

DISCUSSION ON CONTRACTUAL LIABILITY IN SALE OF GOODS CONTRACTS IN VIETNAM: A CISG PERSPECTIVE

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Received: 12/12/2024

Accepted: 20/12/2024

Published: 24/12/2024

Abstract

The 1980 United Nations Convention on Contracts for the International Sale of Goods (commonly referred to as the 1980 Vienna Convention or CISG) is one of the most significant international treaties governing global trade relations. For Vietnam, membership in the CISG represents an effective legal instrument that can enhance the integration of Vietnamese enterprises into international markets. Although Vietnam ratified the CISG in late 2015 to improve the legal mechanisms available for both domestic and international parties involved in concluding, performing, and resolving disputes related to international goods sale contracts, up to date, the principles of the CISG have not been widely recognized by Vietnamese courts and businesses. This paper endeavours to give an analysis of contractual liability under the 2005 Vietnamese Commercial Law from the perspective of the CISG. By highlighting similarities and differences, the article aims to provide insights for Vietnamese businesses and judicial bodies in selecting and applying appropriate laws for contract formation, execution, and dispute resolution.

Keywords: The CISG, the 2005 Commercial Law, contractual liabilities, contract performance, suspension, termination.

Bàn về trách nhiệm do vi phạm hợp đồng mua bán hàng hóa ở Việt Nam từ góc nhìn của công ước Viên 1980

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Tóm tắt

Công ước Liên Hợp Quốc năm 1980 về Hợp đồng Mua bán Hàng hóa Quốc tế (CISG) được xem là một trong những thỏa thuận quốc tế quan trọng nhất trong quan hệ thương mại toàn cầu. Đối với Việt Nam, việc trở thành thành viên của CISG sẽ cung cấp một công cụ pháp lý hiệu quả nhằm thúc đẩy quá trình hội nhập của các doanh nghiệp Việt Nam vào thị trường quốc tế. Dù Việt Nam đã gia nhập CISG vào cuối năm 2015 để cung cấp thêm công cụ pháp lý hữu hiệu để giao kết, thực hiện và giải quyết tranh chấp hợp đồng mua bán hàng hóa cho các bên trong giao dịch thương mại giữa thương nhân trong nước và nước ngoài, cho đến nay, các nguyên tắc của CISG chưa được các tòa án và doanh nghiệp Việt Nam nhận thức rộng rãi.

Bài viết đưa ra những phân tích về trách nhiệm đối với vi phạm hợp đồng theo Luật Thương mại Việt Nam năm 2005 từ góc nhìn của Công ước CISG. Thông qua việc làm rõ các điểm tương đồng và khác biệt, bài viết cung cấp những góc nhìn hữu ích cho các doanh nghiệp và cơ quan tư pháp Việt Nam trong việc lựa chọn và áp dụng luật pháp phù hợp cho việc hình thành, thực hiện và giải quyết tranh chấp hợp đồng.

Từ khóa: The CISG, Luật Thương mại 2005, trách nhiệm do vi phạm hợp đồng, thực hiện hợp đồng, đình chỉ, chấm dứt.

Introduction

Contractual liability and compensation for the breach of sale of goods contracts plays a crucial role in regulating the obligations and rights of the parties involved in business transactions¹. In Vietnam, the legal framework governing sales contracts is primarily provided by the 2005 Commercial Law². However, with the growing integration of Vietnam into the global market, international standards and conventions have become increasingly relevant³. Among these, the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG) offers a comprehensive set of rules aimed at harmonizing the law governing international sales⁴. This paper explores the regulations on contractual liability in sale of goods contracts in Vietnam, comparing the regulations on commercial sanctions and civil liability under the 2005 Vietnamese Commercial Law with the provisions of the CISG regarding remedies for breach of contract. By examining the similarities and differences between Vietnam's legal framework and the CISG, this study aims to offer a deeper understanding of how Vietnam's legal system addresses issues of contractual liability, and how international standards may influence or enhance the current domestic approach.

1. TERMINOLOGY AND SCOPE

Terminology Differences

The 2005 Vietnamese Commercial Law utilizes the term “commercial sanctions” to describe the legal measures imposed on a party for breaching contractual obligations⁵. This term aligns with Vietnam's Civil Law traditions

and emphasizes the enforcement mechanisms designed to remedy the breach. Additionally, the broader concept of “civil liability for breach of civil obligations” is addressed under the Vietnamese Civil Code 2015⁶, showing a clear link between civil and commercial law principles. In contrast, the CISG does not explicitly use the term “commercial sanctions” or “civil liability”. Instead, it adopts the phrase “remedies for breach of contract” to refer to the range of responses available to the aggrieved party⁷. This terminology reflects the Convention's effort to create a uniform, international framework that bridges differences between Civil Law and Common Law traditions. While the terms differ in form, both frameworks aim to provide mechanisms for holding parties accountable and ensuring that the injured party receives adequate redress.

Scope of Application

The CISG was designed as a uniform set of rules to govern international sale of goods contracts. It emphasizes creating legal balance between sellers and buyers and ensures neutrality in international transactions. Its scope excludes certain matters, such as goods intended for personal or family use, liability for death or personal injury, and issues related to the validity of the contract or its terms. Remedies under the CISG are tailored to the complexities of international trade, focusing on harmonizing legal standards⁸.

The 2005 Vietnamese Commercial Law, in contrast, regulates both domestic and international commercial transactions but was developed primarily to address Vietnam's local

¹MP Furmston, GC Cheshire and CHS Fifoot, *Cheshire, Fifoot and Furmston's Law of Contract* (Seventeenth edition, Oxford University Press 2017) 665.

²Vietnam National Assembly, Commercial Law No. 36/2005/QH11, Articles 292-316.

³Dang Hoang Linh, ‘Main trends of Vietnam's international integration in trade up to 2030’ (The Russian Journal of Vietnamese Studies) Vol 4, No 2 (2020) 27-36.

⁴Ingeborg Schwenzer and Peter Schlechtriem (eds), *Commentary on the UN Convention on the International Sale of Goods* (4th edition, Oxford University Press 2016) 1–14.

⁵Vietnam National Assembly (n 2).

⁶Vietnam National Assembly, Civil Code No. 91/2015/QH13, Articles 351-361.

⁷United Nations Commission on International Trade Law, *United Nations Convention on Contracts for the International Sale of Goods* (1st ed, United Nations Publications 2011) 13–20.

⁸Schwenzer and Schlechtriem (n 4) 720.

market needs and internal economic context. Its application extends to broader areas, such as services, logistics, and other forms of trade relationships, beyond just the sale of goods. The comprehensive structure of the 2005 Vietnamese Commercial Law includes a full section (Chapter VII) dedicated to commercial sanctions applicable to all commercial relationships, offering a codified approach to enforce obligations and address breaches.

Key Differences in Legal Presentation

The CISG organizes its remedies for breaches within specific sections for sellers and buyers, reflecting its focus on equality in international trade. For instance:

Articles 45–52 focus on remedies for breaches by the seller⁹.

Articles 61–64 detail remedies for breaches by the buyer¹⁰.

Other general provisions (e.g., Article 25 on fundamental breach) apply to both parties¹¹.

This modular organization simplifies the application of remedies and highlights the intention to balance obligations.

On the other hand, the 2005 Vietnamese Commercial Law consolidates all remedies into a single chapter, Chapter VII: Commercial Sanctions, applicable universally to both parties. This approach is a hallmark of Vietnamese codification style, aimed at clarity and ease of reference for users of the law.

Implications of Terminology and Scope

Although the structural and terminological differences seem significant, they ultimately reflect the respective goals of each legal framework. The flexibility of the CISG accommodates a broad range of international practices, making it widely acceptable across jurisdictions. Conversely, the 2005 Vietnamese Commercial Law's detailed codification aligns with Vietnam's domestic legal tradition and provides more specific guidelines for commercial activities within its jurisdiction.

By understanding these distinctions, Vietnamese businesses can better navigate the nuances of domestic versus international trade contracts, particularly when deciding which legal framework to apply in cross-border transactions.

2. FUNDAMENTAL BREACH

Definition of Fundamental Breach

The concept of “fundamental breach” is central to both the 2005 Vietnamese Commercial Law and the CISG. While both frameworks acknowledge the severity of such breaches, their approaches differ in definition, application, and evidentiary requirements.

According to Clause 13, Article 3 of the 2005 Vietnamese Commercial Law, a fundamental breach is defined as: “*A breach of contract by one party that causes damage to the other party to the extent that it prevents the other party from achieving the purpose of the contract.*” This definition emphasizes the purpose of the contract and its realization by the aggrieved party. If the breach makes it impossible for the non-breaching party to fulfill their intended objectives, it is considered fundamental. However, the 2005 Vietnamese Commercial Law's definition has been criticized for being vague and abstract, as it does not clarify: (1) How to determine the “purpose” of the contract; (2) Whether the breaching party must have knowledge of the aggrieved party's purpose. For example, if Party A contracts with Party B to purchase cashew nuts for export to Europe but Party B delivers low-quality goods, Party A cannot achieve their objective of exporting the goods. While this may constitute a fundamental breach under the 2005 Vietnamese Commercial Law, proving the export intent and its connection to the breach can be challenging.

Article 25 of the CISG provides a more nuanced definition of a fundamental breach: “*A breach of contract committed by one party is fundamental if it results in such detriment to the other party as substantially to deprive*

⁹Law (n 7) 13–16.

¹⁰ibid 18–20.

¹¹ibid 8.

them of what they are entitled to expect under the contract, unless the breaching party did not foresee and could not have reasonably foreseen such a result." This definition integrates two critical elements: (1) Substantial detriment: The breach must significantly deprive the aggrieved party of their contractual expectations. (2) Foreseeability: If the breaching party could not foresee or reasonably anticipate the consequences of their breach, it is not considered fundamental. For example, a seller fails to deliver a machine required for a buyer's production line on the agreed date. If the delay disrupts the buyer's operations and causes substantial financial losses, this could constitute a fundamental breach, provided the seller could reasonably foresee these consequences.

Application of Fundamental Breach in Practice

In 2005 Vietnamese Commercial Law, the abstract nature of the definition often leaves room for subjective judicial interpretation, potentially leading to inconsistent applications in disputes. As for the CISG, its well-defined parameters and the emphasis on foreseeability make it more predictable and consistent for international trade disputes.

If a buyer receives substandard goods:

(1) Under the 2005 Vietnamese Commercial Law, the buyer must prove that the purpose of the contract (for example, resale in a specific market) was frustrated and that the seller was aware of this purpose.

(2) Under the CISG, the buyer only needs to show that the breach caused substantial detriment that was foreseeable by the seller¹².

The CISG's definition of fundamental breach is more specific and adaptable to international trade, facilitating its application in complex cross-border disputes. By contrast, the 2005 Vietnamese Commercial Law's focus on purpose creates challenges in both interpretation and evidence, highlighting the need for Vietnamese law to adopt clearer and more practical standards.

3. REMEDIES

The difference between the 2005 Vietnamese Commercial Law and the CISG concerning fines for breach of contract reflects fundamental divergences in legal philosophy and practical considerations. The 2005 Vietnamese Commercial Law explicitly provides for fines as a remedy for breach, consistent with Vietnam's Civil Law tradition, which emphasizes deterrence and accountability in contractual relationships. These fines serve both as punitive measures and incentives for compliance, reinforcing the binding nature of contracts. In contrast, the CISG does not recognize fines for breach of contract, reflecting its effort to create a unified framework acceptable to a wide range of member states, including Common Law jurisdictions like the US and UK, which traditionally view fines or penalties as unfair. Common Law systems prioritize compensatory damages to restore the non-breaching party to their original position, arguing that contracts are mutual agreements between equals, and punitive measures undermine the principle of fairness and freedom of contract. This omission in the CISG represents a compromise to reconcile diverse legal traditions, highlighting the challenge of harmonization in international law. Practically, the absence of fines under the CISG underscores the importance of clear contractual provisions in international trade, particularly when specifying remedies like penalties, which must align with both the governing law and enforceability standards. For practitioners in Vietnam, this distinction necessitates a shift from relying on statutory fines to crafting precise compensatory remedies within contracts governed by the CISG. Ultimately, this difference illustrates the broader tension between the deterrence-focused approach of the Civil Law systems and the fairness-driven, compensatory approach of Common Law traditions, emphasizing the need for careful legal drafting in cross-border transactions.

¹²ibid.

Specific Performance

Specific performance is a central remedy under the CISG. Article 46 allows the buyer to require the seller to fulfill their obligations, including delivering substitute goods or repairing non-conforming goods, under certain conditions¹³. For instance, the buyer may demand substitute goods only if the non-conformity constitutes a fundamental breach. Article 62 extends similar rights to the seller, enabling them to require the buyer to pay the price, accept delivery, or perform other contractual obligations¹⁴. When it comes to limitations, the CISG does not permit specific performance if the aggrieved party has chosen an inconsistent remedy, such as contract termination or damage compensation. For instance, a buyer purchases machinery from a seller under CISG rules. If the machinery is defective and the defect constitutes a fundamental breach, the buyer may demand a replacement instead of merely seeking damages.

The 2005 Vietnamese Commercial Law also recognizes specific performance as a commercial sanction. Article 297 defines it as requiring the breaching party to fulfill their contractual obligations or take necessary steps to ensure contract fulfillment at their expense. Unlike the CISG, the 2005 Vietnamese Commercial Law does not explicitly limit the use of specific performance to fundamental breaches, giving the aggrieved party more flexibility. For example, a supplier fails to deliver goods on time. The buyer under the 2005 Vietnamese Commercial Law can demand delivery as originally agreed without proving that the delay constitutes a fundamental breach.

Damages

Article 74 of the CISG provides that damages include: (1) Actual losses incurred due to the breach; (2) Loss of profits that were foreseeable at the time the contract was concluded. Damages are capped by the losses the breaching party

foresaw or should have foreseen as potential outcomes of their breach. This rule emphasizes objectivity and predictability. Articles 75 and 76 further detail how to calculate damages in cases of contract termination and market price fluctuations. If a buyer incurs additional costs to procure replacement goods from another seller, the CISG allows the buyer to recover these costs, provided they were foreseeable.

Article 302 of the 2005 Vietnamese Commercial Law defines damages as including: (1) Actual and direct losses caused by the breach; (2) Lost profits that the aggrieved party would have earned had the breach not occurred.

A key distinction between the two frameworks is that the 2005 Vietnamese Commercial Law emphasizes “direct and tangible losses” over foreseeability. This approach focuses more on measurable impacts than speculative or anticipated outcomes. For example, if a buyer contracts for a bulk order of goods but receives only a partial shipment, the buyer can claim compensation under the 2005 Vietnamese Commercial Law for the missing quantity and any associated direct losses, such as lost resale opportunities.

Suspension of Performance

Article 71 of the CISG permits a party to suspend performance if it becomes evident that the other party will not perform a substantial part of their obligations¹⁵. The suspension is a precautionary measure designed to prevent further harm and can be lifted once adequate assurance of performance is provided. A seller suspects that the buyer will not pay for the goods upon delivery. Under Article 71, the seller can withhold shipment until the buyer provides a guarantee of payment¹⁶. Articles 308 and 309 of 2005 Vietnamese Commercial Law allow suspension when: (1) There is a breach of agreed conditions that justify suspension; (2) The other party commits a fundamental

¹³ibid 14.

¹⁴ibid 19.

¹⁵ ibid 23.

¹⁶ ibid 21–22.

breach of their obligations. If a buyer repeatedly fails to meet installment payments, the seller can suspend further deliveries under the 2005 Vietnamese Commercial Law, provided this action is proportional to the breach.

Termination of Contract

Termination (referred to as “avoidance” in the CISG) is governed by Articles 49 and 64, which allow termination if: (1) There is a fundamental breach of the contract; (2) The breaching party fails to remedy the breach within a reasonable period after notice. The CISG also allows termination in cases of anticipated breaches (Article 72). A seller, for instance, delivers a bulk order of defective goods, and replacing them would take months. If the buyer’s operations are heavily dependent on timely delivery, this constitutes a fundamental breach, allowing the buyer to terminate the contract.

Termination is addressed in Articles 312 – 314 in 2005 Vietnamese Commercial Law. While it shares similarities with the CISG, the 2005 Vietnamese Commercial Law also allows for contract termination in cases of repeated minor breaches that cumulatively hinder

contract fulfillment. For example, if a buyer consistently delays partial payments under a supply contract, this could warrant termination of the agreement imposed by the seller under the 2005 Vietnamese Commercial Law.

CONCLUDING REMARKS

While the 2005 Vietnamese Commercial Law and the CISG display considerable similarities, their differences highlight the necessity for Vietnam to refine its commercial laws. The remedies provided by both the 2005 Vietnamese Commercial Law and the CISG reflect their respective priorities: the former supports codified and comprehensive domestic commercial law, while the latter aims to harmonize international trade law. Vietnamese businesses engaging in cross-border contracts should carefully consider these differences when negotiating terms and choosing the applicable legal framework. Joining the CISG would enhance Vietnam’s legal coherence with international norms, protecting domestic businesses in global trade. It is essential for Vietnamese legal authorities to educate businesses about the CISG and address any gaps in the domestic legal framework.

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