

CASE LAW DRAFT NO. 06/2024

On Determining The Governing Law For Construction Contracts

Approved by the Judges' Council of the Supreme People's Court on [date] [month] 2024 and published under Decision No. [number]/QĐ-CA on [date] [month] 2024 by the Chief Justice of the Supreme People's Court.

Source of the Case Law:

The Cassation Decision No. 12/2019/DS-GĐT dated September 24th, 2019, of the Judges' Council of the Supreme People's Court on the case "Contractual Damage Dispute in Rock Drilling and Blasting" between the plaintiff, Q Construction, Commercial and Services Joint Stock Company, and the defendant, V Mining Chemical Industry Holding Corporation.

Location of the Case Law's Content:

Paragraph 5 of the "Court's Opinion" section.

Summary of the Case Law:

- Factual Background:

This case involves a dispute arising from a construction contract entered into by the parties.

- Legal Resolution:

In this case, the Court will first analyze the construction contract itself and apply its relevant provisions to the dispute. Should the contract lack specific clauses addressing the contested issue, the Court will then turn to the applicable construction laws. If, after examining these construction laws, there remains no clear legal guidance, then the Court will ultimately rely on the provisions set forth in the Civil Code to reach a final judgment.

Relevant Legal Provisions:

- Clause 1, Article 138 of the 2014 Construction Law;
- Article 4 of the 2015 Civil Code.

Keywords:

"Construction contract"; "Construction Law"; "Commercial Law"; "Civil Code"; "Governing law for construction contracts"; "Construction execution contract".

CASE DETAILS

In the case filed on December 2nd, 2014, with a supplementary complaint submitted on January 28th, 2015, and in subsequent statements during the proceedings, the plaintiff, Q Construction, Commercial and Services Joint Stock Company (referred to as Q Company, represented by Mr. Phạm D), presented the following allegations:

Q Company entered into Economic Contract No. 16/HĐTC/12 with T Mining Chemical Industry Company (a branch of V Mining Chemical Industry Holding Corporation, hereinafter referred to as T Company) on February 22nd, 2012. Under this contract, Q Company subcontracted T Company to conduct rock drilling and blasting at the construction site of H Hydropower Plant in B City, Đắk Lắk Province. Q Company alleged that during the execution of the contract, T Company fell behind schedule and unilaterally relocated machinery, equipment, and personnel from the site without prior written notice to Q Company. To ensure timely project delivery to the investor, Q Company had to engage another contractor to complete the remaining work. Although both parties signed a project acceptance record on September 25th, 2013, T Company failed to finalize the necessary settlement documents and refused to compensate Q Company for damages resulting from the delayed execution. These damages included costs associated with completing the remaining work, expenses related to project extension, and losses incurred due to the investor's rejection of price adjustments. Therefore, Q Company brought this lawsuit

seeking compensation from V Mining Chemical Industry Holding Corporation in the amount of VND 3,400,000,000.

The defendant, V Mining Chemical Industry Holding Corporation (represented by Mr. Nguyễn Văn S), presented the following counterarguments:

On February 22nd, 2012, Q Company and T Company signed Economic Contract No. 16/HĐTC/12, which specifically outlined the responsibilities for rock drilling and blasting at the H Hydropower Plant construction site. Following the contract signing, T Company executed four blasting campaigns between April 6th, 2012, and December 18, 2012, totaling VND 4,963,278,539 in value. As of the date of the legal proceedings, Q Company still owed T Company VND 3,279,084,691 for these campaigns, as agreed upon in a contract liquidation meeting record dated November 7th, 2014. Regarding the unfinished work, both parties mutually agreed to withhold 25% of the accepted value from the fourth campaign for necessary handling. T Company provided legitimate invoices and supporting documents for the services rendered, but Q Company failed to fulfill its payment obligations. V Mining Chemical Industry Holding Corporation contested Q Company's claim for compensation amounting to VND 3,400,000,000, asserting that such a demand lacked merit based on the contractual agreements and financial transactions between the parties involved.

On March 23rd, 2015, V Mining Chemical Industry Holding Corporation filed a counterclaim, requesting the Court to compel Q Company to pay the remaining debt of VND 3,279,084,691 from the four construction campaigns and late payment interest as per the law.

In the First-instance Business And Commercial Judgment No. 02/2016/KDTM-ST dated May 18th, 2016, the People's Court of Pleiku City, Gia Lai Province made the following rulings:

The court dismissed the lawsuit filed by Q Construction, Commercial and

Services Joint Stock Company seeking compensation of VND 3,400,000,000 from V Mining Chemical Industry Holding Corporation for damages allegedly caused by its subsidiary, T Mining Chemical Industry Company.

The court accepted the counterclaim presented by V Mining Chemical Industry Holding Corporation.

Additionally, the court ordered Q Construction, Commercial and Services Joint Stock Company to pay V Mining Chemical Industry Holding Corporation, through T Mining Chemical Industry Company, an amount totaling VND 3,279,084,691. This sum includes the principal debt of VND 3,279,084,691 and accrued interest of VND 432,019,407.

Additionally, the first-instance court decided on the first-instance court fees and the parties' right to appeal in accordance with the law.

On May 25th, 2016, Q Company appealed the entire First-instance Judgment.

In the Appellate Business And Commercial Judgment No. 05/2016/KDTM-PT dated September 26th, 2016, the People's Court of Gia Lai Province issued the following decision:

The court rejected the appeal submitted by Q Construction, Commercial and Services Joint Stock Company, thereby affirming the rulings set forth in the First-instance Business And Commercial Judgment No. 02/2016/KDTM-ST dated May 18th, 2016, rendered by the People's Court of Pleiku City, Gia Lai Province.

In the Cassation Appeal Decision No. 33/2017/KN-KDTM-VC2 dated May 5th, 2017, the Chief Procurator of the High People's Procuracy in Đà Nẵng appealed the Appellate Business And Commercial Judgment No. 05/2016/KDTM-PT dated September 26th, 2016, of the People's Court of Gia Lai Province. The appeal sought to vacate the aforementioned appellate

judgment along with the First-instance Business And Commercial Judgment No. 02/2016/KDTM-ST dated May 18th, 2016, of the People's Court of Pleiku City, Gia Lai Province. The appeal further requested the Judges' Committee of the High People's Court in Đà Nẵng to conduct a cassation trial and remand the case file to the People's Court of Pleiku City, Gia Lai Province, for a new first-instance trial.

In response, the Judges' Committee of the High People's Court in Đà Nẵng, through Cassation Decision No. 25/2017/KDTM-GĐT dated August 21st, 2017, decided to vacate the entire Appellate Business and Commercial Judgment No. 05/2016/KDTM-PT and the entire First-instance Business and Commercial Judgment No. 02/2016/KDTM-ST. The case was remanded to the People's Court of Gia Lai Province for a new first-instance trial in accordance with legal procedures.

On December 19th, 2017, Mr. Võ Văn Bình, Judge of the People's Court of Gia Lai Province, filed a petition to review the aforementioned Cassation Decision through cassation procedures.

In the subsequent Decision No. 08/2019/KN-KDTM dated June 17th, 2019, the Chief Justice of the Supreme People's Court appealed Cassation Decision No. 25/2017/KDTM-GĐT dated August 21st, 2017. The appeal requested the Judges' Council of the Supreme People's Court to conduct a cassation trial to vacate the aforementioned decision, along with the Appellate Business and Commercial Judgment No. 05/2016/KDTM-PT and the First-instance Business and Commercial Judgment No. 02/2016/KDTM-ST. The Chief Justice sought to remand the case file to the People's Court of Pleiku City, Gia Lai Province, for a new first-instance trial, following statutory procedures.

During the cassation hearing, the representative of the Supreme People's Procuracy urged the Judges' Council of the Supreme People's Court to accept the appeal of the Chief Justice of the Supreme People's Court.

COURT'S OPINION:

[1] It is evident from the working minutes dated September 25th, 2013, between Q Company and T Company that as of that date, T Company had not completed the required acceptance documentation nor finished the foundation pit according to the design specifications. Q Company had to undertake additional work, including using a hammer for chiseling, to meet the project handover deadline to the investor. This clearly indicates that T Company was in delay according to the terms of the contract. Additionally, Q Company failed to fulfill its payment obligations for the four acceptance periods as stipulated in Clause 2.2, Article 3 of the Contract. The debt reconciliation minutes dated May 5th, 2014, August 30th, 2014, and the contract liquidation meeting minutes dated November 7th, 2014, all reflect Q Company's acknowledgment of owing T Company VND 3,279,084,691. Q Company committed to monthly payments of VND 500,000,000 starting from the end of November 2014, but failed to adhere to this arrangement. Therefore, during the execution of the contract, both Q Company and T Company breached the contract terms regarding construction timelines and payment obligations. However, it is crucial to assess the reasons behind these breaches and the intentions of both parties during the execution to determine liability.

[2] Regarding the remaining unfinished work, as documented in the contract liquidation meeting minutes dated November 7th, 2014, Q Company and T Company agreed to retain 25% of the value from the fourth acceptance period to cover costs associated with incomplete small-scale blasting work in the foundation pit. In resolving this dispute, courts at all levels must ascertain the actual volume of remaining work and whether it corresponds accurately to 25% of the value of the fourth acceptance period. If the 25% retention proves insufficient to cover the costs of the remaining work, T Company is liable to pay Q Company the shortfall. Conversely, if the actual remaining work volume is less than 25% of the value of the fourth acceptance period, Q Company must compensate T Company for the excess amount. The failure of the first-instance

and appellate courts to collect sufficient evidence to clarify and quantify the actual volume of remaining work led to the unwarranted dismissal of Q Company's claim for damages.

[3] The cassation decision issued by the Judges' Committee of the High People's Court in Đà Nẵng failed to address the errors made by the first-instance and appellate courts. It asserted that the retention of 25% from the fourth acceptance period by T Company to cover unfinished work was irrelevant to the damages arising from the contract breach, which is deemed unreasonable. Moreover, the cassation court incorrectly concluded that T Company had completed only 50% of the subcontracted work based on provisional contract values compared to accepted work volumes. To accurately assess the situation, it is crucial to refer to the contract liquidation minutes dated November 7th, 2014, to determine the actual work volume agreed upon by the parties in the Contract and to gather evidence clarifying any damages claimed by the plaintiff, Q Company.

[4] On March 23rd, 2015, V Mining Chemical Industry Holding Corporation lodged a counterclaim seeking court orders for Q Company to settle the outstanding amount of VND 3,279,084,691 for the four construction phases, along with applicable late payment interest as stipulated by law. Both the first-instance and appellate courts thoroughly reviewed and resolved both the plaintiff's claim for damages and the defendant's counterclaim. However, the cassation decision No. 25/2017/KDTM-GĐT dated August 21st, 2017, from the High People's Court in Đà Nẵng only addressed the plaintiff's claim for damages, disregarding the defendant's counterclaim. Despite this oversight, it annulled the entire first-instance and appellate judgments for retrial, a decision deemed incorrect.

[5] Furthermore, Contract No. 16/HĐTC/12 dated February 22nd, 2012, between Q Company and T Company concerning construction activities originated from Construction Contract No. 01/HP-XD/HĐ dated August 18th,

2011, between M Electricity Joint Stock Company and Q Company. The first-instance court erroneously applied Commercial Law in its proceedings, whereas the dispute pertains to the construction sector. Hence, the appropriate legal framework should have been Construction Law. In the absence of specific provisions within the Construction Law, the Civil Code should have been applied.

In light of the foregoing,

IT IS DECIDED:

Pursuant to Point a, Clause 2, Article 337, Article 342, Clause 3, Article 343, and Article 345 of the 2015 Civil Procedure Code:

1. The Cassation Appeal Decision No. 08/2019/KN-KDTM dated June 17th, 2019, issued by the Chief Justice of the Supreme People's Court, is accepted.

2. The Cassation Decision No. 25/2017/KDTM-GĐT dated August 21st, 2017, of the High People's Court in Đà Nẵng, as well as the Appellate Business and Commercial Judgment No. 05/2016/KDTM-PT dated September 26th, 2016, of the People's Court of Gia Lai Province, and the First-instance Business and Commercial Judgment No. 02/2016/KDTM-ST dated May 18th, 2016, of the People's Court of Pleiku City, Gia Lai Province, concerning the case "Contractual Damage Dispute in Rock Drilling and Blasting" between the plaintiff, Q Construction, Commercial and Services Joint Stock Company, and the defendant, V Mining Chemical Industry Holding Corporation, are hereby vacated.

3. The case file is remanded to the People's Court of Pleiku City, Gia Lai Province, for a retrial in accordance with the procedures of the first-instance, following all pertinent legal regulations.

CONTENT OF THE CASE LAW:

“[5] ... Contract No. 16/HĐTC/12 dated February 22nd, 2012, between Q Company and T Company concerning construction activities originated from Construction Contract No. 01/HP-XD/HĐ dated August 18th, 2011, between M Electricity Joint Stock Company and Q Company. The first-instance court erroneously applied Commercial Law in its proceedings, whereas the dispute pertains to the construction sector. Hence, the appropriate legal framework should have been Construction Law. In the absence of specific provisions within the Construction Law, the Civil Code should have been applied.”

REASON FOR THE DRAFT’S PROPOSAL

Construction contracts are frequently entered into by businesses and often lead to disagreements. When such disputes arise, it's crucial to apply the laws specifically governing construction contracts. However, construction law isn't always comprehensive. There are areas where it lacks regulations, such as the time frame for filing lawsuits (statute of limitations), penalties for contract breaches in non-government funded projects, and interest rates for late payments. In these situations, identifying supplementary legal sources becomes essential.

Currently, a lack of consistency exists among legal experts and local courts regarding the appropriate legal framework. One approach advocates for applying the Commercial Law first, followed by the Civil Code when the Commercial Law is silent. The other approach suggests directly applying the Civil Code without relying on the Commercial Law as an intermediate step. This choice holds significant weight as the Commercial Law and the Civil Code often have substantial differences in content.

This Cassation Decision by the Judges' Council clarifies the preferred approach: to directly apply the Civil Code, bypassing the Commercial Law. This aligns with the 2014 Construction Law, which defines construction contracts as "civil contracts" (Clause 1, Article 138). Additionally, Article 4 of the 2015 Civil Code states, *"In cases where other relevant laws do not provide*

or provide contrary provisions to Clause 2 of this Article, the provisions of this Code shall apply" (Clause 3). The emphasized portion signifies that when relevant laws, like the Construction Law, lack regulations, the Civil Code takes precedence, not the Commercial Law.

Since this dispute falls within the construction field, the Judges' Council has clearly established the necessity of applying construction law. When construction law lacks specific regulations, the Civil Code should be used to resolve the disagreement. To ensure consistent legal application in similar situations, establishing a legal precedent on this issue is necessary.