contracts but only laid down some forms of international sale of goods. Under Article 27 of this law, "International sale of goods contracts shall be conducted in the forms of export, import, temporary import for re-export, temporary export for re-import and transit". Thus, it can be seen that the international nature of international sale of goods contracts can be determined through the forms of implementation of sale of goods, which are export, import, temporary import for re-export, temporary export for re-import and transit.

Additionally, foreign elements in civil relations can be determined according to Article 663 of the Vietnamese Civil Code 2015, specifically: (i) *at least one of the participating parties is a foreign natural person or juridical person; or (ii) The participating parties are Vietnamese natural persons or juridical persons but the basis for the establishment, modification or termination of such relation arose in a foreign country; or (iii) The participating parties are Vietnamese natural persons or juridical persons but the subject matter of such civil relation is located in a foreign country.* Therefore, an international sale of goods contracts can be concluded between a seller and a buyer who come

from different states, or that contract is signed, amended or terminated abroad, or the goods of the contracts is located abroad.

Meanwhile, international treaties' approaches to this issue are different. According to the 1964 Hague Convention on International Sale of Goods of Tangible Movables, there are three criteria to determine the internationality of a contract for the sale of goods. First, the contracting parties are parties having commercial headquarters in different countries. If the contracting parties do not have a commercial headquarters, their places of residence will be taken into consideration. Yet, the Hague Convention does not address the issue of nationality. Second, The goods which are the subject of the contracts are transferred from one country to another. Third, Offer and acceptance of the sale of goods can be made in different countries.

The 1980 Vienna Convention on International Contracts for the Sale of Goods (CISG), which is considered the most well-known and widely recognised treaty in the field of sale of goods, gives out only one criterion to determine the international nature of a contract for the sale of goods, that is, the contracting parties have their places of business in different countries. This criterion is now most commonly applied since the number of member states of this treaty is rapidly increasing (more than 90 countries).

### ***1.2. Characteristics of International Sale of Goods Contracts***

First of all, it must be affirmed that, because of its nature as a contract for sale and purchase of goods, an international contract for sale and purchase of goods also has the common characteristics of a domestic contract for sale and purchase of goods. However, due to the international nature of this type of contracts, it carries some typical characteristics different from a domestic sale of goods contracts, specifically:

*Firstly*, the parties of an international contract for sale and purchase of goods are normally traders with commercial headquarters located in different countries or with different nationalities. For example: Company A headquartered in Vietnam signs a contract for the sale and purchase of cars with company B headquartered in Korea.

*Secondly*, the goods which are the subjects of the contracts can be transferred across the border of a country, that is, from one country to another. For example: Company A in Vietnam signs a contract to export 10,000MT of rice to Japan. The subject of the contract is rice that will be transferred across the border of Vietnam for exporting to Japan.

*Thirdly*, the currency used for payment between the seller and the buyer can be foreign currency for either party, except for the cases in which contracts are signed between EU traders, the Euro currency is the common currency of both parties. In an international sales contract, the parties are free to choose the payment currency, which can be the currency of the seller's country, the buyer's country or a third country. For example: A Vietnamese company signs a sale contract with a Singaporean company. The payment currency can be Vietnamese Dong, Singapore dollars, or US dollars, depending on the agreement on payment currency between the parties. Normally, in the implementation of international trade activities, the parties often choose strong and easily convertible currencies such as USD, Euro, Pound Sterling, etc.

*Fourthly*, the law governing international sale of goods contracts is complex and diverse. A domestic sale contract is only subject to the laws of that country, but an international sale contract may be governed by national law of buyers or seller's countries, international treaties, international customary law.

*Lastly*, disputes arising between the parties to an international sale contracts can be resolved by a foreign court or arbitration to at least one party according to parties' agreement. For example: When a dispute arises from a sale of contract contract between a Vietnamese trader and a Japanese trader, the dispute resolution agency can be a Japanese court or a Vietnamese court or a court of a third country agreed upon by the two parties.

### ***1.3. The Role of Contracts for the International Sale of Goods***

Generally, international sale of goods contracts play an importance role in maintaining the stability and sustainability of the international trade environment. Its role is shown in several aspects as follows:

*Firstly*, one of the primary role of an international sale goods contract is to establish clear rights and obligations between contracting parties and how the agreement between will be properly executed. Since an international sale of goods contract is normally made between parties in different countries using different languages, by clarifying the contractual clauses, such as subject of contracts, quantity and quality of goods, shipment, payment, remedies for breach of contracts and some other terms, a contract will significantly reduce any potential misunderstandings and disputes arising between the parties during the performance of contracts.

*Secondly*, an international sale of goods contract helps to protect rights and interests of parties in an international sale transaction. An international sale of goods contract is considered as law between parties which legally binds the parties and ensure that both parties are treated equally and their rights and interests are respected. If one of the parties violates the contracts and affects the legitimate rights of the other party, the aggrieved party shall be remedied according the stipulation of that contract, to make sure that his or her rights and interests are protected.

*Thirdly*, an international sale contract is a vital instrument to manage legal risk in international sale transaction, allowing parties to anticipate and address potential risks that they can foresee. By including provisions related to some issues such as warranty, price variation, dispute resolution, termination, or force majeure events, an internal sale off goods contracts provides clear guidance for tackling unexpected situations, so that legal risks can be addressed without any difficulty when they actually arise during the performance of contracts.

## **2. Sources of Law and Governing Contracts for the International Sale of Goods**

As mentioned above, one of the characteristics of international sale of goods contracts is the diversity and complexity of sources of law governing this type of contracts. The main applicable law of an international sale of goods contract can be international treaties, national law

and international customary law. Apart from those, in some cases, soft law or case law can also be applied to international sale contracts.

### **2.1. International Treaties or Conventions**

An international treaty or convention is a legally binding agreement signed between two or more states on a voluntary and equal basis, aiming to determine, change or terminate rights and obligations of member states towards each other in international relations. In practice, there are not many international treaties that directly regulate international sale contracts. Some well-known international conventions that are related to this type of contract are The most widely applied treaty which directly governing international sale contracts is the CISG 1980. This treaty set out provisions stipulating rights and obligations of sellers and buyers in international contracts of sale and rules on formations of international sale of goods contract. Normally a treaty shall apply into an international contracts in the following cases: (i) When both parties come from contracting states of the treaty; (ii) The treaty is chosen by both parties to be the applicable law of the contract; (iii) When parties agree to choose to the law of a contracting state of the treaty to be the applicable law; or (iv) the treaty is chosen by Court/ Arbitration in case the parties did not agree on the applicable law.

### **2.2. National Law**

When there is no international treaty governing international sale contracts which addresses the rights and obligations of the parties, the parties can rely on the law of a certain country to resolve an arising problem. In this case, national law becomes a source of law regulating international sale contracts. In an international sale of goods contract, the national law governing the contract may be the law of the buyer's country or the law of the seller's country, or may also be the law of a third country. Which national law is chosen to be applicable law depends on agreement between both sides. Of course, in practice it will be very difficult for the parties to reach a high level of consensus when choosing one of the two countries' laws to apply into the contract, because each party will want

to choose its own law to apply. However, if both parties agree to choose the law of a third country, the problem can also be solved.

If the international treaty to which the countries of the parties are state member stipulates that the applicable law to an international sale contract is the law of a certain country, then that national law is automatically applied to that contract. For example, the 1986 Hague Convention on the Law applicable to contracts for the International sale of goods indicates that the law of the country where the buyer's head office is located at the time of signing the contract is applied to this type of contract. If in case the parties do not reach any agreement on the applicable law or there is no stipulation under relevant treaties, the competent authority to resolve the dispute arising from an international sale contract will choose the applicable law based on the rule on conflict of laws of its country. For example, if the competent authority to resolve the dispute is the Vietnamese Court, the law applicable to the international business contract will be determined by Civil Code 2015, according to which the rights and obligations of the parties are determined according to the law of the country where the contract is performed.

### **2.3. International Customary Law**

International customary law are commercial practices that are long-standing, repeated over a long period of time, widely recognized and applied in a region or worldwide, which determine the rights and obligations of contracting parties. To recognize a practice to be an international customary law, the following conditions must be satisfied: (i) It is a common habit, applied regularly and repeatedly by many countries; (ii) It is a unique practice on each issue, in each country, region or international community; It has specific and clear content which specify rights and obligations of contracting parties. In the field of international sale, there are some common international customs such as International Commercial Terms (Incoterms) which define obligations of sellers and buyers in relation to shipment of goods, Uniform

Customs and Practice for Documentary Credits (UCP) which set out international rules in relation to payment.

International customs are normally applied to an international sale of goods contracts in the following cases: (i) if the parties specifically agree in the contract or after signing the contract that a certain custom would be applied; (ii) such customs are stipulated in relevant international treaties; or (iii) the contracting parties have no agreement on the disputed issue, the relevant international treaties and the chosen national law do not regulate the disputed issue, the issue that needs to be adjusted will be subject to a relevant international custom. In principle, the parties can agree to apply an international custom, as long as such custom are not contrary to the general principles of Vietnamese law.

### **2.4. Other Sources of Law**

In addition to the above sources of law, international sale contracts can be governed by some “soft law” as model law guiding the conclusion and implementation of international sales contracts. One typical example is the Principles of International Commercial Contracts (PICC) drafted by the International Institute for the Unification of Private Law (UNIDROIT),... Besides, if an international sale contract is governed by law of a common law country such as England, America, Australia, etc..., case law or judicial decisions can be applied to that contract.

## **3. Vietnamese Law on Contracts for the International Sale of Goods and some Recommendations for Improvement**

### **3.1. Stipulations on contracts for the international sale of goods under Vietnamese law**

Currently, the specific regulations on international goods sale contracts under Vietnamese law are quite limited. There are only a few specific stipulations on contracts for the international sale of goods in the Commercial Law 2005, and if any issue related to this type of contract is not regulated by the Commercial Law, it will be referred to general stipulations of the Civil Code 2015. In general, there are some basic regulations on contracts for the international sale of goods as follows:

*i. Forms of International Sale of Goods Contracts*

In Vietnam, according to Article 401 of the 2005 Civil Code, the general rule regarding forms of civil contracts is that contracts can be concluded in writing, verbally or even by specific acts. However, for international sale contracts, Vietnamese Commercial Law 2005 stipulates that contracts must be made in writing or other forms of equal legal validity (Article 27, Clause 2). Besides written document, an international sale contract can be established in some other forms of validity equivalent to documents include telegraph, telex, fax, data message... as stated under Article 3.15 of the Commercial Law. Therefore, words or conducts are unaccepted forms of international sale contracts under Vietnamese law.

*ii. Content of International Sale of Goods Contracts*

The content of a contract for the international sale of good is what parties expressly agree in the contract. In Vietnam, the law does not stipulate mandatory content for international sales contracts. The law upholds the principle of freedom of contract and allows contracting parties to freely agree on terms of contracts that are not prohibited by law. The law does not prescribe the fundamental terms which should be included in international sales contracts. However, based on the 2015 Civil Code, the 2005 Commercial Law, the main content usually includes the following clauses: Parties to the contracts ( Name, address and Contact information of contracting parties); Description of goods (Name of goods, specifications, quality and quantity); Price and payment (Total contract value, payment method and time); Delivery terms (Time and methods method of delivery); Warranty, insurance (Warranty policy, goods insurance); Dispute resolution; Force majeure; Applicable law;; and Language of contract...etc.

*iii. Obligations of Parties in Contracts for the International Sale of Goods*

Under Article 3.8 of the Commercial Law 2005, the sale of goods is a commercial activity in which the seller is obliged to deliver goods, transfer ownership of goods to the buyer and has

right to receive payment; the buyer is obliged to pay the seller, receive goods and ownership of goods as agreed. The obligation of delivery of the seller is specially regulated under Article 34, 35, 37, 42 of the Commercial Law which stipulate that the seller is obliged to deliver the conforming goods at the correct time and place and deliver the documents related to the goods. Meanwhile, the buyer is obliged to make payment for the goods at the time and place as agreed or stipulated by law; as well as to receive the goods according to Article 50, 54, 55, 56 of the Commercial Law. It can be seen that the provisions of Vietnamese law on the obligations of the parties in international goods sale contracts are quite clear and compatible with the laws of other countries (such as English Sale of Goods Act 1979) as well as international legal documents (such as the CISG) on this issue.

*iv. Remedies for Breach of Contracts for the International Sale of Goods*

When a breach of contract for the international sale of goods occurs and the breaching party is not exempt from liability for that breach, he will be subject to some remedies as agreed in the contract or stipulated by law. Vietnamese law provides a number of remedies available in case of breach of sale of goods contracts. According to Article 292 of the 2005 Law on Commercial Law, there are six remedies for breach of contracts of sale, including Specific performance of contract, Penalty, Damages, Suspension of performance of contract, Stoppage of performance of contract and Cancellation of Contract. The Commercial law 2005 specifically regulates the concepts, bases of application as well as legal consequences of these remedies. Depending on each specific case, the non-breaching party shall apply appropriate remedies for the breach of contract.

***3.2. Some Recommendations for Improvement of Vietnamese Law on Contracts for the International Sale of Goods***

Although Vietnamese law has provided some general and specific regulations on international goods sale contracts, legal practices still shows some shortcomings in this regard that need to be adjusted. Hereafter are some recommendation for the improvement

of Vietnamese law regarding contracts for international sale of goods.

*Firstly, amending regulations on the forms of international sale of goods contracts*

The laws of each country regulate differently with regard to forms of international sale of goods contracts. Some civil law countries such as France, Switzerland... consider freedom of contracts as a basic principle, hence in these countries, an agreement expressing the common will of the parties is a sufficient condition for the formation of a contract, regardless of the form of agreements. Similarly, the CISG 1980 stipulates in Article 11 which states “A sales contract need not be concluded or confirmed in writing unless it complies with any other requirement on the form of the contract. The contract may be proved by any means, including the testimony of witnesses”. That means, the CISG does not require any specific form of international sale of goods contracts. Meanwhile, Vietnamese Commercial Law 2005 stipulates that contracts for the international sale of goods must be made in writing or other forms of equal legal validity. This stipulation is considered too rigid and not suitable for signing contracts in practice of international sale. Nowadays, with the rise of e-commerce, many new business models in international sale have emerged which change the method of establishing international sale contracts. With the support of digital technology, international sales contracts can be signed electronically in which contracts can be signed and executed completely automatically without human participation, also known as smart contracts, executed autonomously and transparently based on technology platform. Therefore, it is recommended that Vietnamese Law should adopt a more flexible approach regarding forms of contracts, allowing international sale of goods contracts to be established by any form, unless the parties agree otherwise.

*Secondly, supplementing regulations on basic terms of international goods sale contracts*

The content of a contract includes the terms that constitute that contract. The laws of some countries require that a contract must have some certain basic terms, without which the contract will be invalid. For example: According to English, American law or Australian law, the basic term in a sale contract is the subject matter of the contract; French and German law require that a contract must include the subject matter and price terms (Hang, 2012). Meanwhile, Vietnam allows the parties to freely agree without specifying basic terms of the contract. Failure to specify the basic terms in a contract for the sale of goods can lead to arbitrary discretion in the conclusion of the contract between the parties. A sale contract which is lack of basic terms will cause difficulties for the parties during performance of that contract. Therefore, it is recommended that a sale of goods contract must include at least two basic terms, which are subject matter and price terms.

*Thirdly, amending regulations on penalty for breach of international goods sale contracts*

Although Vietnamese law has provided a number of remedies for breach of sale contracts, among them, penalty for breach of contract is a controversial remedy as it seems to be inappropriately regulated under both Vietnamese Commercial Law 2005 and Civil Code 2015. It is a remedy whereby the non-breaching party requires the breaching party to pay a fix sum of money in case of breach if there is an agreement in the contract, except in the case of exemption<sup>1</sup>. Regarding level of penalty, The Civil Code allowed the amount of penalty to be agreed upon by the parties<sup>2</sup>, while according to Commercial Law, the level of penalty must not exceed 8% of the value of the violated contractual obligations<sup>3</sup>. It can be seen that the provisions of the two legal documents on penalty level are in explicit conflict. In addition, there is no specific regulations to resolve cases where the parties agree on a penalty for breach of contract which is greater than 8% of the value

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<sup>1</sup>Article 300 of the 2005 Commercial Law

<sup>2</sup>Clause 2, Article 418 of the 2015 Civil Code

<sup>3</sup>Article 301 of the 2005 Commercial Law

of the breached contractual obligation, whether the penalty clause should be invalidated or the non-breaching party can claim the maximum 8% of the value of the breached obligation. It should also be noted that in the international trading environment, the laws of many countries as well as international legal documents often do not provide the remedy of penalty for breach of contracts but instead provide a similar remedy which is liquidated damages. Liquidated damages is a common remedy in many common law and civil law systems such as UK, France, Germany, USA, China, etc. and in international trade agreements such as the Principles of International Commercial Contracts and the Vienna Convention on the International Sale of Goods 1980. Parties often agree to liquidated damages to be a fixed amount of money that the non-breaching party can claim for losses caused by the breach of contract. While a penalty clause for breach of contract is drafted with the purpose of deterring and punishing the breaching party, liquidated damages are provisions that compensate for loss and remedy loss. It can be seen that penalty and liquidated damages are similar to the extent that they are (i) agreed upon before the breach (ii) only applied if there is a breach of contract and (iii) the breaching party must pay the other party an agreed amount regardless of actual damages. According to the approach of national and international law, a liquidated damages clause may be acceptable if (i) the amount of liquidated damages agreed by the parties is reasonably close to the actual damage, (ii) it is difficult to prove the loss or the application of other remedies is inconvenient or difficult to implement in practice, and a liquidated damages clause which agree a large and unreasonable

amount will be considered a penalty agreement and void. Although Vietnamese law set out the maximum level for penalty to prevent unreasonable penalty clause, but in essence, the remedy of penalty for breach of contract can not be liquidated damages since, in terms of its application purposes, this sanction cannot be used as a form of deterrence to force contract performance. Meanwhile, according to current legal trend, the law does not encourage the application of penalty for civil transactions, but instead the remedy of damages for losses caused by breach of contract. Thus, in the context of Vietnam strengthening trade relations with other countries, in order to harmonize national and international laws in the field of international sale, Vietnamese law should adjust the provision on penalty for breach of contracts in general and breach of contracts for the international sale of goods in particular. Vietnamese legislature can refer to the liquidated damages provisions of the convention and the laws of some countries such as the UK and the US.

### Conclusion

With the important role of contracts for international sale of goods in international business, Vietnamese law has provided general and specific regulations governing this type of contract. These regulations have created a fairly complete legal framework to effectively regulate legal issues arising from international sale of goods contracts. However, to promote the development of import-export business activities, it is necessary to adjust Vietnamese regulations on contracts for the international sale of goods to be compatible with those of international treaties and other legal systems but also suitable to the legal and practical context of Vietnam.

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