

CISG-online 6248	
Jurisdiction	Vietnam
Tribunal	Tòa án Nhân dân Tỉnh Bình Dương (Binh Duong Province People Court)
Date of the decision	16 March 2022
Case no./docket no.	02/2022/KDTM-ST
Case name	<i>Company W [...] v. S [...] Production and Trading Co., Ltd.</i>

Translation by Vy Ngo Nguyen Thao** & Hy Nguyen Hoang Thai****

In the Name of Socialist Republic of Vietnam, People's Court of Binh Duong Province

[The composition of the First Instance Tribunal includes:]

Judge – Presiding Judge: Mr. Nguyen Cong Luc.

People's jurors: Mr. Nguyen Quoc Dung, Ms. Le Thi My.

[Trial Secretary:]

Ms. Nguyen Thi Hang – Secretary of the People's Court of Binh Duong Province

[Representative of the People's Procuracy of Binh Duong province participated in the trial:]

Ms. Ngo Kim Duyen – Prosecutor.

On March 16, 2022, at the headquarter of the People's Court of Binh Duong Province, the public trial for the business and commercial case No. 07/2019/TLST-KDTM, dated 3 September 2019, regarding the dispute over the «contract for sale and purchase of goods» is held. This trial is based on the Decision No. 05/2022/QDXXST-KDTM dated 24 January 2022 on bringing the case to trial, and the Decision No. 03/2022/QDST-KDTM dated 2 February 2022 on postponing the trial. The case is between the litigants:

1

* All translations should be verified by cross-checking against the original text.

** Lecturer of International Trade Law Department, Faculty of International Law, Ho Chi Minh City, Vietnam.

*** Lecturer of International Trade Law Department, Faculty of International Law, Ho Chi Minh City, Vietnam.

Claimant: Company W; address: No. X Street Y, Economic Development Zone D, City W, Shandong Province, China. 2

Legal representative of the claimant: K Limited Company, address: No. G, Quarter T, Street D, Ward P, District 9, Ho Chi Minh City (according to the written authorization letter dated 13/4/2018). L Limited Company authorized Ms. Nguyen Thi Phuong H, address: No. M, Street P, Ward H, Thu Dau Mot City, Binh Duong P Province, Ho Chi Minh City (according to the authorization letter dated May 23, 2018) to act on behalf of the L Limited Company. Ms. Nguyen Thi Phuong H and Ms. A were present.

Respondent: S Production and Trading Limited Company, address: Lot M, Industrial Park Đ, Zone R, Commune Đ, District B, Binh Duong Province. Legal representative: Ms. Nguyen Thi L, address: No. R Street L, Commune P, District N, Ho Chi Minh City; title: legal representative. Ms. Nguyen Thi L is absent. 3

[Merit of the Case:]

** According to the claim submission dated June 5, 2018, and the recorded settlement process of the case, the legal representative of the [seller], which is Company W (hereinafter referred to as [seller] or Company W), requested the Court to resolve the claim as follows: 4*

On 5 June 2017, [seller] and S Manufacturing and Trading Limited Company (hereinafter referred to as [buyer] or S Company) entered into a contract for the sale and purchase of pesticides under the Purchase and Sale Contract No. KE6-056/06-17 with a contract value of \$ 38,400. Once the contract is signed, the seller delivered the goods as per the agreement. However, despite repeated requests for payment, the buyer has not paid for the purchase and has transferred the company to other entities to evade the responsibility of repaying the debt, resulting in significant difficulties and damages for the seller. Hence, the [seller] seeks a Court resolution to compel the [buyer] to pay the original purchase amount of \$ 38,400, along with the late payment interest of \$ 4,608, which sums up to a total of \$ 43,008 (equivalent to VND 980,797,440). 5

On 8 December 2021 and at the mediation sessions held on 27 December 2021 and on 4 January 2022, the legal representative of the [seller] presented the interest calculation, which indicated that: the payment deadline was 90 days from the issuance date of the bill of lading on 2 July 2017, making the payment term due on 3 October 2017. The [seller] submitted its claim on 5 June 2018. The period of delay from 3 October 2017 to 5 June 2018 is 245 days. The [seller] has requested an interest rate of 10% per year, which is equivalent to 0.83% per month and 0.0274% per day, as per the medium-term lending interest rate of the Joint Stock Commercial Bank for Foreign Trade of Vietnam. The interest calculated from the date of delayed payment to the date of [seller]'s claim submission is \$ 2,577.80 or VND 58,670,545.92, which is derived from 245 days x 0.0274% x \$ 38,400. Hence, the total amount claimed by the [seller], including the original purchase amount and interest, is \$ 38,400 USD (the original purchase amount) + \$ 2,577.80 (the interest amount) = \$ 40,977.80 USD or VND 932,654,545.92. 6

* *The Court has served the writ of action to the [buyer], S Production and Trading Limited Company, but the [buyer] has not provided any written statement of opinion in response.* During the mediation sessions held on 27 December 2021 and 4 January 2022, Ms. Nguyen Thi Le, the legal representative of the [buyer], acknowledged the debt owed to the [seller]. However, as she was not the legal representative at the time the debt was incurred, she was not aware of it. To resolve the matter, the [buyer] proposed to pay the [seller] 50% of the original purchase amount without interest. The [buyer], faced with a difficult situation, proposed a settlement wherein they would pay the [seller] 50% of the original purchase amount without any interest required.

7

During the trial, the [seller]'s legal representative maintained the claim for the principal but modified the demand for the interest rate to be 3% per year x 150% = 4.5% per year on the original purchase amount. The legal representative of the [buyer] was duly summoned by the Court to attend the trial twice, but failing to appear without justification.

8

The representatives of the People's Procuracy of Binh Duong Province expressed their opinion that: the handling of the case by the People's Court of Binh Duong Province was within its competence. The process of settling the case, the persons conducting the proceedings, and the participants in the proceedings complied with the provisions of the Code of Civil Procedure. In regards to the resolution of the case, the [seller]'s claim was admissible and the trial panel was recommended to accept the [seller]'s entire claim for the delayed original purchase amount and interest in its entirety.

9

Upon a diligent examination of the case file and all pertinent evidence during the course of trial proceedings, and after the comprehensive consideration of arguments presented by both parties, as well as the opinions expressed by the representatives of the People's Procuracy of Binh Duong Province regarding the resolution of the case;

10

[Reasonings of the Court:]

[1]. Regarding the proceedings:

[1.1]. On dispute resolution jurisdiction:

According to Article 6 Contract of Sale and Purchase of Goods No. KE6-056/06-17 dated 5 June 2017, the parties agreed to designate the Vietnam International Arbitration Center at the Ho Chi Minh City Chamber of Commerce and Industry as the arbitration to resolve any disputes. However, this particular arbitral institution does not exist in practice, rendering the arbitration agreement «unenforceable», according to the explicitly stated Article 4 of Resolution No. 01/2014/NQ-HDTP dated 20 March 2014 of the Council of Judges of the Supreme People's Court, providing guidance on the implementation of certain provisions of the Law on Commercial Arbitration of 2010.

11

According to Article 6 of the Law on Commercial Arbitration of 2010, «in case the disputing parties have an arbitration agreement and one party initiates legal action in court, the court must reject the case unless the arbitration agreement is void or unenforceable.» After comparing this provision with the circumstances of the current case, it has been determined that the lawsuit initiated by W S Limited Company against S Limited Company at the People's Court of Binh Duong province conforms to the provisions of the Law on Commercial Arbitration, as well as Articles 30, 35, and 37 of the Code of Civil Procedure of 2015, as the arbitration agreement cannot be implemented.

12

[1.2]. Regarding the statute of limitations:

The Contract of Purchase and Sale No. KE6-056/06-17 specifies a payment period of 90 days from the date of the bill of lading, which in this case is 2 July 2017. As W Limited Company filed a lawsuit on 5 June 2018, within the statute of limitations as prescribed by Article 319 of the Commercial Law of 2005, the legal action is deemed to be within the statute of limitations.

13

[1.3]. On the participation of litigants:

The [buyer] was summoned twice in accordance with legal procedures, but failed to appear. In accordance with Point b, Clause 2, Article 227 of the Code of Civil Procedure, the Court is authorized to proceed with the trial in the absence of the [buyer].

14

[2]. Regarding the application of the law:

Both China and Vietnam are parties to the 1980 Vienna Convention on contracts for the International Sale of Goods (hereinafter referred to as the CISG). The CISG has been in force in China since 1988 and has been in force in Vietnam since 1 January 2017. Article 1(1)(a) of the CISG provides as follows:

15

«This Convention applies to contracts of sale of goods between parties whose places of business are in different States.

a. When these States are States Parties to the Convention.»

The Purchase and Sale Contract No. KE6-056/06-17 was signed on 5 June 2017 between an enterprise with a commercial head office in Vietnam and another enterprise with a commercial head office in China. Therefore, the CISG is the applicable law instead of the domestic law. Concurrently, Clause 1, Section 5 of the Commercial Law of 2005 stipulates: «Where an international treaty to which the Socialist Republic of Vietnam is a contracting party provides for the application of foreign laws, international trade practices or has provisions different from those of this Law, the provisions of such international treaty shall apply.»

16

[3]. On the merit of the case:

[3.1].

17

The Purchase and Sale Contract No. KE6-056/06-17, signed on 5 June 2017, between a Vietnamese enterprise and a Chinese enterprise, contains provisions that are lawful and do not violate social ethics, and thus, creates legally binding rights and obligations between the parties. The performance of the contract has been demonstrated by the full delivery of the goods in accordance with its terms. The [seller] has presented documents and evidence that are consistent with those provided by the Customs Department of Saigon Port Border Gate Area I, which includes the Declaration of imported goods (raw customs), the Written request to bring the goods to the preservation of Company S, Commercial invoices, goods packaging lists, bills of lading and registration certificates for state inspection of the quality of imported pesticides. These documents confirm that S Company has completed the customs clearance of 3,000 liters of AZOXYSTROBIN 250G/L + DIFENOCONAZOLE 150G/L (Branded trade: ASMILATOP SUPER 400SC), worth \$ 38,400 from W Company (China). The [seller] additionally submitted a Letter of Confirmation of Payment from the Director of S Company, which confirms the quantity of the imported goods and the commitment of Company S that it will make a payment of \$ 38,400 by November 30, 2017. During the trial, the legal representative of S Company acknowledged the debt owed to W Company but proposed to pay only 50% of the total amount. However, the [seller] did not agree to the proposal, resulting in the unsuccessful mediation. Consequently, it is evident that S Company is indebted to W Company for the unpaid amount of \$38,400. As the contract in question is an international sales contract, the agreement to pay in USD by the parties does not violate the provisions of the law on foreign exchange management. As per the regulations of Article 53, Article 54 CISG and Article 50 of the Commercial Law of 2005, S Company is legally obliged to make the payment.

[3.2.].

18

Regarding interest on late payment: Both Article 78 of the CISG and Article 306 of the Commercial Law of 2005 provide that the defaulting party has the right to claim interest on the overdue amount. The [seller] is claiming that the interest on late payment, calculated from the date of delayed payment under the contract (i.e., from the bill of lading date of 2 July 2017 plus 90 days to 3 October 2017) until the date of filing the claim (5 June 2018), is in accordance with the contract and does not violate the law. However, the Purchase and Sale Agreement No. KE6-056/06-17 does not specify the late payment interest rate. The [seller]'s original claim is for an interest rate of 10% per year, as stipulated under Article 306 of the Commercial Law of 2005: «When a party that breaches a contract delays payment for goods or services, the aggrieved party may claim interest on the delayed payment at the average interest rate for overdue debts in the market at the time of payment for the period of delay, unless otherwise agreed or provided for by law.»

Based on the verification conducted by the People's Court of Binh Duong Province, the average lending interest rate in the market was determined by considering the interest rates announced by three major banks in the province, namely the Joint Stock Commercial Bank for Investment and Development of Vietnam, the Joint Stock Commercial Bank for Foreign Trade of Vietnam, and the Saigon Thuong Tin Commercial Joint Stock Bank. The court found that the interest rate for short-term foreign currency loans denominated in is 3% per year. Overdue interest rate is: 3% per year x 150% = 4.5% per year. During the trial, the [seller] modified their request, stating that the interest rate of 4.5% per year should be accepted, which is consistent with the average interest rate on overdue debts in the market, in particular: \$ 38,400 USD x 8 months 3 days x 4.5% per year = \$ 1,166.4 USD.

19

[4].

The People's Procuracy of Binh Duong province's position on the settlement of the case is appropriate.

20

[5].

Regarding court fees: The [seller] is not liable to pay court fees. The [buyer] is liable to pay court fees on the amount owed to the [seller], as per the law.

21

For the above reasons,

[Decision:]

In application of Article 6 of the 2010 Law on Commercial Arbitration; Article 4 of Resolution No. 01/2014/NQ-HDTP dated 20/3/2014 of the Council of Judges of the Supreme People's Court guiding the implementation of certain provisions of the Law on Commercial Arbitration in 2010.

22

In application of Articles 30, 35, 37, Clause 2, Article 227, Articles 266, 271 and 273 of the Civil Procedure Code; Resolution No. 326/2016/UBTVQH14 dated 30/12/2016 of the Standing Committee of the National Assembly stipulating the level of collection, exemption, reduction, collection, remittance, management and use of court fees and court fees;

In application of Article 1(1)(a) and Articles 53, 54 and 78 of the 1980 Vienna Convention on Contracts for International Sale of Goods (CISG); Clause 1, Article 5, and Articles 11, 50, 306, 319 of the 2005 Commercial Law.

The court decided to:

1. Grant the request of Company W to bring the lawsuit regarding the dispute over the contract of sale and purchase of goods, and orders S Manufacturing and Trading Co., Ltd. to pay the amounts owed under the Purchase and Sale Agreement No. KE6-056/06-17 dated 5 June 2017, which includes:

23

- Commodity debt: 38,400.
- Late payment interest: 1,166.4.

- In total: 39,566.4.
- Payment method: Wire transfer.

In case these amounts are paid directly in the territory of Vietnam, they shall be converted into Vietnamese Dong at the central exchange rate of Vietnam Dong to US Dollar announced by the State Bank at the time of payment.

From the date of the execution petition of the debtor (for the amounts payable to the debtor) until the execution of the judgment, the executing party shall bear interest on the amount still to be executed at the interest rate specified in Article 357, Article 468 of the Civil Code of 2015.

2. Regarding court fees:

24

- Company W is not liable to pay court fees and shall receive a refund of VND 20,000,000, which was paid as an advance for court fees according to Receipt No. 0026760 dated 12 June 2018, of the Civil Enforcement Department of Binh Duong province.
- S Manufacturing and Trading Limited Company is liable to pay to court fees of VND 39,500,000.

3. On the right of appeal: The litigant present at the trial has the right to appeal this decision within 15 days from the date of adjudication. The absent litigant has the right to appeal within 15 days from the date of receipt of the judgment or the date the judgement is published in accordance with the law.

25

In case the judgment or decision is executed according to Article 2 of the Law on Civil Judgment Enforcement, both the civil judgment enforcement and the person subject to civil judgment enforcement have the right to agree on the enforcement, request it, or be forcibly enforced according to Articles 6, 7, and 9 of the Law on Civil Judgment Enforcement; the statute of limitations for enforcement of judgments shall comply with Article 30 of the Law on Civil Judgment Enforcement./.