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The right to avoid the international sale of goods contract: Comparison of Viet Nam to CISG and PICC

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ABSTRACT

Foreign trade is an indispensable activity in the globalization era. Researching the liabilities of parties in performing the sale contracts and the avoidance right of parties in the contracts is a vital issue. Therefore, this article compared Vietnamese Commercial Law 2005 with the United Nations Convention for the International Sale of Goods (CISG) and Principles of International Commercial Contracts (PICC) regarding the avoidance of sale contracts, including the three aspects, fundamental breach, failure in performance obligations of contract at the end of adding time, and anticipatory breach. The findings not only enable Vietnamese merchants to master international rules in establishing foreign trading but also show differences and similarities between Vietnamese law and international rules. By doing that, this article puts forward some implications for rebuilding the definition of “fundamental breach” in Vietnamese commercial law. Also, this paper suggested that the avoidance clause of the Vietnamese law should include the claim to terminate the agreement of the innocent party due to the non-performance party’s failure to fulfill contractual duties at the end of adding time, and the other party will be constituted an “anticipatory breach”.

1. INTRODUCTION

The sellers and buyers enter a sale of goods transaction to acquire their benefits from performing the content of the agreement. Thus, the contract is not obviously avoided by the parties or the judges. Avoiding contracts will be entitled as having a breach of a party in the contract; however, not all breaches of a contract permit the aggrieved party to end the agreement. Typically, different legal systems have various approaches to limit a claim for avoidance. In international trading, among several conditions that are adopted, a serious breach (fundamental breach) is commonly used as a mandatory criterion for termination (Jan, 2017). It was seen above that identifying whether such non-performance is severe enough for avoidance

depends on specific regulations in domestic and international rules.

While CISG and PICC have codified a clear foundation for identifying how “fundamental breach” is understood, the current laws of Viet Nam regarding “fundamental breach” are quite general, so it is impossible to make a uniform understanding at courts. Also, in Vietnamese law, the claim to avoid the transaction of the innocent party after the debtor’s failure to continuously undertake their obligation within added time needs to be outlined more concretely. Finally, a contractual remedy can only be brought where the other party failed to perform. It means that no termination can be claimed before there is an actual non – performance (Jan, 2017). Nevertheless, PICC and CISG have

shown that one party involved in a contract is entitled to announce to the other party, prior to the agreed-upon performance date, that he is not able to conduct his duties according to their consensus. This is called an “anticipatory breach” of contract, which entitles the aggrieved party to terminate the performance of the contract immediately regardless of the day fixed for performance (Evan, 2005). The author’s view of point is that Vietnamese lawmakers should consider an “anticipatory breach” as a context for avoidance. Above all, taking a critical look at the terms of CISG and PICC may help Viet Nam improve its pertinent rules as well as provide useful knowledge to Vietnamese merchants in concluding and conducting international sales of goods contracts.

2. FOUNDATION FOR AVOIDING CONTRACT UNDER CISG, PICC AND VIETNAMESE LAW

2.1. Fundamental breach

Evaluating a non-performance of the breaching party as a condition for termination is not similar in different countries. In France, the courts will allow the injured parties to avoid the contract if a non-performance is serious and causes a significant detriment to them. Under German law, avoid the contract is allowed “the non-performance or poor performance of the contract brings a disadvantage for the innocent party that is substantially deprives the innocent's expectations under the contract” (Hein, 2017). Under English law, there exists a fundamental principle allowing the innocent party to terminate a contract if the breach by the other party is adequately severe, requiring a "substantial failure of performance." English lawmakers divide terms of contracts into two groups, namely condition and warranty terms. The contract can only be terminated due to condition terms (the root of the contract) that were committed (Evan, 2005).

To make a uniform statute for working out foreign trade contract, the United Nations Convention for the International Sale of Goods (CISG) has now been ratified by eighty countries, including Viet Nam. “Fundamental breach” was found in CISG as a base requirement for an immediate termination.

Under CISG (United Nations, 1980), the buyer has the right to claim the contract terminated if the seller's failure to fulfill any contractual obligations, as outlined in the contract or the convention itself, constitutes a fundamental breach (Article 49). “Fundamental breach” is defined as a violation of

the contract by one party which in turn causes detriment to the other party to the extent that the other party suffers from substantial deprivation of what they are entitled to expect from the contract, unless the breaching party is unforeseeable and a reasonable person in similar circumstances would not have foreseen such an outcome (Article 25). Clearly, according to Article 25, to determine how fundamental breach is, we need to provide focus on four main contents. First, what is the detriment? The detriment in CISG can be understood as a result of a contractual breach from the breached party. However, detriment was not defined clearly. Whether impairment requires factual damages or losses and whether it covers only material losses or invisible damages as well. To this extent, legal scholars have recognized that the term detriment within the CISG encompasses all (actual and future) negative consequences of any breach of contract, not just present and future financial losses resulting from a breach of contract, but also any other adverse consequences. The extent of the detriment does not matter in this assessment. The extent of the deprivation is a noteworthy point (Michael, 2010). Thus, for a breach to be considered fundamental under the CISG, it must result in a detriment that significantly deprives the innocent party of what they are entitled to expect from the contract. The reference to the expectation under the agreement clarifies that the criteria for determining a breach of contract should be based on both the explicitly stated terms and the implied terms within the contract itself. For example, tiles sold as “impermeable” that turned out to be easily stained by household items such as juice constituted a fundamental breach of contract. In *Delchi Carrier SpA v. Rotorex Corp*, the second Circuit Court of Appeals held that a fundamental breach of contract occurred when the air compressor did not comply with the sample model and the accompanying specifications regarding cooling capacity and energy consumption (Larry, 2005). The next element of a fundamental breach is in favor of the breached party since the foreseeability requirement would be considered. It means that the consequences caused by the breaching action must have been foreseeable. If the debtor proves that they did not foresee and a person who has similar qualifications in the same situation is unforeseeable, such result, there is no fundamental breach (Eduardo, 2007). Typically, in international business, requiring one party to be aware of all of the expectations under the contract of the other party is difficult. So, foreseeability plays a crucial role in

contract law by excluding the breaching party from liability for violation of the agreement if the substantial consequences of the breach could not have been anticipated. Similar to CISG, PICC (The International Institute for the Unification of Private Law [UNIDROIT], 1994) recognizes fundamental breach is an essential ground for avoidance as well. It is noteworthy that while the foundation for identifying fundamental breaches has yet to be clarified in CISG, PICC has made a specific guideline for determining a fundamental breach with five remarkable signals.

The first signal also takes substantial deprivations into account: “The non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract, unless the other party did not foresee and could not reasonably have foreseen such a result” (Art. 7.3.1, cl. 2, pt. a). Unlike CISG, PICC does not require actual damages or material losses (detriment) as a basic condition for avoidance. Under PICC, there is a fundamental breach if the aggrieved party is bereaved of what they expect under the agreement. Obviously, this rule allows for eradicating the difficulties of the aggrieved party in proving actual detriment. In the next circumstance, PICC considers the type of terms in the contract as a base. It means that if the duty that has been violated is the root of the contract, this non-performance also becomes a fundamental breach. (Art. 7.3.1, cl. 2, pt. b). The next signal for determining a fundamental breach depends on the breaching party's fault. Naturally, the non-performance which is caused by a neglectful or intentional action obviously raises a claim for avoidance from the breaching party (Art. 7.3.1, cl. 2, pt. c). The right to avoid the contract of the aggrieved party in this situation is not only used as a self-protective solution but also is a strict remedy to the negligent party. The next concept of a fundamental breach is that “the non-performance gives the aggrieved party reason to believe that it cannot rely on the other party's future performance” (Art. 7.3.1, cl. 2, pt. d). For a claim for avoidance in this situation, the injured party must illustrate that there is proper non-performance in the future from the breaching party. Termination will be merely adopted if the innocent party's inference is justifiable. The last concept of fundamental breach is that “the non-performing party will suffer disproportionate loss because of the preparation or performance if the contract is terminated” (Art. 7.3.1, cl. 2, pt. e). This concept relates to the case whereby the breaching party has believed in the

contract and prepared or promoted to perform the contract. Here, even though the breach is severe enough that the aggrieved party may terminate the contract, it is also necessary to focus on disproportionate damages suffered by the breaching party. The aggrieved contractor cannot claim avoidance if the substantial consequences of this remedy give rise to serious damage regarding the breaching party because they spent a wealth of cost, and effort for preparation or performance while continuously performing the contract still enables the aggrieved party to gain what they expect under the contract.

According to Vietnamese law, the claim for avoidance of the aggrieved is accepted if the breaching party's actions constitute a fundamental breach (The National Assembly of Viet Nam, 2005). The definition of fundamental breach in Vietnamese commercial law is partly different from that of CISG and PICC. Under Vietnamese commercial law, “fundamental breach means a contractual breach by a party, which causes damage to the other party to an extent that the other party cannot achieve the purpose of the entry into the contract” (Art. 3, cl.13). Clearly, to determine a breach as a fundamental breach, two factors need to be proved. Whether the aggrieved party suffered “detrimental” and whether they were deprived of their purpose of concluding the contract. The concept of fundamental breach under Vietnamese law repeats an ambiguous requirement that has yet to be clarified in CISG. Apparently, the innocent party's deprivation regarding his expectation is a vital condition, and it is proof of damage (negative consequence) whilst proving actual loss is unnecessary. Considering the findings from analyzing the relevant regulations in CISG and PICC, determining whether the aggrieved party can no longer acquire the purpose of entering into the contract can be challenging. This determination often relies on the intentions of the parties, which might not always be explicitly outlined in the contract terms. Vietnamese law lacks specific guidelines for determining a “fundamental breach”, whereas PICC has named concrete circumstances that promote its application more effectively than Vietnamese law.

2.2. Failure in performance obligations of contract within the adding period

Article 49 CISG lays down two conditions for avoidance by the buyer. Subparagraph (1) (a) gives the buyer the right to terminate the contract where the seller's breach amounts to a fundamental breach

of the contract mentioned in Article 25 CISG. Whilst, Subparagraph (1) (b) deals with the late delivery and circumstances where the seller does not completely deliver the goods. In some cases, a delay or non-delivery might not automatically qualify as a fundamental breach unless timely delivery is explicitly outlined as a critical aspect of the contract. However, if the timely delivery is deemed essential, the buyer can still declare the contract avoided if the seller fails to deliver within an additional period specified by the buyer after the initial breach. As regards to the seller's entitlement for avoidance, Article 64 CISG indicates the seller can make a claim for avoidance if the buyer does not conduct his obligation to pay the price or take delivery of the goods within the additional timeframe predetermined by the seller or if they declared that they will not do so during the period so fixed. It is accepted that the injured party has the right to terminate the contract merely after the additional period has expired and subsequent performance has not been tendered. The party in breach has not utilized its "second chance" (Reiner, 2021). It is noteworthy that, in this context, late delivery is not required to become a fundamental breach, whereas the failure in performance obligations at the end of the added time becomes a crucial condition.

According to Art. 7.1.5, cl. 3, PICC acknowledges that "Where in a case of delay in performance which is not fundamental, the aggrieved party has given notice allowing an additional period of reasonable length, it may terminate the contract at the end of that period. If the additional period allowed is not of reasonable length, it shall be extended to a reasonable length. The aggrieved party may in its notice provide that if the other party fails to perform within the period allowed by the notice, the contract shall automatically terminated". Furthermore, Article 7.3.1, PICC indicates that: "In the case of delay, the aggrieved party may also terminate the contract if the other party fails to perform before the time allowed under Article 7.1.5, cl.3 has expired".

Thus, the nature of these PICC regulations is similar to the relevant acts of CISG. The avoidance clause under PICC also distinguishes between termination due to failure to perform essential obligations (Art. 7.3.1) and termination resulting from a delay in delivery because of non-compliance with a *Nachfrist* (Art. 7.1.5). Under German law, the termination of a reciprocal contract is called *Rücktritt*. Under the *Nachfrist* approach, if a debtor fails to perform on time or in line with the contract and the creditor has also "specified, without result,

a reasonable period for performance or cure" (Art. 323(1) BGB). Other legal systems also adopt *Nachfrist* model as the basis for statutory regulations concerning contract termination (Hein, 2017).

Obviously, the avoidance right will be laid down because of a fundamental non-performance (comprising non-conforming goods or late performance). If a delay in performance is not justified as a fundamental breach, the innocent party is not entitled to declare avoidance immediately. The breaching party will be extended for continuously conducting their duty. A claim for avoidance is merely accepted, in which the party in breach is unable to fulfill their obligation within the extended period set by the injured party.

Vietnamese law has not emphasized this concept in the avoidance regime. A similar content has been found in Article 299 – Vietnamese Commercial law regarding the relationship between specific performance remedies with the rest of remedies (including avoidance). According to Art 299, applying the remedy to specific performance allows the breaching party to be extended for a period to finish his late delivery. If they fails to conduct their obligations subsequently within the adding period of time fixed by the injured party, the other remedies (comprising avoidance) could be applied by the aggrieved party in order to prevent his detriment. Perhaps, this content leaves open the question whether the aggrieved party could be obviously declared contract avoided after the failure of the breaching party in continuously conducting breached obligation within the time limit set by the innocent party. Whether this breached action must be determined as a fundamental breach, which the creditor may make a claim for avoidance. It is vital to build a concrete circumstance in the avoidance regime under Vietnamese commercial law.

2.3. Anticipatory breach

According to Art. 72 in CISG, the test of the anticipatory breach has been addressed that one party has the right to avoid the transaction if the other party constitutes a fundamental breach of contract before the time fixed for performance under the contract. It has to be clear that this non-performance will occur, which will more easily be satisfied with renunciation than for incapacity. In the words of one court, this requires that a debtor both seriously and expressly or unambiguously deny its obligation under the contract (Michael, 2013). It is accepted that the concept of anticipatory breach

may be illustrated by the creditor's inference or is a notice from the non-performance party. As for the former, the party intending to declare the contract being avoided must issue a suitable announcement to the other party in order to permit him to provide consistent assurance of his performance. As for the latter, such notice is not mentioned (Art. 72, cl 2 and cl 3). It is possible that including anticipatory breach as one of grounds for avoidance stems from constraint that the aggrieved party must mitigate their losses in making a claim for damages. As regards to adequate assurance, this matter has yet to be interpreted in CISG, but it could provide information to the party in need of assurance or interpreting to his suspicion or even giving a bank guarantee of performance. Giving the breaching party this opportunity prevents the injured party from abusing the authority to put the contract to an end.

For anticipatory breaches in PICC, it can be found in Article 7.3.3. This provision was modeled on Article 72(1) CISG. Article 7.3.3 PICC provides: "Where prior to the date for performance by one party it is clear that there will be a fundamental non-performance by that party, the other party may terminate the contract". PICC has mentioned adequate assurance as well. The context, however, is not similar to CISG. While Article 72(2) CISG requires the creditor to give reasonable notice to the debtor in order to permit him to provide adequate assurance of his performance in cases of an 'objective' anticipatory breach, under Article 7.3.4 PICC, a sufficient guarantee requirement can be applied as the innocent party's intention rather than his obligation (Larry & Chen, 2017). Naturally, offering an opportunity for the breaching party to ensure his capacity is established as a legitimate right of the innocent party. Therefore, ignoring such content would result in the contract being avoided by the subjective judgment from the non-breaching party because the non-performance has not occurred at the time fixed.

Under Article 314 of Vietnamese commercial law, the aggrieved party may solely avoid the contract as the non-performance party committed their obligations (fundamental breach or others under their agreement). It means that anticipatory breach has not been stipulated in Vietnamese law. The

results show that accepting the right to avoid the contract because of an anticipatory breach in CISG and PICC encourages Vietnamese Lawmakers to take a critical look at this concept. Clearly, this regulation assists in minimizing losses to the aggrieved party instead of waiting until the non-performance has happened on the day fixed.

3. CONCLUSION

The avoidance of the agreement in CISG and PICC contains the same crucial elements, while Vietnamese law reveals several different points. To make the regulations in terms of the basics for avoidance much more conceivable and consistent with international rules, Vietnamese law should consider the following three issues:

First, it is vital to rebuild a new definition in relation to "fundamental breach". The new definition should cover two main ideas: The first one is that the expectation of the innocent party can be probably found in the terms of the contract. So, determining what the injured party may expect under the contract is more reasonable than clarifying what the innocent's purpose is. The new concept of fundamental breach should exclude the "damage" factor because its meaning has been neglected in ascertaining the characteristics of fundamental breach in practices.

Second, the termination of the contract in a circumstance where the breaching party fails to carry out their obligation during the adding period is necessary for protecting the legitimate rights of the innocent party. The strict remedy in such a context is worthy of the non-performance party's failure in the second chance. It is recommended that Vietnamese law should draw a specific framework for this concept in the avoidance regime.

Finally, the anticipatory breach should be accepted as an advanced rule since it makes the legitimate safety of the parties in the contract much more thoughtful and allows the parties to mitigate their damages. It is easy to understand why CISG and PICC have taken anticipatory breach as an essential context for avoidance. Thus, anticipatory breaches should be considered in improving Vietnamese law regarding avoidance.

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