

VIETNAMESE LAW ON SANCTIONS FOR VIOLATIONS OF DELIVERY OBLIGATIONS CAUSING DAMAGE TO BUSINESS PROFITS OF ENTERPRISES

LEI VIETNAMITA SOBRE SANÇÕES POR VIOLAÇÕES DAS OBRIGAÇÕES DE ENTREGA QUE CAUSAM DANOS AOS LUCROS COMERCIAIS DAS EMPRESAS

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Abstract: The article studies and clarifies the loss of profits intentionally caused by enterprises violating the delivery obligation in the contract relationship of goods purchase and sale. The purpose of this violation is to benefit from price fluctuations in the market. The research in the article also determines the level of loss according to the market value and applies the provisions of the Commercial Law of Vietnam on the purchase and sale of goods and related regulations, sanctions for enterprises intentionally causing losses to partner enterprises in the form of full compensation for losses, remedying the consequences.

Keywords: Commerce. Compensation for damages. Business profits.

Resumo: O artigo estuda e esclarece a perda de lucros intencionalmente causada por empresas que violam a obrigação de entrega na relação contratual de compra e venda de bens. O objetivo dessa violação é se beneficiar das flutuações de preços no mercado. A pesquisa no artigo também determina o nível de perda de acordo com o valor de mercado e aplica as disposições da Lei Comercial do Vietnã sobre a compra e venda de bens e regulamentações relacionadas, sanções para empresas que causam intencionalmente perdas a empresas parceiras na forma de compensação integral por perdas, remediando as consequências.

Palavras-chave: Comércio. Indenização por danos. Lucros empresariais.

1. Introduction

An enterprise is defined as “*an organization with its own name, assets, and headquarters, established or registered in accordance with the provisions of law for business purposes*” (Clause 10, Article 4 of the Law on Enterprises of Vietnam 2020).

Domestic and international trade relations between enterprises in Vietnam and with enterprises in other countries around the world are quite common, the final target of these relations is business profits.

With fluctuations in commodity prices - the subject of the transaction (goods), the cause of the calculation of profits as predicted from the contracts signed as originally has changes. The act of one party to the business unilaterally terminating or cancelling the sale contract in order to benefit from price fluctuations higher than the original agreed price. In other words, the act of not delivering goods by the business for this reason is a violation, causing serious damage to partner businesses, due to loss of profits, including other possible damages that may push the business into a state of business risk. This also causes businesses to lose confidence in contractual relationships and the stability of the economy.

Sanctions in the form of compensation for damages are set by lawmakers to overcome the damages caused by lost business profits arising from the act of not delivering goods fully and on time, punishing violating businesses. However, the application of regulations on compensation for damages, the scope, and the level of compensation for damages are issues that need to be raised to be resolved according to the research of this article.

2. Theoretical framework, method

In this topic, the main concepts and theories that underpin the research are presented the theory of business freedom, freedom of contract agreement in general, and the commercial sector in particular, stand out, providing a solid basis for understanding the context of the investigation. Accordingly, the business parties agree on sanctions for violating delivery obligations within the legal framework. Based on this theoretical basis, businesses choose their sanctions for violating delivery obligations by the purpose of the contract, avoiding cases where the terms of the agreement are not mentioned, causing difficulties.

Methods of analysis and evaluation to clarify legal provisions and compare similarities and differences of Vietnamese and international laws; The process of analyzing situations is demonstrated through typical trial cases, demonstrating the effectiveness of applying the law to dispute resolution in Vietnam. Data collection was carried out through cases, and regulations.

3. Results and Discussion

3.1. Theoretical basis for sanctions for violations of delivery obligations causing damage to business profits of enterprises

3.1.1. Concept, characteristics

The sale of goods is a form of commercial contract, which has its own characteristics under Vietnamese law. In this relationship, the enterprise, as the seller, carries out the activity of “*transferring ownership of goods from the seller to the buyer*”¹, and the enterprise receives the goods corresponding to the agreed value. The seller is also responsible for protecting the ownership of the goods for the buyer “*for the property sold to the buyer not to be disputed by a third party*”²...

In particular, the obligation to deliver goods is a basic obligation, arising from specific agreements on quantity, quality of goods, time, method of implementation (delivery of goods). between business parties. This obligation to deliver goods is clearly stated in the sale contract for implementation and used as evidence to resolve disputes later.

Practical evidence shows that the relationship of buying and selling goods is complicated, long-term, and risky. The transaction time from when businesses sign the contract to the actual delivery of goods is long. This leads to changes in the value of goods compared to the initial data recorded by the parties in the contract according to the operating rules of the commodity economy. This will lead to changes in business profits, businesses do not deliver goods according to the agreements of the contract, causing damage to partner businesses.

Loss of business profits in this case is defined as: “*financial loss due to interruption of business operations...*”³

Therefore, the sanction for breach of the obligation to deliver goods for illegal gain is a form of sanction for breach of basic contractual obligations that makes the transaction

¹ Hanoi Law University, 2019, Commercial Law Textbook, Justice Publishing House, p. 60

² Hanoi Law University, 2019, Commercial Law Textbook, Justice Publishing House, p.. 61

³ Law Insider, Loss of Profits,

<https://www.lawinsider.com/dictionary/loss-of-profits>, accessed on 10/11/2024

purpose for the violated party not achieved. This is the damage caused by the loss of business profits of the enterprise, arising from illegal acts, intentionally violating the sale contract caused by the selling enterprise.

From the above concept, according to the author, the sanction for breach of the obligation to deliver goods causing damage to business profits of enterprises has the following characteristics:

Firstly: Increasing the price of goods leads to changes in the effectiveness of the contract, which is the reason why the seller does not deliver the goods, violating the contractual obligations.

Goods are the subject of the transaction of the sales contract, which can be essential items serving the needs of life, or goods serving the production and business activities of the enterprise. These goods are always affected by many objective factors according to the law of market movement. These can be changes in the direction of increase or decrease compared to the price initially estimated by the parties in the sales contract. In case the selling enterprise does not deliver the goods according to the committed time of the contract, causing “damage” to the buyer, then this form of sanction will arise.

Secondly: The selling business is at fault for not delivering the correct quantity and time as committed with the purpose of profiting from this act.

The subject of goods is governed by many factors leading to price changes in each period beyond the subjective consciousness of the parties, affecting the effectiveness of the signed goods sale contract. Therefore, this violation is not considered an "objective risk" from which the enterprise does not deliver the goods, causing damage to the buyer, contrary to the nature of the commercial relationship.

Fluctuations in the price of goods in principle do not change the value of the signed contract unless the parties agree otherwise. In the relationship of buying and selling goods, with the purpose of seeking profit, in principle the parties anticipate the objective risks that may occur that negatively affect the contract, so that the parties can share and minimize the damage. In particular, the act of not delivering goods to gain profit is contrary to the contractual commitment and illegal.

Thirdly: Causing damage to the purchasing business from the economic profits that would have been enjoyed from the seller's proper performance of its delivery obligations.

There are many damages that can occur during the business process as well as when performing the sale contract. However, this damage is identified as business profit, which the receiving enterprise should have enjoyed but the selling enterprise did not deliver the

goods, taking advantage of this profit. Therefore, determining business profit loss is quite complicated, stemming from the specific characteristics of the changing value of goods, requiring appraisal or verification activities by specialized agencies, then there is a valid basis to assign responsibility and request compensation for damages.

Therefore, compensation for damages in this case is due to the subjective fault of the enterprise, which is the seller of goods who did not deliver the goods in order to benefit. This issue is specifically regulated by law with sanctions against the violating party, avoiding abusive acts for profiteering, violating commercial law of Vietnam.

3.1.2. Applicable law

- Legal regulation of sanctions for breach of delivery obligations

The relationship between businesses buying and selling goods is quite complicated, associated with the interests and business efficiency of businesses. Therefore, the regulations must be complete and clear as a basis for dispute resolution. In addition, the commercial relations carried out between Vietnamese businesses and with countries around the world, regulated by law must be consistent with the international commitments that Vietnam participates in, only then will fairness be ensured, without discrimination between domestic and foreign businesses, causing negative impacts on the investment environment.

Therefore, legal regulation in this case is inevitable, consistent with the business needs of businesses, thereby the application of law to resolve disputes is also unified, achieving high efficiency.

- Application of law in contractual relations and dispute resolution

Contractual relations in general and the research field by topic are governed by many factors, so the adjustment and application of law also have differences. The author temporarily divides according to the provisions of Vietnamese and international law as follows:

Firstly: According to Vietnamese law

Sanctions for breach of delivery obligations for profit are associated with the sale and purchase of goods, and are subject to the provisions of commercial law of Vietnam. The following specific provisions can be mentioned: the Civil Code of Vietnam 2015, the Commercial Law of Vietnam 2005 and related provisions, specifically: the Law on Consumer Protection 2023, the Law on Electronic Transactions 2023.

Because there are many laws regulating the provisions on sanctions for breach of delivery obligations, in principle, the application of specialized laws is given priority. In cases

where specialized laws do not provide, the general law (Civil Code) is applied to resolve the issue.

Specifically, Clause 2, 3, Article 4 of the Civil Code of Vietnam 2015 stipulates: *“Other relevant laws regulating civil relations in specific fields must not be contrary to the basic principles of civil law;... In cases where other relevant laws do not provide or have regulations that violate Clause 2 of this Article, the provisions of this Code shall apply.”*

Thus, the application of national law (Vietnam) in this case must first be based on the provisions of the Commercial Law of Vietnam 2005 and related specialized regulations, even though the principles of this transaction are also set out in the Civil Code of Vietnam 2015. Only when the provisions of the specialized Law do not mention or are contrary to the general law, will the Civil Code of Vietnam 2015 in effect be applied.

Unifying the application of the law as cited above will avoid overlapping and incorrect application, leading to incorrect dispute resolution decisions, affecting the interests and reputation of businesses.

Secondly: According to international law

In commercial relations, it may include enterprises established and headquartered outside the territory of Vietnam participating in the signing of sale contracts, which may result in sanctions for breach of delivery obligations. The application of legal provisions in this case, according to the author, should be based on the agreement of the business parties, as well as on the Agreements signed between the Government or the Conventions that Vietnam has signed, including international trade practices recognized by businesses.

In general, priority must be given to the application of Agreements and Conventions that resolve commercial contracts, including sanctions for breach of delivery obligations to benefit businesses, as well as the resolution of disputes arising from these sanctions.

In Vietnam, the Convention on Contracts for the International Sale of Goods (CISG) 1980 drafted by the United Nations Commission on International Trade Law (UNCITRAL) is a source of law uniformly applied to international sales contracts between member countries that ratify the Convention. Enterprises that are large-scale commercial

partners of Vietnam are all members of this Convention⁴. Vietnam joined the CISG in late December 2015, effective in Vietnam from January 1, 2017, and widely applied in judgments to resolve disputes over sale contracts in Vietnam.

For example, Judgment No. 02/2022/KDTM-ST dated March 16, 2022 of the People's Court of Binh Duong Province (Vietnam) resolved a dispute over sale contract. When applying the law, the Court made the following comments: “Regarding the application of the law: Both China and Vietnam are member states of the 1980 Vienna Convention on Contracts for the International Sale of Goods (hereinafter referred to as “CISG”). The CISG has been in effect in China since 1988 and in Vietnam since January 1, 2017. Article 1.1.a of the CISG provides as follows: “*This Convention applies to sale contracts between parties whose places of business are in different States... a. When these States are member states of the Convention*”.

Sale contract No. KE6-056/06-17 dated June 5, 2017 was signed between an enterprise with its commercial headquarters in Vietnam and an enterprise with its commercial headquarters in China. Therefore, CISG is the applicable law instead of national law. On that basis, the Court applied Article 1.1.a and Articles 53, 54, 78 of the 1980 Vienna Convention on Contracts for the International Sale of Goods (CISG) to resolve the above case.

In addition to CISG, the application of international commercial practices is also often of interest to those working in adjudication, referring to the resolution of international commercial disputes in Vietnam.

3.2. Legal status of sanctions for violations of delivery obligations causing damage to business profits

3.2.1. Conditions of validity and scope of application

- Conditions of validity:

In a contractual relationship, the parties must have the obligation to fully comply with the provisions on the form and content of the contract. Accordingly, the obligation to deliver goods in a sales relationship is a basic term of the contract. Violation of this obligation leads to the purpose of the buyer's business not being realized.

⁴ Statistics show that as of 2019, it has been ratified by 93 countries, accounting for a significant proportion of world trade, making it one of the most successful unified international laws. See: Wikipedia, United Nations Convention on Contracts for the International Sale of Goods,

https://vi.wikipedia.org/wiki/C%C3%B4ng_%C6%B0%E1%BB%9Bc_Li%C3%AA_n_H%E1%BB%A3p_Qu%E1%BB%91c_v%E1%BB%81_H%E1%BB%A3p_%C4%91%E1%BB%93ng_mua_b%C3%A1n_h%C3%A0ng_h%C3%B3a_qu%E1%BB%91c_t%E1%BA%BF

Article 24 of the Commercial Law of Vietnam 2005 stipulates the form of goods sale and purchase contract as follows: “1. *A sale contract may be expressed orally, in writing, or established by specific conduct.* 2. *For types of sale contracts that the law requires to be made in writing, such provisions must be followed.*”. According to Article 11 of CISG 1980: “*A sale contract need not be signed or evidenced in writing or be subject to any other requirement as to form. It may be proved by any means, including the testimony of witnesses.*”.

According to the above-cited provisions, a sale contract that gives rise to the obligation to deliver goods must be made in writing or in other forms permitted by law, only then will it be legally effective and binding on the parties' responsibilities for their commitments.

However, in business activities, according to Vietnamese law, decisions of the enterprise made by the legal representative on behalf of the enterprise must be accepted by the Board of Directors or the Board of Members depending on the type of enterprise established. It is worth noting that the determination of evidence showing the value of goods, time of delivery, quantity of goods delivered, violations, etc. must be made in writing, only then will it be effective and have full information for the parties involved to implement and serve as evidence to resolve disputes later.

- Scope of application:

In general, the agreement between the parties on the contract is valid, if the contract contains a provision on sanctions for breach of delivery obligations causing damage to the enterprise, it is also legally effective. The question is whether Vietnamese law requires the parties to the enterprise to agree on this provision on sanctions, recorded in the sale contract or not?

The provisions of Vietnamese law allow business parties to reach agreements without violating the provisions of the law. In addition, the law also allows for compensation for damages if damage occurs and the party causing the damage is at fault. Article 585 of the Civil Code of Vietnam 2015 stipulates the principle of compensation for damages as follows: “1. *Actual damages must be compensated in full and promptly. The parties may agree on the level of compensation, the form of compensation in cash, in kind or by performing a task, and the method of compensation in one lump sum or in multiple installments, unless otherwise provided by law.*”

According to the above regulations, compensation for loss of business profits does not need to be agreed upon by the parties in the contracts, but only needs the damaged enterprise to prove that the party at fault caused the damage to be compensated. Damages

in this case are implemented on the principle of compensation to the extent of the damage, except in cases where the parties agree on a level of damage lower than the level permitted by law.

3.2.2. Determination of loss of business profits and liability for compensation

- Determination of loss of business profits

Loss of business profits is the profit obtained from trading goods under normal conditions. That is the profit for goods that the enterprise should have obtained from the performance of the signed contract. From a legal perspective, business losses can occur for many different reasons, which can be subjective or objective, affecting fluctuations in the price of goods, leading to the decision of the enterprise not to deliver goods in cases of force majeure. However, the loss in this case is only established when one party of the enterprise does not perform or does not properly perform the sales contract to benefit from the decision not to deliver goods (subjective will of the enterprise).

To determine business profit loss, there must be reference bases or must go through appraisal activities of specialized agencies.

Regarding legal basis, Article 52 of the Commercial Law of Vietnam 2005 stipulates the basis for determining the value of damaged goods as follows: *“In case there is no agreement on the price of goods, no agreement on the method of determining the price and no other instructions on the price, the price of goods is determined according to the price of that type of goods under similar conditions regarding the method of delivery, time of purchase and sale of goods, geographical market, method of payment and other conditions affecting the price.”*

According to the United States Uniform Commercial Code § 2-713, the buyer's damages for non-delivery or refusal to deliver: *“(1) Subject to the provisions of this Article relating to evidence of market price (Article 2-723), the remedy for damages for non-delivery or rejection by the seller is the difference between the market price at the time the buyer became aware of the breach and the contract price together with any incidental and consequential damages provided for in this Article (Article 2-715), but less the cost savings resulting from the seller's breach. (2) The market price is determined at the place of tender or, in the case of rejection after arrival or cancellation of acceptance, at the place of arrival.”*⁵

According to the above-cited provisions, market price, in the most general sense, is the value of the actual transaction between the parties on the market at the time of the breach

⁵ LII Legal Information Institute, *Uniform Commercial Code*,
<https://www.law.cornell.edu/ucc>, accessed on 10/11/2024

as agreed by the parties to deliver the goods in the contract. The basis for determining this value according to Vietnamese law is as follows:

- (i) Based on the assessment results of competent authorities.
- (ii) Based on transaction documents for the same type of goods on the market.

However, when the parties to a dispute resolve it at the Court or Arbitration, the Trial Panel decides on the appropriate form. Regardless of the form, the value of the goods for comparison is made according to the market price at the place of delivery.

Thus, regardless of the time when the dispute arises and the time when the dispute is resolved by the Court or Arbitration Panel, it is necessary to take the time of violation, on the basis of respecting the agreement of the parties, as the basis for resolution. Only then can stability and uniformity in the application of the law be ensured when resolving disputes.

In practice, Vietnamese Courts and Arbitrations when resolving disputes over sale contracts that generate sanctions for breach of delivery obligations also follow this direction. However, the burden of proof for the enterprise is required to be raised, in cases where there is no evidence, it is applied according to the agreement.

Case: In the case resolved at Commercial Arbitration, the Buyer argued that due to the violation of delivery time, installation and technology transfer, it caused revenue loss due to delayed power generation. This damage was calculated based on the time required to complete the power generation installation according to the contract until the day the power plant generated electricity to the national grid. From there, the enterprise requested compensation for the loss of income from electricity sales in 04 months with the amount of: VND 9,320,288,976. However, according to the Arbitration Council, the compensation level was only considered according to the agreement of the two parties, about 20% of the total revenue. The amount of compensation that the violating enterprise must pay is determined as: $\text{VND } 4,780,935,550 \times 20\% = \text{VND } 956,186,510$ due to late delivery.⁶

Thus, determining the direct benefit that the injured party would have enjoyed if there had been no violation is not easy to prove, especially in cases where profits from business activities are determined. Therefore, this depends largely on the dispute resolution council considering and evaluating the evidence provided by the enterprise. In cases where

⁶ VIAC, 2023, *Determination of benefits that would have been enjoyed if there had been no violation* <https://www.viac.vn/thu-tuc-trong-tai/047-%7C-xac-dinh-khoan-loi-dang-ra-duoc-huong-neu-khong-co-vi-pham-a190.html>, accessed on 10/11/2024

there is no clear basis, the arbitration council will rely on the agreement of the parties to resolve the case.

- *Regarding liability for compensation:*

Clause 1, Article 585 of the Civil Code of Vietnam 2015 stipulates that “*Actual damages must be compensated in full and promptly*”. Vietnamese law also allows for a reduction in the compensation level according to Clause 2, Article 585 of the Civil Code of Vietnam 2015, according to which: “*The person responsible for compensation may have the compensation level reduced if there is no fault or if the fault is unintentional and the damage is too great compared to his/her economic capacity.*”.

Article 74 CISG 1980 provides for business loss, “*Damages for breach of contract are a sum covering the loss and loss of profit suffered by the other party as a result of the breach. Such damages cannot exceed the loss and loss of profit which the aggrieved party foresaw or ought to have foreseen at the time of the conclusion of the contract, having regard to the circumstances of which it knew or ought to have known, as a possible consequence of the breach*”. This provision is similar to Article 7.4.2 Principles of Contracts for the International Sale of Goods (PICC).⁷

Thus, compensation must be based on the principle of all business profits that the enterprise would have enjoyed if the delivery enterprise had fully performed its obligations. Because the enterprise was intentionally at fault and benefited from that illegal act. This is completely different from damages caused by objective reasons that are not the fault of the delivery enterprise. Lawmakers allow exemption from liability according to Article 294 of the Commercial Law of Vietnam 2005, applicable to the following cases: The occurrence of a case of exemption from liability that the parties have agreed upon; The occurrence of a force majeure event; The violation of one party is entirely due to the fault of the other party; The violation of one party due to the implementation of a decision of a competent state management agency that the parties could not have known about at the time of entering into the contract.

Case: Judgment No. 02/2012 dated March 30, 2012 of the People's Court of District X, Ho Chi Minh City resolved a dispute over a sale contract. Accordingly, the Plaintiff was Vietnam Maritime Corporation (abbreviated as “Vietnam Maritime Corporation”) suing the

⁷ International Institute for the Unification of Private Law, *UNIDROIT Principles of international commercial contracts* 2016
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extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.unidroit.org/english/principles/contracts/pri
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Defendant, VD Transport Joint Stock Company (abbreviated as “VD Transport Company”) according to the petition dated June 9, 2011. Accordingly, Vietnam Maritime Corporation filed a lawsuit requesting VD Transport Company to return VND 1,000,000,000 in contract advance payment and accrued interest of VND 252,000,000, a total of VND 1,252,000,000.

During the lawsuit, VD Transport Company counter-sued that VN Maritime Company had violated the delivery and compensation for damages due to violating Article 312 of the Law for Commerce of Vietnam, thus requiring VN Maritime Company to compensate for the actual, direct loss that VD Transport Company had to suffer and the direct benefits that it should have enjoyed, specifically the loss of DO oil due to waiting for the return of goods in the amount of VND 44,352,055 (according to the Vietcontrol Inspection Certificate dated February 28, 2011). The loss of FO oil due to waiting for the return of goods in the amount of VND 140,113,869 (according to the Vietcontrol Inspection Certificate dated February 28, 2011) and other salaries and expenses totaling: VND 1,013,841,197. The Court's judgment accepted the above amount according to the request of VD Transport Company.

According to the above judgment, the Court accepted the lawsuit request and forced Vietnam Maritime Company to compensate for the loss of business profits and all costs incurred due to the Company's violations.

4. Conclusion

The sanctions in contractual relations are set out in accordance with Vietnamese law. In commercial relations, the study in this article also clarifies the loss of business profits caused by enterprises' failure to deliver goods. This loss directly causes the income loss of enterprises, so the article clarifies the legal relationship and responsibility for sellers to bear all the losses due to their intentional mistakes. In general, the provisions under Vietnamese law are similar to the laws of other countries and are fully applied in the practice of resolving disputes over sale contracts in Vietnam. This creates peace of mind and confidence for foreign enterprises and investors when trading and investing in Vietnam.

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