

# Extension for contract performance under the CISG 1980 and implications for Vietnamese businesses

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## ABSTRACT

Being adopted in 1980 and getting effective from January 1, 1988, The United Nations Convention on Contracts for the International Sale of Goods (CISG) has become one of the most widely accepted international trade treaties. Despite its validity in Vietnam since the beginning of 2017, the Convention is still applied in a very limited way by domestic businesses. In fact, there have been a lot of sophisticated legal issues in international trade, especially in cases the parties fail to promptly or properly perform their contractual obligations or even in case of non-performance. This article is aimed to study the provisions of additional time for late performance (Nachfrist) under CISG 1980 in comparison with Vietnamese laws, and current situation of extension for contract performance under CISG 1980. The research collected, summarized, compared and analyzed data from trustworthy sources and conducted the in-depth interviews with the experienced experts in commerce, law, and dispute settlement. The results point out some similarities and differences in establishing the additional time between Vietnamese legal documents and the Convention. Furthermore, it is also showed in this article that disputes related to the Nachfrist clause are quite common and tend to decrease, but only with the participation of mainly European countries and China. In terms of content of dispute cases, the rate of disputes arising from the Seller's breach of contract is much higher than that rate from the Buyer's. Regarding methods of dispute settlement, China has nearly always chosen arbitration while European countries have given priority to the court. From the analysis, some implications for Vietnamese businesses in the application and interpretation CISG's provisions of contract extension were represented as solutions to help businesses improve their legal knowledge and limit risks in international commercial activities.

**Key words:** CISG 1980, extension for contract performance, Nachfrist, Vietnam businesses

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## INTRODUCTION

In the context of the continuous fluctuating global economy and politics as well as the unconstrained development of international trade, CISG 1980 was born with the consensus of more than 60 member countries as a uniform law regulating international commercial activities. Within over 30 years from the effective date, January 1<sup>st</sup>, 1988, the Convention has, unquestionably, represented its significant legal role in adjusting international sales contracts. Nowadays, it has been considered as one of the most successful multilateral conventions with 94 States worldwide including Vietnam, the 84<sup>th</sup> State Party<sup>1</sup>.

In fact, since January 1<sup>st</sup>, 2017, when the Convention came into force, it has become a priority unless the applicable law was stipulated in sales contracts in Vietnam. It can be seen that the Convention has gradually developed its effectiveness for Vietnamese businesses. However, most of domestic firms might be vague on the Convention's regulations because of the tendency to use Vietnam Commercial Law (VCL) in adjusting

contractual relations. Furthermore, in the process of implementing contracts, businesses always obviously face risks of contractual violations. In the event of a dispute, businesses need to have a certain understanding to apply appropriately remedies to ensure the maintenance of their contracts and rights. Although there is no significant difference between two legal systems, Vietnamese laws have been not yet fully compatible with CISG. For example, the sanction of contract penalties is governed by VCL 2005 but not mentioned in the Convention. Firms can get into trouble and violate the law if such existence is neglected. With the hope of contributing to legal resources related to CISG and mitigating risks associated with cases of breaching, the authors are inspired to this study. The article will conduct the in-depth analysis into the law provisions and practical aspects with regard to additional time under CISG 1980 to suggest some implications for Vietnamese businesses. This research will study legal issues and practical aspects relating to extensions for contract performance, specifically additional time for late perfor-

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mance (Nachfrist) under CISG 1980. Some implications could be concluded so that Vietnamese businesses are more likely to apply CISG regulations effectively as well as get relevant solutions in case of any disputes.

## LITERATURE REVIEW

### Overseas Research

The *Nachfrist Remedy* by Pilar Perales Viscasillas was presented in "Celebrating Success: 25 Years United Nations Convention on Contracts for the International Sale of Goods" in September 2005 as an outstanding publication. The author focuses on analyzing aspects of provisions relating to fixing additional time such as serving an effective notice. Furthermore, the writing explains the relationship of Nachfrist to other remedies such as specific performance or avoidance<sup>2</sup>.

The publication *Additional Period (Nachfrist) for Late Performance: Perspectives from the CISG, UNIDROIT Principles, PECL and Case Law* of Chengwei Liu (2<sup>nd</sup> edition in March, 2005) clarifies the concept of an additional period fixed for late performance and analyzes the related aspects of additional time in different legal instruments including the CISG, UNIDROIT Principles and PECL<sup>3</sup>.

The next publication is *Nachfrist Was It? Thinking Globally and Acting Locally: Considering Time Extension Principles of the U.N. Convention on Contracts for the International Sale of Goods in Revising the Uniform Commercial Code* of John C. Duncan Jr. (2000). The article considers the need for adding a new provision and rethinks some of the current mechanics in light of potential incorporation of the Nachfrist provision in the following parts. Also, the writing offers suggestions for inclusion of the Nachfrist procedure in light of the reconsideration of these existing provisions<sup>4</sup>.

The research *The Concept of Fundamental Breach and Avoidance under CISG* was submitted for the degree of Doctor of Philosophy by Amir Al-Hajaj, Brunel University in 2015. This paper explores the concept of fundamental breach and the remedy of avoidance under the CISG and examines CISG literature and case law in the area of avoidance and identifies several theoretical and practical issues associated with the current understanding of avoidance as a remedy of last resort. It mentions and clarifies the relationship between Fundamental breach, Avoidance and Nachfrist<sup>5</sup>.

*Nachfrist under National Law, the CISG, and the UNIDROIT and European Principles - A Comparison*, conducted by Maryellen DiPalma in 1999 comparatively examines the application of Nachfrist concepts

in national laws and under the principles of international contract law referred to above as well as reviewing the specifics of notice, reasonable amount of time, and the effects of Nachfrist on avoidance of a contract<sup>6</sup>.

### Domestic Research

The Master dissertation *Gia hạn thời gian thực hiện hợp đồng theo công ước Viên 1980 về hợp đồng mua bán hàng hóa quốc tế và bài học kinh nghiệm cho Việt Nam (Additional Time for Contract Performance under the CISG 1980 and Lessons for Vietnam)* was conducted by Pham Thu Huyen (2011), Foreign Trade University in Hanoi. The dissertation explains provisions of additional time in comparison to German Civil Code, CISG, Vietnamese Commercial Law 2005 and other legal instruments such as PICC, PECL. In addition, some popular disputes are analyzed throughout theories, thereby giving suggestions for some relating institutions<sup>7</sup>.

The article *So sánh các quy định về trách nhiệm do vi phạm hợp đồng trong Luật Thương mại Việt Nam 2005 và Công ước Viên 1980 (Comparing the Provisions of Responsibilities due to Breach of Contract in the 2005 Vietnam Commercial Law and the 1980 Vienna Convention on International Sale of Goods)* written by Phan Thi Thanh Thuy was launched on VNU Science Journal: Study Law, Volume 30, Number 3 in 2014. The writing focuses on comparing the provisions of the VCL 2005 and the CISG in order to clarify differences and similarities between these legal documents. It also makes recommendations to assist Vietnamese businesses and tribunals to choose applicable legal provisions when signing and performing contracts as well as resolving disputes<sup>8</sup>.

The book *Các biện pháp xử lý việc không thực hiện đúng hợp đồng trong pháp luật Việt Nam (Remedies for Non-conforming Performance of Contract in Vietnam Laws)* was compiled and adjusted by Do Van Dai (2013). This monograph book consists of two chapters, resolving each group of problems according to the structure: trial practice, law comparison, suggestion, etc. The chapter one deals with remedies for non-conforming performance of contract that Vietnam Laws regulate while the chapter two learns about remedies for non-conforming performance of contract as agreed between parties such as contract penalty, agreements on late payment interests, and agreements on exemption<sup>9</sup>.

The reference book *Giải quyết tranh chấp hợp đồng thương mại quốc tế (Settlement of international trade contract disputes)* was written by Nguyen Ngoc Lam

(2014). The author researches each legal aspect, the potential risks of disputes through specific provisions of international trade contracts such as disputes in numbers of goods agreed, disputes in terms of contract validity, disputes in clauses of payment, etc. Thereby, the writer proposes solutions to actively prevent disputes and when disputes occur, which methods should be applied to effectively solve<sup>10</sup>.

Moreover, there are also various papers regarding contract performance extensions written by various researchers and scholars all over the world. However, the research papers have been quite theoretical, thus the actual situations have not been much concerned. Besides, there have not been many documents on analyzing situations and disputes regarding to The Nachfrist Principle in a detailed and in-depth manner that Vietnamese businesses may suffer. Therefore, this research is going to study the application of additional time under CISG 1980 in practice over the years.

## RESEARCH METHODOLOGY

*Data collection:* The article collects and produces statistics with regard to Nachfrist provisions on the website <https://iicl.law.pace.edu/cisg/search/cases>, which is represented in part 4 of this research. This method encompasses a sequence of tasks including collecting and sorting to make relevant comparisons; analyzing and synthesizing information and data from reliable sources such as publications, journals, annual reports, researches, both of which are domestic and international.

*Comparative law:* This method involves some essential comparisons to draw out the similarities and differences in CISG 1980 and Vietnamese legal documents, primarily in Vietnam Commercial Law (VCL) 2005 and Vietnam Civil Code (VCC) 2015 on the same issue, relating to the extension for contract performance.

*Case study:* This method embraces significant and prominent cases regarding additional periods for contract performance from credible sources, namely the official database system of CISG, available at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu) and International Institute for the Unification of Private Law (UNIDROIT) database ([www.unilex.info](http://www.unilex.info)). A discussion would be made eventually, which would facilitate remarks for Vietnamese businesses and some implications to improve the situations as well.

*In-depth interview:* The authors carried out telephone interviews with Mr. Nguyen Cong Phu (Deputy Chief Judge of the Economic Court of People's Court in Ho

Chi Minh City), Mr. Pham Van Chat (PhD) (Arbitrator at Vietnam International Arbitration Centre - VIAC). The experts provided general overviews which represent the practical complex situations of applying CISG in dispute settlement as well as understanding levels of Vietnam businesses. Their constructive comments and advice supported the writers to compile remarks and recommendations for Vietnamese businesses to minimize significant damage in international trade.

## RESULTS AND FINDINGS

### Overview of Extension for Contract Performance under CISG 1980

#### Definition of Extension for Contract Performance under CISG 1980

Extension for contract performance is to fix additional time so that the aggrieved party fulfills contractual obligations as agreed. In Germany, providing an automatic extension of time for the parties to a commercial contract to fulfill their obligations is known as Nachfrist. However, various multilateral and international organizations have developed legal standards applicable to international sales contracts which have incorporated (or purported to incorporate) the concept of Nachfrist. These include CISG 1980, the UNIDROIT Principles, prepared by the UNIDROIT, and the European Principle prepared by the Commission on European Contract Law under the aegis of the European Union. Articles 47 and 63 of the CISG entitle the party who is not in breach of contract to fix an additional period of reasonable time for performance of the obligations to the party in breach. This is a rule addressed to the parties and not to the judges or arbitrators, who, on the contrary, cannot grant to any of the parties a period of grace (Articles 45.3 and 61.3 of the CISG)<sup>11</sup>.

#### The Purposes of Extension for Contract Performance

*First of all*, the CISG provisions express the expectation of drafters to preserve contractual relations. The contract needs to be done exactly as the parties have committed, because the proper implementation of the contract expresses the respect of the agreement between two parties.

*Secondly*, the intention to fix additional time for late performance is based on the Principle of Good Faith. Indeed, these provisions are to protect the defaulting party from being applied strict sanctions due to breaching the contract. In case of contract breaching,

even that is fundamental or non-fundamental, the aggrieved party will not immediately apply strict remedy such as cancellation of contract, but allow the defaulting party to have another chance to fulfill their obligations, avoiding negative effects on mutual interests. *Thirdly*, it appears that the primary purpose of a Nachfrist procedure is to protect the aggrieved party who is waiting for a delayed performance. Actually, the Nachfrist Principle is a basis for the innocent party to cancel the contract without considering whether the breach is fundamental or not. This right is envisaged in Art. 49 and 46.

### **Procedures of Application**

#### *Requirement of Application*

The first requirement to fix additional time is an effective contract. The second requirement to fix additional time is occurrence of breach of contract. The suitable time for a party to serve Nachfrist notice is when the other party fails to fulfill its obligations when the contract expires. The obligations are stipulated in Art. 30 for the Seller and for the Buyer, his obligations are stipulated in Art. 53. In addition, in case the goods delivered do not conform to the descriptions prescribed in the contract, the goods have not been delivered in the quality or goods are defective, the obliged regularly apply remedy of specific performance under Article 46 or 62 CISG. Therefore Nachfrist procedure is not used when a performance is defective in a way which is not fundamental because the notice procedure applies only to delayed performance, not to defective performance<sup>12</sup>.

#### *Forms of Notification*

As for the form of the notice, the CISG is silent on whether the notice must be in writing or can be presented orally. However, a broad interpretation of CISG Art. 11 will lead to the conclusion that the notice granting an additional period for performance under Art. 47 and 63 need not be made in writing and that it may be transmitted by any means. Meanwhile, VCL 2005 regulates: “*International purchase and sale of goods shall be conducted on the basis of written contracts or other forms of equal legal validity*” (Art.27.2). It should be understood that a Nachfrist notice must be in writing or other forms of equal legal validity under Vietnam laws. Thereby, telegraph, telex, fax, data messages (electronic mails, viber, zalo ...) are also considered as writing.

#### *Effective Time of Notification*

Under the CISG the general rule of Art. 27, the Nachfrist notice would be effective as long as it is sent in accordance with Part 3 and by means appropriate in the

circumstances. Following this rule, the risk in transmission of a Nachfrist notice is fairly burdened on the side of the non-performing party. For more comments, a plain understanding of the receipt principle is that a party cannot rely on a notice sent to the other party unless and until the notice reaches that party. Although it is not necessary that the notice should actually have come to the addressee's attention provided that it has been delivered to him in the normal way, the risk of errors in the communication is normally placed upon the sender under the receipt principle. However, the situation here is one party giving a notice to the other party to be notified is in default. It seems appropriate to put the risk of loss, mistake or delay in the transmission of the message on the defaulting party rather than on the aggrieved party.

#### *Content of Notification*

Vietnamese Laws and CISG do not stipulate the content of Nachfrist notification. However, according to Pilar Perales Viscasillas (2005), there are two conditions that need to be considered: the request for fulfillment of obligation by the aggrieved party and the determination of a deadline. If the notice particularly specifies the request to perform the contractual obligation without specifying a specific date, it will not be sufficient to be considered an extension notice but a notice for specific performance of the contract specified in Article 46 CISG.

### **Effects of Extension for Contract Performance**

#### *During the Extended Time*

The party who grants the extension of time cannot terminate or seek specific performance during the extension time under the CISG, Article 47.2 and Article 63.2. It might be interpreted that during the Nachfrist period, the Buyer or the Seller granting additional time keeps the possibility of requesting the damages caused by the delay in performance. Also, since Article 47.2 of the CISG is not to be understood as an offer of respite, the Buyer retains the right to claim a penalty clause. However, the aggrieved party does not need to wait until the Nachfrist has expired to avoid the contract. Instead, when the non-performing party has declared that he will not perform within the additional period of time, the contract may be avoided.

#### *Comparisons*

This point of view has also been recognized in VCL 2005, particularly according to Article 316: “*A party shall not lose its right to claim damages for the loss caused by a contract breach by the other party when other remedies have been applied*”. More specifically,



Clause 1 Art. 299 allows the aggrieved party to claim for damages and fines to be paid but must not apply other remedies. Similarly, if there are provisions of contract penalty for late performance, the aggrieved party is also entitled to apply this sanction during the additional period.

#### *After the Expiry of Extension*

Art 64.1.b and 49.1.b stipulates that the Seller and Buyer may declare the contract avoided if the other does not, within the additional period of time fixed by the Seller, Buyer perform his obligations. Furthermore, once the additional period of time has expired without performance by the Seller/Buyer, the Buyer/Seller may not only avoid the contract under (Clause b in Art.49 and 64) but may resort to any other remedy he may have.

#### *Comparisons*

While CISG 1980 clearly stipulates which remedies will be applied in case of the expiration of the extension period that the violating party fails to fulfill its obligations, the VCL 2005 does not obviously regulate. Formerly, when there had not been the occurrence of VCC 2015, to study avoidance by the defaulting party in case of additional time expiring under VCL 2005, it is necessary to look into provisions relating to avoidance. Article 310 VCL 2005 regulates that the remedy of contract avoidance can only be utilized under the circumstance of fundamental breach. For example, in case of the non-delivery of the goods by the Seller, if time is of the essence, which amounts to a fundamental breach that entitles the Buyer to declare the contract avoided. Moreover, the legal texts instead state that contract can be avoided upon occurrence of an act of breach which the parties have agreed shall be a condition resulting in the termination of performance of the contract (Art.310.1 VCL 2005). However, it is recommended that Vietnamese firms, in conducting trade with foreign partners, should incorporate the provision of Nachfrist into the contract to eradicate the legal difference between the two laws regarding the remedy of contract avoidance<sup>13</sup>.

### **Current situation of Extension for Contract Performance under CISG 1980**

#### ***Number of Dispute Cases***

The Table 1 presents the number of disputes applying the Nachfrist Principle as well as using provisions of fixing additional time (Art. 47 and 63) under the CISG to resolve trade disputes of the Contracting States. The table is divided into three periods, every 10 years. In general, there are gradual reductions in the number of cases using provisions of extension,

especially in the last decade. The first period, 1991-2000 witnesses the largest proportion of disputes using Art. 47 and Art. 63, accounting for 39.2% and the next decade with 36.4% of the total. Some countries such as Argentina, Italy, Brazil, etc. only participating in one dispute during the whole period are included in the others. The majority of nations listed are in Europe, including 7 of the 11 identified countries. That is actually reasonable because Europe is the birthplace of the CISG, with the idea of establishing an International Convention to regulate international trading activities. Therefore, these countries have applied CISG 1980 on a regular basis as a unified source of law in international trade demonstrates the pioneer role in dissemination of the CISG all over the world. It is obvious that Germany almost leads the number of Nachfrist related disputes, ranking above China and Switzerland. Of the 143 cases applying provisions of fixing additional time shown in the Table 1, there are 40 disputes with the participation of Germany, accounting for 28%. On a broader scale, the CISG Database recorded 613 disputes which have jurisdiction in Germany, and 1430 case law relating to Germany out of a total of 4194 cases applying CISG, which was updated until the end of 2020<sup>14</sup>. It shows that Germany was always an outstanding country in the statistical data on the application of the CISG in dispute settlement. Indeed, in 2002, the CISG became part of the German Civil Code<sup>15</sup>.

Being considered one of the two largest trading partners in the world, China ranks in the second position with 20 disputes applying The Nachfrist Principle, accounting for 14%. In fact, the CISG came into effective on January 1st, 1988 in China. Even though the number of Chinese disputes using provisions of extension declined remarkably during three periods: 13 cases in the period of 1991-2000, decreasing a half in the period of 2000-2009, and no cases relating to Nachfrist in the third period. China has always been a country with a large number of disputes recorded in the system. It is likely that China has a long tradition of trading, such as the Silk Road, dealing with many countries from all over the world, thus an international law source such as CISG 1980 is an optimal choice of trust for partners.

All in all, the case laws of using Nachfrist Principle are mainly in the European region, accounting for over 70%, over 15% in Asia, and the rest include Australia and the Americas, all of which are developed countries and the world leading trading platforms.

**Table 1: List of Contracting States applying Provisions of Extension for Contract Performance under CISG 1980 over the period 1991-2020 (Unit: case)**

Nations	Period of time			Total	%
	2011-2020	2001-2010	1991-2000		
Australia	0	1	2	3	2.1
Austria	4	1	4	9	6.3
Belgium	0	1	1	2	1.4
China	0	7	13	20	14.0
France	5	5	2	12	8.4
Germany	4	14	22	40	28.0
Netherlands	8	2	0	10	7.0
Republic Of Korea	2	0	0	2	1.4
Russia	4	4	2	10	7.0
Switzerland	4	11	2	17	11.9
US	1	2	0	3	2.1
Others	3	4	8	15	10.5
Total	35	52	56	143	100.0

(Source: Manual compilation of the authors form CISG Database at <http://www.iicl.law.pace.edu/cisg/search/cases>)

### Content of Dispute Cases

The updated data on the system has shown nearly 150 disputes regarding the extension for contract performance. However, not all cases have full and specific information. It can be seen from the Table 2, Nachfrist provisions were divided into particular issues, including two main groups: Right to fix additional period for performance and its effects.

In general, Art. 47 has been applied notably in case law, whereas the number of disputes using Art. 63 are fewer, even a half. Although, the purpose of provisions of extension was to protect the interest of the aggrieved party, the Buyer obviously took great advantages of this Principle, with 73 cases accounting for 66.4% of the total. Indeed, risks that Buyers often encounter when fulfilling their obligations is that the Seller fails to deliver goods on time, or fails to deliver the paper of ownership of the goods on due date, or deliver the goods at the wrong place. In short, the Seller regularly breaches the contract because of not fulfilling his obligations under CISG 1980. In contrast, the numbers of cases that the Seller took advantage of Art. 63 were half fewer than the counterpart, making up 33.6% of the entire proportion, the main cause derived from not paying the price of contract.

### Dispute Settlement Methods

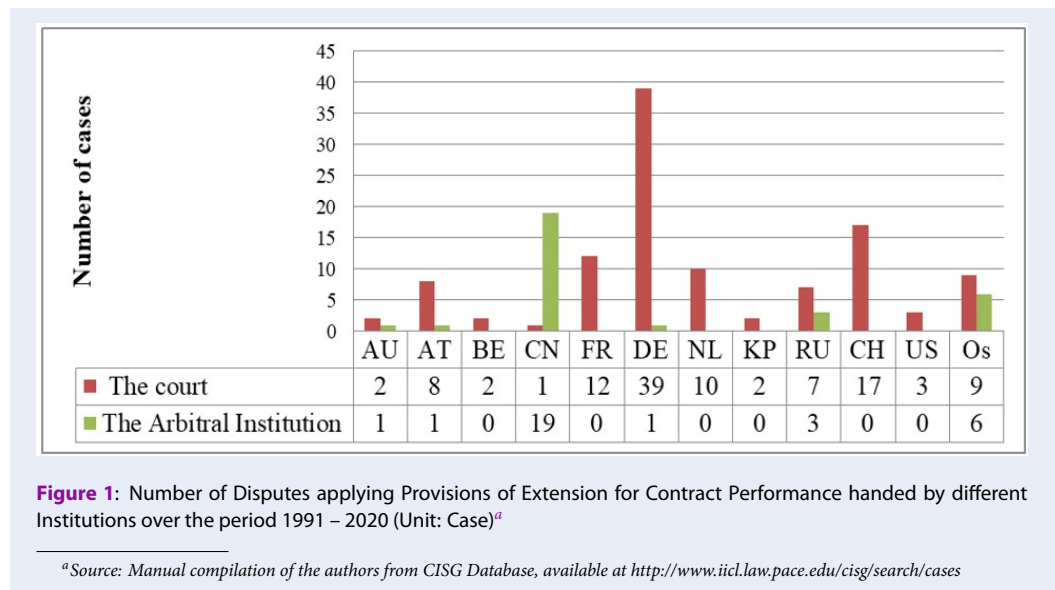
It is shown in the Figure 1 that from 1991 to 2020, 39 cases in Germany (DE) regarding extension of contract performance are resolved at the court, accounting for 27.3% of the total lawsuits recorded in the system. Switzerland (CH) that ranked third in numbers of disputes applying Art. 47 or 63 also preferred to select the court during many continuous years. The priority of choosing courts also is in other geographical areas such as Austria (AT), France (FR), Netherland (NL), etc. However, Chinese traders seemed to always select the arbitration center to solve the disputes. There have 19/20 lawsuits handled by arbitral institutions, accounting for 13.3% of the total. Indeed, both foreign and Chinese clients preferred arbitrators to hear their disputes since arbitration, compared with judicial means, is more flexible. Up to 2008 it has published three volumes of compilation of arbitral awards regarding sales of goods and foreign investments. The books consist of 337 arbitral awards, out of which 160 has been made after 1988<sup>16</sup>. This fact indicates that in China, arbitration institutions not only contribute to the integration of international law into China's legal framework but also is of great importance on Chinese business transactions.

### General evaluation

**Table 2: Numbers of Disputes applying Article 47 and 63 under CISG 1980 over the period 1991 - 2020**

	Specific provisions	Cases
Article 47	47A Buyer’s right to fix additional period for performance	65
	47B Buyer’s remedies during period (Art. 47.2)	7
	47C Other issues	1
TOTAL		73
Article 63	63A Additional final period for Buyer’s performance (art. 63.1)	36
	63B Seller’s remedies during period (Art. 63.2)	1
TOTAL		37

(Source: Manual compilation of the authors from CISG Database at <http://www.iicl.law.pace.edu/cisg/search/cases>)



**Figure 1: Number of Disputes applying Provisions of Extension for Contract Performance handed by different Institutions over the period 1991 – 2020 (Unit: Case)<sup>a</sup>**

<sup>a</sup>Source: Manual compilation of the authors from CISG Database, available at <http://www.iicl.law.pace.edu/cisg/search/cases>

**Causes of Extension for Contract Performance**

The Nachfrist Principle aims to maintain the contract relationship and interest of parties, before coming to strict remedy as avoidance. However, the reason for the fact that one party fixes a specific period of time for the other party to fulfill its obligation is quite general from the perspective of the Buyer and the Seller and is affected by many objective factors including weather, politics and subjective factors of the people (such as one of the parties wanting to adjust and supplement contract clauses). In terms of the delivery obligation of the Seller, the Buyer often has to extend a period of time because of troubles in suppliers, or non-delivery of sufficient quantity as agreed upon, or delays in delivery due to weather fluctuations or political factors that prevented Sellers to deliver goods according to due date. Regarding obligations of the

Buyer, the Seller regularly grants additional time for the Buyer to make the payment, particularly to open the Letter of Credit. The reason for the delay in the process of opening letters of credit is quite complicated, not directly related to the financial situation of partners, including the situation that the Buyer hesitates to open L/C when the seller makes a new offer on prices and the agreement has not been reached yet during contract performance.

**The Validity of Notice**

The renewal notice is not merely communications of contracting parties, but also a legal basis for the aggrieved party to implement strict remedy as avoidance to protect their interests. A valid notice of extension includes various elements analyzed in Chapter One such as a notice of a valid contract in case of existence of violation; valid content of notice and reasonable time. Nevertheless, in the case laws assessed, notices

did not absolutely meet those requirements. The reasons are partly due to invalid contracts, or valid contracts but unclear time of performance, leading to not being able to determine suitable time for granting notices of extension. It is also likely that content of the notice is as reminding, does not fix a specific interval of the extension. The illegitimate application of CISG stipulations relating to extension for contract performance probably originates from lack of thorough understanding of The Nachfrist Principle, eventually leading not to gain deserving interests, though such extension is fixed by the aggrieved party.

### **The Reasonableness of Extension**

The rationality of extension time depends on many factors such as fluctuations in the price of goods on the market, the complexity of formalities as well as ways to determine a reasonable time period by the aggrieved party or the defaulting party. However, in the situations analyzed, the jurisdiction considered the reasonableness of the renewal notice on many factors, when the contract has no agreement on the reasonable time; the commercial practices of the parties will be a foundation to regard. Besides, the Principle of Good Faith always seems to be the guiding principles in the judgment of the court. Particularly, the notice of extension indicated the defaulting party to perform their obligations within 11 days. However, the court assessed 7 weeks in total, from the expiry of extension until time of contract avoidance as reasonable. Such periods of time was considered to be long enough for the violating party to fulfill its obligation. It is thought that this judgment of the court was to protect the aggrieved party from the non-cooperative manifestations of the violating party during the contract performance.

## **CONCLUSION AND IMPLICATIONS**

### **Conclusion**

Being the fundamental principles of the CISG, the extension for contract implementation is widely applied in trade activities as well as selling and purchasing of goods. Fixing additional time can be considered as one of the optimal measures in the purpose of ensuring the proper implementation of the contract as committed, along with protecting the stability and integrity of the contract, thus is encouraged by CISG drafters and prioritized to apply in practice, especially in case of late performance or non-performance of obligations.

*Firstly*, regarding the conditions and time for extending additional period, The Nachfrist Principle is theoretically applied for all types of breach. However,

late performance is a common situation of fixing additional time for contract performance under CISG 1980. The aggrieved party can grant additional time in case of non-implementation in due date of contract performance.

*Secondly*, regarding procedures of extension, the remedy can be applied without going through a court or arbitration. In addition, the aggrieved party also has no obligation to prove the existence of breach when granting additional time. The important issue to consider here is the validity of an extension notice in terms of form and content as well as how to determine the beginning and end of the extended period, thereby considering the reasonableness of additional time.

*Thirdly*, regarding to legal effects of extension, there are differences in rights and obligations of parties during extended time and expiry of extension. However, notwithstanding validity of time, the aggrieved party still has the right to request the violating party to compensate for damage caused by their breaching. During additional periods, the innocent party may not resort to any remedy for breach of contract including cancellation, whereas in lapse of the grace time, avoidance of contract can be declared despite whether or not fundamental breach occurred. Such stipulation can aim to maximize the benefits gained from contract performance in case that final expectation could not be achieved.

*Fourthly*, based on the above theoretical basis, the subject has been clarified by analyzing the provisions and cases related to The Nachfrist Principle under CISG 1980. Furthermore, the writers also investigated the situation of goods trading in Vietnam in recent years, the world's situation of political and economic fluctuations and the legal awareness of Vietnamese firms, thereby making predictions on the positive upward trend in levels of extension for contract performance under CISG as well as perception of domestic businesses on the remedy. From the above analysis and assessments, some implications in the application and interpretation of the provisions of the CISG relating to contract extension have been represented for Vietnamese businesses. The authors hope those suggestions partly contribute to improving the legal knowledge of businesses on fixing additional time and limiting risks in international trade.

### **Implications**

The CISG has been in effect in Vietnam for about 4 years and automatically applied where disputes arise. Also, some Vietnamese businesses have been "acquainted" with this Convention for a considerable



time. However, there is only one dispute in Vietnam that applies CISG to be resolved by court before 2017 and is not related to the extension for contract performance. It is between Ng Nam Bee (Singapore) Pte Ltd. v. Tay Ninh Trade (SOE) Co., sentencing on April 5<sup>th</sup>, 1996<sup>17</sup>. The dispute arose from the buyer's failure to take delivery according to the contract terms and the seller had the right to declare the contract avoided (Art.64.1, CISG). Since 2017, there have only been 6 lawsuits applying CISG and all were resolved at Vietnam International Arbitration Center (VIAC)<sup>18</sup>. It can be seen that the number of disputes resolved with the application of CISG in Vietnam is limited and mainly resolved by arbitration. Therefore, our businesses do not have much experience in resolving disputes related to CISG which are expected to increase in the near future. The following are some implications in reference to advice by scholars and synthesized from materials relating to contract performance under CISG in generally as well as extension for contract performance for Vietnamese businesses specifically.

#### **Freedom to select Applicable laws**

Although CISG 1980 is a uniform international commercial law, the freedom of selection of applicable laws is not precluded during conclusion of contracts. Basically, the scope of applying the Convention is to adjust relations related to the implementation of international sales contracts. However, internationally trade includes many fields from goods to delivery obligation, payment obligation that the Convention does not regulate in all matters. Therefore the parties have the right to resolve the remaining issues by choosing the applicable law at their discretion<sup>19</sup>. Furthermore, even though CISG 1980 came into force 1 January 2017, Vietnamese businesses are still likely to negotiate with their partners that are Contracting States to select applicable laws to adjust issues beyond the scope of the Convention.

According to Mr. Pham Van Chat, some foreign businesses formerly have referred to the CISG, under which they state that issues which are not mentioned in the contract will be explained according to the CISG. At present, contracts are often concluded on the basis of both compliance with the National Laws and the agreements in international treaties, of which the most important are Free Trade Agreements (FTAs). Therefore, businesses have to always memorize when drafting: not contrary to the provisions of the FTAs if the contracting parties are FTA members, negotiate all issues in the contract so as to minimize disputes.

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#### **Be attentive to the difference between CISG 1980 and VCL 2005**

First, while CISG separates additional time for contract performance from specific performance, Vietnam Laws considers extension as an effect of specific performance. Mr. Nguyen Cong Phu recommends that if a Vietnamese enterprise is an aggrieved party, it is necessary to pay attention to the application of this intermediate measure, to avoid applying more serious remedies such as contract avoidance. Such action will be regarded as lack of good faith by courts and arbitrators, not wanting to continue to perform the contract. If a Vietnamese enterprise is a violating party, it is necessary to note the difference between additional time for contract performance and specific performance so that it can propose the aggrieved party to provide a period of grace to implement current obligations, thereby limiting damages.

The second difference is the issue of applying avoidance after the expiration of the extension for non-fundamental violations. VCL 2005 and CISG 1980

are stipulated quite differently in this regard. Art. 49 and 64 CISG allow the aggrieved party to cancel the contract in case of non-performance by the defaulting party after a lapse of *Nachfrist*, whereas VCL 2005 only permits contract cancellation in the case of a fundamental breach, or which is specifically mentioned in the contract (Art. 310 VCL). Therefore, domestic businesses should add to the testimonial clause of right of avoidance by the aggrieved party in case that the breaching party fails to perform the obligation after the extension period. Furthermore, the parties should negotiate in order to list or exclude which types of breaching that the parties are likely to extend the time for contract performance or which violation is fundamental causing the cancellation.

### **Pay attention to the Requirement of Extension**

Based on some typical disputes analyzed in Part 4, businesses should pay close attention to the validity of the contract, as well as the specific time for contract performance from the drafting stage. A contract is the most important legal foundation for the parties to exercise their rights and obligations as well as protect their rights and interests in case of a violation arising. In Mr. Pham Van Chat's opinion, the contract is also a legal basis for the Court and the Arbitrator to determine the responsibilities of the parties in case that the parties cannot reconcile disputes themselves. When the contract is recognized as validity, the aggrieved party has a basis to apply The *Nachfrist* Principle under CISG 1980. Therefore, businesses need to carefully learn about their partners to avoid signing contracts with shell corporations, or as disreputable representatives. In other situations, parties should agree on a specific time for contract performance in order to avoid partners taking advantage of effects of *Nachfrist* to pressure the price down due to market fluctuations. Furthermore, the authors also notes that domestic businesses should not forecast non-performance of their partners when time for contract performance has not yet expired in order to grant an invalid notice of extension.

### **Pay attention to the Reasonableness of Extension**

As mentioned, the reasonableness of extension depends on various factors that Art. 47 and 63 do not stipulate clearly. Even after the incident has arisen, the parties can still consult each other to fix an additional time. Nevertheless, according to Mr. Nguyen Cong Phu, businesses should specify the terms of contract performance extension. Because the CISG allows the defaulting party to grant additional time in a

reasonable period as similarly as the Civil Code 2015, while VCL 2005 does not stipulate this, thus the parties should indicate how long the reasonable period is.

From the authors' perspective, firms are likely to take advantage of the *Nachfrist* Principle so as to sound out performing intentions of the defaulting party by fixing "short notices". If the defaulting party desire more time for performance, he or she will endeavor to fulfill the obligations, or proactively propose a new extension. In this case, the CISG provisions do not prevent the aggrieved party from fixing a second extension or even a third additional time. Instead, in the case violators clearly shows that they do not want to maintain the contract with "short extension", the enterprise can terminate the contract legally. This measure is thought to be much more effective than extending a long enough extension for the breaching party and facing their non-performance risks./.

## **LIST OF ABBREVIATIONS**

Art.: Article  
CISG: United Nations Convention on Contracts for the International Sale of Goods  
Free Trade Agreements: FTAs  
PECL: Principles of European Contract Law  
PICC: Principles of International Commercial Contracts  
UCC: Uniform Commercial Code  
UNICITRAL: United Nations Commission on International Trade Law  
UNIDROIT: International Institute for the Unification of Private Law  
VCC: Vietnam Civil Code  
VCL: Vietnam Commercial Law  
VIAC: Vietnam International Arbitration Center

## **CONFLICTS OF INTEREST**

The authors declare that there are not any conflicts of interest.

## **AUTHORS' CONTRIBUTIONS**

The authors have equally contributed to the article. The first author (Nguyen Tien Hoang) is responsible for the part: Results and Findings. The second author (Nguyen Nguyen Cat Anh) is responsible for the parts: Literature Review, Research Methodology. The third author (Tran Nguyen Thien Ly) is responsible for the parts: Introduction, Conclusion and Implications.

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# Gia hạn thực hiện hợp đồng theo công ước viên 1980 và những hàm ý đối với doanh nghiệp Việt Nam

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## TÓM TẮT

Công ước Liên hợp quốc về Hợp đồng Mua bán Hàng hóa Quốc tế (CISG) được thông qua vào năm 1980 và có hiệu lực từ ngày 01 tháng 01 năm 1988, là một trong những điều ước thương mại quốc tế được chấp nhận rộng rãi nhất trên thế giới. Mặc dù đã có hiệu lực tại Việt Nam từ đầu năm 2017, Công ước hiện đang được các doanh nghiệp trong nước áp dụng rất hạn chế. Trên thực tế, có nhiều vấn đề pháp lý phức tạp phát sinh trong thương mại quốc tế, đặc biệt là trong trường hợp các bên không thực hiện, hoặc thực hiện không đúng, không đầy đủ nghĩa vụ hợp đồng. Bài viết nhằm mục tiêu nghiên cứu các quy định về việc kéo dài thêm thời gian trong trường hợp chậm thực hiện hợp đồng (Nachfrist) theo CISG 1980 trong mối quan hệ so sánh với pháp luật Việt Nam cũng như thực trạng về việc gia hạn thực hiện hợp đồng theo CISG 1980. Nghiên cứu đã thu thập, tổng kết, so sánh và phân tích dữ liệu từ các nguồn đáng tin cậy và thực hiện phỏng vấn sâu với các chuyên gia có nhiều kinh nghiệm trong lĩnh vực thương mại, luật và giải quyết tranh chấp. Kết quả cho thấy một số điểm tương đồng và khác biệt về vấn đề gia hạn thực hiện hợp đồng giữa CISG và luật Việt Nam. Nghiên cứu còn cho thấy các tranh chấp liên quan đến điều khoản Nachfrist khá phổ biến và có xu hướng giảm dần nhưng chỉ với sự tham gia chủ yếu của các nước châu Âu và Trung Quốc. Ngoài ra, các tranh chấp xảy ra do người bán vi phạm hợp đồng chiếm tỷ lệ cao hơn nhiều so với vi phạm từ người mua. Về phương thức giải quyết tranh chấp, Trung Quốc hầu như luôn lựa chọn trọng tài, trong khi các nước châu Âu ưu tiên tòa án. Từ những phân tích đó, các tác giả đã đưa ra một số lưu ý cho các doanh nghiệp Việt Nam trong việc giải thích và áp dụng các điều khoản về gia hạn hợp đồng theo CISG nhằm giúp các doanh nghiệp nâng cao hiểu biết pháp luật và hạn chế rủi ro trong hoạt động thương mại quốc tế.

**Từ khóa:** CISG 1980, gia hạn thực hiện hợp đồng, Nachfrist, doanh nghiệp Việt Nam

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