The form of contracts for the international sale of goods plays a key role in determining the existence of a contract in practice. Both the 1980 Vienna Convention (CISG 1980) and Vietnamese Commercial Law 2005 have different provisions on this issue. However, Vietnam has reserved the provision on contracts form in Article 11, Article 29 and Part II of the CISG 1980 (this reservation complies with Article 12 and Article 96). This reservation is the cause of the problems in the settlement of disputes over the form of the contracts the implementation of which is related to Vietnam. This article will analyze the situation of conflict of laws on the form of contracts for international sale of goods under Article 11 of the CISG an under the Vietnamese Commercial Law 2005 and also point out the importance of form of contracts in foreintrade relationships. Through these analyzes, the article will make recommendations to improve the effectiveness of the implementation of these regulations in practice, contributing to the role of law to create a strong legal framework to promote foreign trade activities.

Keywords: conflict of laws; form of contracts.

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«Коллизии в правовом регулировании формы договора международной купли-продажи товаров между нормами статьи 11 Венской конвенции 1980 г. и Вьетнамского коммерческого закона 2005 г.» (Vu Thi Bich Hai, Nguyen Ngoc Bien Thuy Huong)


Ключевые слова: коллизия правовых норм; форма договоров.

The accession to the CISG 1980 has marked an important milestone in Vietnam’s entry into international multilateral treaties on trade and the enhancement of international integration, contributing to the improvement of the Vietnamese regulations on this field, creating a modern, fair and safe legal framework for Vietnamese enterprises to implement their own contracts for
the international sale of goods. The CISG 1980 is becoming more and more important in the situation when Vietnam is promoting export and import, expanding international trading market and many Vietnamese businessmen have to cope with the risks in trading with foreign partners. Thus, in Vietnam, before and after the President’s Approval (November 24th, 2015) of the accession to the CISG 1980, the legal issues related to the international contract were discussed and analyzed in many forums of legal and economic community in Vietnam. A number of workshops were organized to research the content of the CISG 1980, such as the Workshop «Applying the UN Convention on Contracts for International Sale of goods in international trade dispute resolution at the Vietnamese Courts» held by the Supreme Court and the UNDP in Vietnam on 21.02.2019 [6], Workshop on «Interpretation and application of CISG in international trade practice» organized by the Vietnam Commission for the Promotion of International Trade (CISGVN) in cooperation with the International Trade Lawyers Club (VBLT) on 12.09.2017 and 15.09.2017 [5], etc. Although the form of the contract of international sale of goods is also a part of the CISG 1980, this issue seems to be less attractive to the domestic researchers because the CISG allowed members to reserve this provision. Therefore, in Vietnam, the research on this issue is limited. The article «International Business Contracts — Some problems enterprises should pay attention to» by Nguyen Xuan Cong is one of the few papers on this issue [10]. The paper analyzes the concept, characteristics of contract and the form of contract in comparison with the Vietnamese Commercial Law 2005. However, this paper does not analyze the current situation as well as difficulties in applying this regulation in the context of Vietnam’s increasing integration into the global economy.

In the world, this issue is also discussed inadequately because most developed market economies regulate the form of contracts similar to the 1980 CISG, so there is no legal conflict. This situation mainly occurs in developing countries. However, members of the CISG 1980 [3] are mostly developed countries.

In Vietnam, many enterprises still have limited understanding of the CISG, and some of them are even not aware of the CISG [8]. Therefore, the purpose of the paper is to clarify the general issues of the form of contracts for the international sale of goods in accordance with Article 11 of the CISG 1980 and the Vietnamese Commercial Law 2005 as well as to analyze some difficulties in implementing this type of contract.

The results of this paper will be a source of reference for Vietnamese legislators in finalizing Vietnamese law to conform with the international practice and the socio-economic situation of the country. Enterprises can also take this paper as a reference for the application of the provisions of CISG and provide some appropriate recommendations on how to protect their legitimate rights and interests. Moreover, this paper is a useful source of reference for teaching, learning and researching international trade law.

1. The provisions of CISG 1980 and Vietnamese Commercial Law on the form of contracts

The form of contracts for international sales of goods is the «outer sheath» containing the unity of the will of the parties in a contractual relationship. The contracts might be expressed by: i) writing text, ii) speech, iii) act, iv) witness testimony; v) other forms. Due to different legislative views, the CISG 1980 and the Law of Vietnam regulate this issue differently.

1.1. Under the CISG 1980. The fact that the CISG 1980 provides «quite loose» regulations on the form of contracts has created the best conditions for the parties to set and obtain their goals participating in the international merchandising relation (Ms. Nguyen Thi Thu Trang. The Deputy Director of the Legal Department of the Vietnam Chamber of Commerce and Industry (VCCI) concludes: «The CISG 1980 coming into force will carry forward a wide range of benefits to the Vietnamese enterprises. Vietnam has been enhancing its export of goods. The import-export activities are taking place excitingly and contracts on international sale of goods have accounted for a large proportion in the total number of contracts in general» [1]). According to Article 11 of the CISG 1980, a contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be provedby any means, including witnesses. This is also stated in the law of most countries having a developed market economy like England, France, America. In other words, the contract may be expressed in any form. In particular, the following can be mentioned:

**Written form of contracts**: This form meets the conditions on the safety, comprehensiveness and clarity of a contract for international sale of goods. Accordingly, the parties express their will as well as the content of the clause they wish to commit and can check the contract quickly and accurately. Moreover, this is also the most effective evidence if the parties have disputes [4, p. 166]. With the above advantages, this form is often applied to the important contracts which have high value or complex content, or long duration.

Apart from the traditional writing form (paper-based contracts), under Article 13 of the CISG 1980, telegram and telex are also considered as written forms of contracts.

**Verbal form of contracts**: A verbal contract (or an «oral contract») is made directly by speech or indirectly by voice message to express the thoughts and intentions of the parties. The advantages of this form are simplicity, speed and maximum cost savings for the parties, but it also has a downside which is the difficulty of proving
their true will if a dispute arises. Therefore, in practice, in order to avoid denial of the parties involved, this form is usually applied to contracts of minor value, the parties to which have relations of mutual goodwill and mutual trust.

**Act form of contracts:** Specific acts in this case must merely be action (not verbal or written) [see: 4]. This form is usually applied when the parties clearly understand the content of the contract and accept all conditions stipulated by the other party.

**Witness form of contracts:** The testimony of a witness is the confirmation of those who see entering into a contract, execution and termination of a contract. Nevertheless, it is not always easy to find witnesses and get their consent to testify about the existence of a contract for the international sale of goods.

**Other forms:** In addition to the above forms of contracts, the CISG 1980 also accepts other forms of contracts if they ensure the objective truth of the existence of the contract.

Basically, choosing an appropriate form for the contract is decided by the parties based on the principle of freedom to agreement. However, for written contracts, the provisions on amending and terminating contracts seem to be stricter. Under Article 29 of the CISG 1980, a contract may be modified or terminated by the mere agreement of the parties. A written contract which contains a clause stating that any amendment or termination of the contract must be made in writing by the parties cannot be altered or terminated by the agreement between the parties in any other forms. However, the conduct of either party may not allow them to invoke such a provision to the extent that the other party may rely on that conduct.

1.2. **Under the Vietnamese Commercial Law 2005.** Article 24.1 of the Vietnamese Commercial Law 2005 (VCL 2005) stipulates that contracts for sale and purchase of goods may be expressed in verbal or written or established by specific acts. This provision also complies with Article 119 of the Civil Code 2015 on the form of civil transactions [9]. Nonetheless, the contracts for «international purchase and sale of goods shall be conducted on the basis of written contracts or other forms of equal legal validity» (Clause 2, Article 27 VCL 2005). Forms of validity equivalent to documents include telex, facsimile, data message and other forms provided for by law (Clause 15, Article 3 VCL 2005). This is similar to the regulations of other developing countries in the world.

Thus, for the international purchase and sale of goods, while VCL 2005 only recognizes written contracts, the CISG 1980 recognizes the principle of freedom to agreement, that is to say, a contract for international sale of goods is not always in writing but can be established by speech or specific acts or in a manner that can be demonstrated in any way, including testimony of witnesses (Article 11 CISG 1980).

Article 5 of the VCL 2005 regulates the application of treaties, foreign laws and international commercial practices. Accordingly, in cases where a treaty to which Vietnam is a contracting party stipulates the application of foreign laws or international commercial practices, or contain provisions different from those of this Law, the provisions of such a treaty shall apply. Parties to commercial transactions involving foreign elements may agree to apply foreign laws or international commercial practices if such foreign laws or international commercial practices are not contrary to the fundamental principles of the Vietnamese law.

In addition, the Civil Code 2015 also provides for the principle of the application of foreign laws to civil relations involving foreign elements at Article 664.1, Article 665.2 and Article 683.7. Under Article 683.7 of the Civil Code 2015, the form of a contract shall be determined in accordance with the law applied to this type of contract. In case the form of a contract does not comply with the form of the law applied to such a contract but it complies with the form of the law of the country where the contract is entered into, or with the law of Vietnam, such a form of contract shall be recognized in Vietnam.

Due to the legal conflict over the form of the contract, the CISG 1980 chose a compromise by incorporating into the CISG 1980 the provisions which would recognize both forms of the contract. Article 11 of the CISG 1980 provides that the contract may be concluded verbally and it is not necessary to comply with any other requirements on the form of the contract. Article 96 of the CISG 1980 allowed a country to make a reservation of Article 11 of the CISG 1980, if the law of that country stipulates that the contract must be in written form.

To conform with those provisions mentioned above, Article 1 of the Decision N 2588/2015/QD-CTN dated on 24.11.2015 on Vietnam’s accession to the CISG 1980 confirmed that Vietnam had reserved the provisions on the form of contracts in Article 11, Article 29 and Part II of the CISG 1980. (This reservation is in accordance with Article 12 and Article 96). Under Article 96 of the CISG 1980, if a Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with Article 12 that any provision of Article 11, Article 29, or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has its place of business in that State. And under Article 12 CISG 1980, Any provision of Article 11, Article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing...
does not apply where any party has his place of business in a Contracting State which has made a declaration under Article 96 of this Convention. The parties may not derogate from or vary the effect or this article.

Therefore, although the CISG 1980 officially came into force in Vietnam on 01.01.2017, the provisions of the CISG on the form of contracts do not automatically apply to the contracts which have a Vietnamese enterprise as a party to them. China, which has been a member of the CISG since 1988, also declared that it «shall not be bound by Clause 1.b of Article 1 nor be bound by Article 11 and the provisions of CISG 1980 relating to Article 11» [3]. This discrepancy does not prevent Vietnam from participating in the CISG 1980 because Vietnam has the right to reserve this discrepancy [2]. Nevertheless, this is the main cause leading to problems in the settlement of contractual disputes related to the form of contracts for international sale of goods.

2. The practice of legal conflicts between Article 11 of the CISG 1980 and the Vietnamese Commercial Law 2005 about the form of the contracts for the international sale of goods

Vietnam stimulates the export of goods. Therefore, the activities of import and export are developing and, as a result, the number of contracts for international sale of goods is increasing among other kinds of contracts. However, as discussed above, the VCL 2005 and the CISG 1980 have different provisions on the form of contracts and Vietnam has reserved this article of the CISG 1980. In fact, various issues related to the resolution of the disputes on contracts arise because contracts are not in written form.

For the contracts one party to which is Vietnamese and the other is a CISG 1980 member: Wood, wood products, aquatic products and agricultural products (pepper, cashew nuts, etc.) are some of the key export items of the agricultural sector with a turnover of several billion dollars a year [8]. In the contracts for international sale of these kinds of products, three parties are named including: i) seller (Vietnamese); ii) buyer (foreigners); iii) broker; but only two parties (the seller and the broker) sign the contract (the buyer does not sign it). There are two cases:

Case 1: The seller (Vietnamese) did not deliver goods, the buyer (foreigners) sued the seller (Vietnamese) under Article 11 of the CISG 1980. In this case, the contract was not recognized by the Vietnamese party because they had reserved Article 11 of CISG 1980 and according to Article 12 of the CISG 1980 it «does not apply where any party has its place of business in a Contracting State which has made a declaration under Article 96 of this Convention. The parties may not derogate from or vary the effect of this article».

Case 2: The buyer (foreigners) does not receive goods but the seller (Vietnamese) can not sue the buyer (foreigners) under the law of Vietnam because the buyer (foreigners) does not sign the contract. While Vietnamese law (Clause 2, Article 27 of the VCL 2005) stipulates that the contracts must be made in writing, the seller (Vietnamese) can not sue the buyer under Article 11 of CISG 1980 because Vietnam has reserved this regulation.

For the contracts the parties to which are both foreigners and members of the CISG 1980 (without a Vietnamese party) and which are executed in Vietnam: in this case, the contract may be approved in judgment of a foreign court or in award of foreign arbitration but such judgment and award may not be recognized and enforced in Vietnam because this is «contrary to the basic principles of Vietnamese law» [11, p. 85]. Therefore, the fact that the judgments of foreign courts or awards of foreign arbitrations may not be recognized and enforced in Vietnam because the form does not comply with the provisions of Vietnamese law, is also one of the causes hindering the development of foreign trade.

The VCL 2005 only accepts contracts for international sale of goods in writing. The question is whether it is necessary to make such contracts in writing.

Previously, Vietnamese enterprises made written contracts only to comply with the customs procedures [7] because the dossier must have such a contract (Clause 1, Article 24 of the Law on Customs 2014). However, under Clauses 1 and 2, Article 16 of Circular N 38/2015/TT-BTC dated on March 25, 2015 stipulating Customs procedures, Customs inspection and supervision, Export tax, Import tax and Tax administration applied to Exported and Imported Goods, enterprises are not required to submit contracts on export or import goods, except for export or import goods subject to taxes refusal under Clause 4, Article 16 of this Circular. (According to representative of Vietnam Electronic Industries Association (VEIA), the original contract for international sale of goods for the two parties to negotiate is very long and thorough. However, it is very difficult for a partner to sign something. In fact, a commercial contract is not really necessary for the transaction but it is only for filling in the customs file.)

According to the representative of Panasonic Corporation, companies usually have long-term business partnership, so the contracts have been confirmed by email, not been signed. Therefore, the regulations requiring that contracts for international sale of goods must be included in the customs dossier will make it difficult for enterprises [12]. In fact, due to the customs dossiers requiring a contract for international sale of goods, on the one hand, the parties make a contract to «deal» with customs and this contract does not reflect the truth in the trading relations between the parties. On the other hand, the declaration of e-customs dossiers is also applied. As a result, the current
Law on customs of Vietnam has repealed these regulations (except for export and import goods subject to taxes refusal) is totally appropriate. In fact, basic information related to the customs declaration in the contract is available on the commercial invoice, the bill of lading submitted to the customs office (such as the name of goods, unit price, value, conditions of delivery, payment methods, etc.). At this time, it is unnecessary to enforce the contract in writing to save both the cost and the time for enterprises.

The accession to the CISG 1980 has marked a new milestone in the process of participation in multi-party convention on commerce, as well as enhanced the level of the integration of Vietnam. In addition, this accession has also contributed to the improvement of the Vietnamese legal system on international purchase and sale and helped Vietnamese enterprises establish a modern, fair and safe legal framework for the implementation of the international market economies like Britain, France, the United States, allowing contracts for international sale of goods to be signed verbally, in writing, by act or any other form agreed upon by the parties freely [9]. However, for developing countries like Vietnam, the contract can only be made in writing. This can protect Vietnamese enterprises by engaging in foreign trade because written contracts help not only to monitor and supervise the contract performance effectively, but also to obtain sufficient evidence when a dispute arises. However, this is also the proof of the state monopoly in foreign commercial management and will be an obstacle for the development of foreign trade. From the above analysis, we suggest that Vietnam should not continue to reserve Article 11 of the CISG 1980 and give Vietnamese enterprises the freedom to choose the form of contract when engaged into a relationship of international purchase and sale, so that foreign enterprises have stronger legal beliefs when investing in Vietnam. In their turn, Vietnamese enterprises should take responsibility for choosing the contract form in accordance with their own conditions.

In conclusion, the unification and harmonization of the international law on commerce contracts is an indispensable development trend of international trade. Vietnam has been actively involved in this process by joining the CISG 1980. However, since Vietnam has reserved Article 11 of the CISG 1980, it has definitely led to a number of constraints for Vietnamese and foreign enterprises when engaging in foreign trade. In the coming time, Vietnam should consider implementing Article 11 of the CISG 1980, so that our business entities are free to choose the form of contracts when entering into the relationship of international purchase and sale and to create the sustainable and healthy development of the international economy.

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7. Hợp đồng ngoại thương trong XNK & Thủ tục hải quan = Workshop on Interpretation and harmonization of the international economy. Vietnam has been actively involved in this process by joining the CISG 1980. However, since Vietnam has reserved Article 11 of the CISG 1980, it has definitely led to a number of constraints for Vietnamese and foreign enterprises when engaging in foreign trade. In the coming time, Vietnam should consider implementing Article 11 of the CISG 1980, so that our business entities are free to choose the form of contracts when entering into the relationship of international purchase and sale and to create the sustainable and healthy development of the international economy.

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