CASE LAW NO. 09

*This case law was adopted by the Judicial Council of the Supreme People’s Court on 17 October 2016 and promulgated under Decision No. 698/QD-CA dated 17 October 2016 by the Chief Justice of the Supreme People’s Court.*

## Source of the case law:

Cassation Decision No. 07/2013/KDTM-GDT dated 15 March 2013 of the Judicial Council of the Supreme People’s Court on commercial case *“Dispute on contract for sale of goods”* in Bac Ninh Province between the plaintiff being Vietnam – Italy Steel Joint Stock Company against the defendant being Hung Yen Metallurgy Joint Stock Company; persons with related rights and obligations are Ms. Le Thi Ngoc Lan and Mr. Le Van Dung.

## Location of contents of the case law:

Paragraphs 4, 5 and 6 of Section 2 *“Findings”* of the aforesaid cassation decision.

## Overview of the case law:

### Background 1 of the case law:

The contract for sale of goods is breached because the seller failed to deliver or delivered insufficient goods to the buyer, causing the seller to be obligated to return the advance payment and overdue interest for late payment.

### Legal resolution 1:

In this case, the overdue interest is determined on the basis of the average overdue interest rate on the market of at least three local banks at the time of payment (first- instance hearing), unless otherwise agreed by the parties or stipulated by the law.

### Background 2 of the case law:

With respect to the contract for sale of goods, there arise the obligations to pay penalties for breach and compensation for damages.

### Legal resolution 2:

In this case, the obligor is liable for paying the penalties for breach and compensation for damages, but is not obligated to pay interest on the penalties for breach and compensation for damages.

## Applicable provisions of laws relating to the case law:

* Article 34, Article 37, Article 297.3, Articles 300, 301, 302, 306 and 307 of the Commercial Law 2005;
* Articles 307, 422, 474 and 476 of Civil Code 2005;

## Key words of the case law:

*“Contract for sale of goods”, “Breach of contract”, “Return the advance payment”, “Overdue interest due to late payment”, “Overdue interest rate”, “Average overdue interest rate on the market”, “penalties for breach”, “compensation for damages*”.

**CONTENTS OF THE CASE**

Pursuant to the statement of claims dated 7 July 2007, application for amendment of the Statement of Claims dated 10 October 2007, documents in the case and submissions of the plaintiff’s representative:

On 3 October 2006, Vietnam – Italy Steel Joint Stock Company (hereinafter referred to as *“Vietnam – Italy Steel Company”*) entered into Economic Contract No. 03/2006-HDKT with Hung Yen Metallurgy Joint Stock Company (hereinafter referred to as *“Hung Yen Metallurgy Company”*) by Mr. Nguyen Van Tinh – Deputy Director acting as the authorized representative under the Power of Attorney No. 621 dated 10 September 2005 by the General Director of the company. Under this contract, Vietnam – Italy Steel Company (party

A) purchased steel billets GOST 380-94 Grade CTS-5SP/PS from Hung Yen Metallurgy Company (party B) with the quantity of 3,000 metric tons +/-5%, unit price of VND6,750,000/ton; time of delivery was from 25 to 31 October 2006; the total contract price was VND20,250,000,000 +/-5%.

On 4 October 2006, Vietnam – Italy Steel Company remitted the entire amount of VND20,250,000,000 to Hung Yen Metallurgy Company via the bank wire instructions through Joint Stock Commercial Bank for Foreign Trade of Vietnam – Hai Duong Branch. Hung Yen Metallurgy Company delivered 2,992,820 tons of steel billets to Vietnam – Italy Steel Company and left 7,180 tons undelivered, which corresponded to an amount of VND48,465,000.

On 20 December 2006, both parties signed Contract No. 05/2006-HDKT. Hung Yen Metallurgy Company’s authorized representative who signed the contract was Mr. Le Van Manh – Deputy Director (under Power of Attorney No. 1296/UQ/HYM by the General Director). Under this contract, Vietnam – Italy Steel Company purchased 5,000 metric tons of steel billets (with specifications and quality are the same as those in Contract No. 03), unit price of VND7,290,000/ton (included VAT and transportation expenses). The total contract price was VND36,450,000,000+/-5%; time of delivery was from 18 January 2007 to 30 January 2007. Vietnam – Italy Steel Company would advance an amount of VND500,000,000 to Hung Yen Metallurgy Company immediately after the contract was signed; the remaining amount would be paid in two instalments after Vietnam – Italy Steel Company took the delivery. The contract also provided for Hung Yen Metallurgy Company’s obligation on paying a penalty for breach equivalent to 2% of the contract price if it failed to deliver the conforming goods or failed to deliver the goods. According to Vietnam – Italy Steel Company’s representative, on 21 December 2006, Vietnam – Italy Steel Company remitted the advance payment of VND500,000,000 to Hung Yen Metallurgy Company, but Hung Yen Metallurgy Company did not perform the contract and did not have any reasons for not performing.

On the same date of 20 December 2006, Vietnam – Italy Steel Company signed Contract No. 06/2006 with Hung Yen Metallurgy Company (with the authorized representative being Mr. Le Van Manh – Deputy Director) to purchase 3,000 metric tons of steel billets of which the unit price was VND7,200,000/ton from Hung Yen Metallurgy Company. The contract price was VND21,600,000,000; the time of delivery was from 5 January 2007 to 15 January 2007.

On 22 December 2006, Vietnam – Italy Steel Company remitted the full amount of VND21,600,000,000 to Hung Yen Metallurgy Company under the bank wire instructions through Techcombank – Hung Yen Branch, but Hung Yen Metallurgy Company delivered only 2,989,890 tons of steel billets to Vietnam – Italy Steel Company, leaving 7,640 tons undelivered, equivalent to VND55,008,000.

On 1 February 2007, Vietnam – Italy Steel Company signed Contract No. 01/2007 with Hung Yen Metallurgy Company (with the authorized representative being Mr. Le Van Manh

– Deputy Director) to purchase 5,000 metric tons of steel billets of which the unit price was VND7,800,000/ton from Hung Yen Metallurgy Company. The contract price was VND39,000,000,000 +/-5%. During the contract performance, Vietnam – Italy Steel Company remitted an amount of VND37,100,000,000 to Hung Yen Metallurgy Company and Hung Yen Metallurgy Company delivered 3,906.390 tons of steel billets to Vietnam – Italy Steel Company with the value of VND30,469,842,000. The quantity of steel billets which Hung Yen Metallurgy Company had not delivered to Vietnam – Italy Steel Company was 928,255,38 tons being valued at VND7,240,158,000.

Vietnam – Italy Steel Company sent a number of letters requesting Hung Yen Metallurgy Company to perform the contracts but Hung Yen Metallurgy Company failed to do so, causing Vietnam – Italy Steel Company purchase steel billets from other manufacturers to ensure its production and business activities.

As Hung Yen Metallurgy Company breached the contracts signed between both parties, Vietnam – Italy Steel Company initiated a lawsuit against Hung Yen Metallurgy Company to hold Hung Yen Metallurgy Company liable for the payment and compensation for damages due to the breaches in delivery in Contracts No. 03/2006, 05/2006, 06/2006, 01/2007 at the time of the lawsuit, amounting to VND12,874,208,683, wherein the pending payment amounts of VND11,181,662,503 was for 1,777,020 kilograms of steel billets, the amount for penalties for breach was VND1,316,490,480, and the overdue interest was VND376,145,700.

At the first-instance hearing on 3 September 2009, the plaintiff’s representative requested that Hung Yen Metallurgy Company pay an amount of VND28,145,956,647 to Vietnam – Italy Steel Company being calculated until the time of the first-instance hearing of 3 September 2009 and Hung Yen Metallurgy Company be compelled to issue VAT invoices to Vietnam – Italy Steel Company with regards to the delivered quantity of the goods under Contract No. 06/2006 being VND21,544,992,000 and under Contract No. 01/2007 being VND30,469,842,000.

In the written testimony, mediation minutes and hearing minutes, the Defendant’s representative presented:

At the time Hung Yen Metallurgy Company signed those aforementioned contracts with Vietnam – Italy Steel Company, Ms. Le Thi Ngoc Lan was still the General Director and Mr. Le Van Dung (Ms. Lan’s husband) was the business consultant. On 22 March 2007, Ms. Le Thi Ngoc Lan transferred all of her shares in Hung Yen Metallurgy Company to Ms. Nguyen Thi Toan who then became the acting General Director from 2 April 2007. Pursuant to the agreement on division of property during marriage between Mr. Le Van Dung and Ms. Le Thi Ngoc Lan and the debt commitment document of the Company, Mr. Le Van Dung agreed to bear all responsibilities to pay all of Hung Yen Metallurgy Company’ debts arising before 1 April 2007. Now Vietnam – Italy Steel Company claimed for compensation for damages from Contracts No. 03/2006, 05/2006, 06/2006 and 01/2007, and Hung Yen Metallurgy Company does not agree because the responsibility to compensate such damages belong to Mr. Dung, Ms. Lan and other former leaders and managers of Hung Yen Metallurgy Company. Hung Yen Metallurgy Company was attempting to work with Mr. Dung so that Mr. Dung would directly pay Vietnam – Italy Steel Company or Mr. Dung would pay such amount to Hung Yen Metallurgy Company for Hung Yen Metallurgy Company to pay to Vietnam – Italy Steel Company.

Hung Yen Metallurgy Company proposed the Court to review and re-evaluate the validity of Contracts No. 03/2006, 05/2006, 06/2006, and 01/2007 signed by Mr. Manh on behalf of Hung Yen Metallurgy Company with Vietnam – Italy Steel Company in this case and review the responsibility of Mr. Dung, Mr. Manh, Mr. Tinh and Ms. Lan with respect to the debts requested by Vietnam – Italy Steel Company. At the first-instance hearing, Hung Yen Metallurgy Company basically agreed with the numbers relating to the contract performance that were provided by Vietnam – Italy Steel Company; however the financial data was not agreed, because the financial data have not been compared to the debt numbers; the overdue interest on the contracts needed to be recalculated, the defendant did not agree with the interest in contract No. 05 because both parties had agreed to cancel the contract and transfer the amount of VND500,000,000 advanced by Vietnam – Italy Steel Company to perform Contract No. 01/2007. Therefore, there was no contractual breach committed by Hung Yen Metallurgy Company with regard to Contract No. 05.

The person with related rights and obligations – Ms. Le Thi Ngoc Lan presented: in early 2004, she and her husband purchased the shares in Hung Yen Metallurgy Company from Mr. Nguyen Luong Tuan and Mr. Nguyen Van Thanh; at that time Hung Yen Metallurgy Company was during its early development. Due to that reason, Ms. Lan became the General Director and Chairperson of the Board of Management meanwhile Mr. Dung became the business consultant of Hung Yen Metallurgy Company. Due to the conflicts arising in their marriage, on 5 September 2005, Ms. Lan and Mr. Dung entered into an agreement on division of property during marriage at Hong Ha Law Office (registered with Hanoi Bar Association). According to this agreement, Ms. Lan owned the house at No. 250 Ba Trieu Street, Mr. Dung owned the entire VND48,000,000,000 being the shares of the spouses in Hung Yen Metallurgy Company and Mr. Dung had to be responsible for all the debts of Hung Yen Metallurgy Company during the early development of Hung Tai Steel Rolling Mill (which belonged to Hung Yen Metallurgy Company). Since Ms. Lan no longer had shares and had transferred them to Mr. Dung, Ms. Lan authorized Mr. Tinh and then Mr. Manh to manage the company. Although Ms. Lan did not own any shares, she remained the General Director, but in reality, Hung Yen Metallurgy Company was managed by Mr. Dung (Ms. Lan’s husband), Mr. Tinh and Mr. Manh. In July 2007, Ms. Lan handed over the

outstanding debts and the General Director position to Ms. Toan. Ms. Lan further confirmed the fact that Mr. Manh and Mr. Tinh (both of whom were Deputy Directors of Hung Yen Metallurgy Company) signed economic contracts with Vietnam – Italy Steel Company with her authorization regularly. However, when the handover (of the rights and obligations) to Ms. Toan occurred, Mr. Dung as well as Ms. Toan and Ms. Lan confirmed that the responsibility to pay the debts to Vietnam – Italy Steel Company did not belong to Ms. Lan.

The person with related rights and obligations – Mr. Le Van Dung presented: Although he and his wife had agreed to divide property during their marriage and Mr. Dung was able to own the shares in Hung Yen Metallurgy Company, Mr. Dung only held the position of business consultant without being entitled to sign any economic contracts as well as to make payment, therefore, he had no responsibility. Mr. Dung disagreed with Hung Yen Metallurgy Company’s statement that he must be the one to be responsible for paying the debts. He asserted that the responsibility fell on Hung Yen Metallurgy Company and Ms. Toan. Mr. Dung confirmed that on 1 April 2007, he signed a commitment with Ms. Toan. The commitment document showed the total value of debts for both parties to finalize and this was for internal use between him and Ms. Toan as the basis for the finalization and handover; however, there was no actual purchase of shares in the Company between him and Ms. Toan. Both parties did not sign any agreement on purchase of shares and he was not aware of the transfer of shares between Ms. Lan and Ms. Toan. As for the lawsuit initiated by Vietnam – Italy Steel Company against Hung Yen Metallurgy Company to request it to pay pursuant to the contracts, Mr. Dung noted that, from the legal perspective, Hung Yen Metallurgy Company must be responsible as a legal person. He does not have any responsibility with any clients or business partners. His responsibilities, if any, were only with Hung Yen Metallurgy Company. Mr. Dung requested to be absent from all court hearings.

In First-instance Commercial First-instance Judgment No. 01/2007/KDTM-ST dated 14 November 2007, the People’s Court of Bac Ninh Province ruled to: *“Compel Hung Yen Metallurgy Company to pay Vietnam – Italy Steel Company the total amount of money from the 04 Contracts No. 03 dated 3 October 2006; No. 05 dated 20 December 2006; No. 06 dated*

*20 December 2006 and No. 01 dated 1 February 2007, being valued at VND24,674,428,500”.* In addition, the first-instance court ruled on the court fees and the right to appeal of the involved parties.

On 27 November 2007, Hung Yen Metallurgy Company submitted an appeal.

In Appellate Commercial Judgment No. 120/2008/KDTM-PT dated 18 June 2008, the Appellate Court of the Supreme People’s Court in Hanoi ruled to: *“Set aside First-instance Commercial First-instance Judgment No. 01/2007/KDTM-ST dated 14 November 2007 of the People’s Court of Bac Ninh Province. Transfer the case to the People’s Court of Bac Ninh Province for re-settlement in accordance with the law”* for the reason: the first-instance court had not collected the statements of Ms. Lan, Mr. Dung, Ms. Toan, Mr. Tinh, and Mr. Manh and had not determined the persons participating in the proceedings, and thus failed to determine who shall bear the responsibility to pay the debts to Vietnam – Italy Steel Company. Furthermore, other documents such as debt commitment documents, money receipts of Mr. Dung, power of attorney for the company management… are all copies without being duly notarized, certified or without being compared with the originals of the

first-instance court.

In First-instance Commercial First-instance Judgment No. 09/2008/KDTM-ST dated 23 October 2008, the People’s Court of Bac Ninh Province ruled to: *“Compel Hung Yen Metallurgy Company to pay Vietnam – Italy Steel Company the amount of VND31,902,035,179.56 as the remaining payment under the 04 Contracts No. 03 dated 3 October 2006; No. 05 dated 20 December 2006; No. 06 dated 20 December 2006 and No. 01*

*dated 1 February 2007”.*

On 5 November 2008, Hung Yen Metallurgy Company submitted an appeal.

In appellate Commercial Judgment No. 32/2009/KDTM-PT dated 19 February 2009, the Appellate Court of the Supreme People’s Court of Hanoi ruled: *“1. To set aside First-instance Commercial Judgment No. 09/2008/KDTM-ST dated 23 October 2008 of the People’s Court of Bac Ninh Province on “Dispute on contract for sale of goods” between Hung Yen Metallurgy Company and Vietnam – Italy Steel Company. 2. Transfer the case to the first-instance court for re-settlement”,* for the reason: the General Director being Mr. Tran Van Vi only initiated a lawsuit to claim the amount of VND12,874,298,683 from Hung Yen Metallurgy Company but the authorized representative had amended and supplemented the claims continuously, which exceeded his authorization and was in violation of Article 164.2.1 of the Civil Procedure Code and Resolution No. 02/2006/NQ-HDTP dated 12 May 2006 of the Judicial Council of the Supreme People’s Court. All the applications for amendment and supplementation of the claims of the authorized representative were not in compliance with the law, and that the first-instance court accepted all claims of the authorized representative was a serious violation of the civil proceedings, thus the appellate court did not review the contents of the appeal in respect of Hung Yen Metallurgy Company.

In First-instance Commercial Judgment No. 18/2009/KDTM-ST dated 3 September 2009, the People’s Court of Bac Ninh Province ruled: *“1. To compel Hung Yen Metallurgy Company to pay Vietnam – Italy Steel Company the total amount of VND28,145,956,647 as the remaining payment under the 04 contracts: Contract No. 03 dated 3 October 2006; Contract No. 05 dated 20 December 2006; Contract No. 06 dated 20 December 2006 and Contract No. 01 dated 1 February 2007 and issue VAT invoices to Vietnam – Italy Steel Company for the amount of VND21,544,992,000 in regard to Contract No. 06/2006 and an amount of VND30,469,842,000 in regard to Contract No. 01/2007”.* In addition, the first-instance court ruled on the court fees, the enforcement and the right to appeal of the involved parties in accordance with the law.

On 23 September 2009, Hung Yen Metallurgy Company submitted an appeal.

In Appellate Commercial Judgment No. 63/KDTM-PT dated 5 April 2010, the Appellate Court of the Supreme People’s Court of Hanoi ruled: *“To set aside First-instance Commercial Judgment No. 18/2009/KDTM-ST dated 3 September 2009 of the People’s Court of Bac Ninh Province. Transfer the case to the People’s Court of Bac Ninh Province for re-settlement in accordance with the law”.*

On 25 July 2010, People’s Court of Bac Ninh Province issued Official Letter No. 110/2010/CV-TA requesting the Chief Justice of the Supreme People’s Court to reconsider the appellate judgment by following cassation procedures.

In Decision on appeal No. 17/2012/KDTM-KN dated 25 June 2012, the Chief Justice of the Supreme People’s Court requested that the Judicial Council of the Supreme People’s Court to conduct the cassation procedures to set aside Appellate Commercial Judgment No. 63/KDTM-PT dated 5 April 2010 of the Appellate Court of the Supreme People’s Court of Hanoi; transfer the case to the Appellate Court of the Supreme People’s Court of Hanoi for settlement following appellate procedures in accordance with the law.

At the cassation hearing, the representative of the Supreme People’s Procuracy agreed with the protest of the Chief Justice of the Supreme People’s Court.

## The Judicial Council of the Supreme People’s Court finds:

1. From October 2006 to February 2007, Vietnam – Italy Steel Company and Hung Yen Metallurgy Company entered into 04 economic contracts (No. 03/2006/HDKT dated 3 October 2006, No. 05/2006-HDKT, No. 06/2006-HDKT dated 20 December 2006 and No. 01/2007-HDKT dated 1 February 2007).

At the time of the signing of the contracts, with respect to Hung Yen Metallurgy Company, Ms. Le Thi Ngoc Lan was still the legal representative (pursuant to the Enterprise Registration Certificate with fifth amendment dated 12 August 2005 and sixth amendment dated 6 July 2007 of Hung Yen Metallurgy Company and Decision on changes of business registration No. 140/QD-HDCD dated 2 July 2007 of Hung Yen Metallurgy Company). Under Power of Attorney No. 621/UQ-KKHY dated 10 September 2005, Ms. Lan had *“1. Authorized Mr. Nguyen Van Tinh to manage and operate Hung Yen Metallurgy Company. 2. Mr. Nguyen Van Tinh shall be responsible for: a/ Representing the Company in relations with the Banks, organizations, individuals and other involved units to ensure the normal operation of the company; b/ On behalf of the Company, performing civil, economic and commercial transactions within the business lines of the Company…”* On 20 November 2006, Ms. Lan issued Power of Attorney No. 1296/UQ/HYM empowering Mr. Le Van Manh to manage and operate the Company (contents of the authorization were the same as those for Mr. Tinh).

It was lawful that Ms. Lan issued the aforesaid power of attorney in favor of Mr. Nguyen Van Tinh and Mr. Le Van Manh (who were Deputy Directors of the Company) to sign those economic contracts. The fact that Mr. Tinh and Mr. Manh, on behalf of the company but not themselves, signed the contracts leaves them to have no related rights and obligations in this case. As a result, it cannot be determined that Mr. Tinh and Mr. Manh are persons with related rights and obligations in this case as requested by the defendant and opined by the appellate court.

The fact that the appellate court based on the Agreement on division of property during marriage between Ms. Le Thi Ngoc Lan and Mr. Le Van Dung and the Debt commitment document of the Company between Mr. Le Van Dung and Ms. Nguyen Thi Toan to state that Mr. Dung, Ms. Lan and Ms. Toan are persons with related rights and obligations is not correct. That is because, the agreement on division of property during marriage was between Mr. Le Van Dung and Ms. Le Thi Ngoc Lan; and that Ms. Nguyen Thi Toan and Mr. Le Van Dung had an agreement on

responsibility in paying the debts was an internal matter of Hung Yen Metallurgy Company. The debt commitment made between Mr. Dung and Ms. Toan had not been accepted by Vietnam – Italy Steel Company being the party having related rights”. Pursuant to Article 315.1 of the Civil Code 2005, *“The obligor may transfer a civil obligation to a substitute obligor, if the obligee consents”.* During the dispute settlement, Mr. Dung and Ms. Lan gave clear statements on their agreement on division of property during marriage, the signing of contracts with Vietnam – Italy Steel Company, responsibility of Hung Yen Metallurgy Company in performing the obligations in the contracts; Mr. Dung also requested to be absent from the court hearings. Therefore, that the summons of Mr. Dung and Ms. Lan to give testimony and be cross-examined as requested by the appellate court is not necessary. As a consequence, it is not lawful for the appellate court to set aside First-instance Commercial Judgment No. 18/2009/KDTM-ST dated 3 September 2009 of the People’s Court of Bac Ninh Province and transfer the case to the People’s Court of Bac Ninh Province for re-settlement.

1. As to the contents: During the contract performance, Vietnam – Italy Steel Company remitted money via bank wire instructions to Hung Yen Metallurgy Company; Hung Yen Metallurgy Company delivered the goods to Vietnam – Italy Steel Company (proved by Minutes of goods delivery duly stamped by Hung Yen Metallurgy Company). According to Article 93.1 of the Civil Code 2005, it is provided that: *“A legal person shall bear civil liability for the exercise of its civil rights and performance of its civil obligations established and performed by its representative in the name of the legal person”*. Therefore, in this case, Hung Yen Metallurgy Company shall be responsible for paying the debts to Vietnam – Italy Steel Company.

Since Hung Yen Metallurgy Company failed to fulfill its commitments as agreed in the contracts (i.e. failure to deliver sufficient goods to Vietnam – Italy Steel Company), there is sufficient basis for Vietnam – italy Steel Company to initiate a lawsuit against Hung Yen Metallurgy Company to request Hung Yen Metallurgy Company to return the received money (corresponding to the undelivered goods), the overdue interest for late payment, penalties for breach and compensation for damages (due to the non-delivery, Vietnam – Italy Steel Company had to purchase the goods from other sellers at higher price than that of Hung Yen Metallurgy Company), which is in accordance with Article 34, Article 297.3, Articles 300, 301,

302, 306 and 307 of the Commercial Law 2005.

However, the first-instance court made an incorrect calculation as to the amount that Hung Yen Metallurgy Company is obligated to pay Vietnam – Italy Steel Company, in particular:

As to the advance payments with regard to the undelivered goods in the 4 economic contracts, the first-instance court had correctly calculated the correct amount of money that Hung Yen Metallurgy Company had to return Vietnam – Italy Steel Company. However, as to the overdue interest on the aforesaid amount, although the first-instance court applied Article 306 of the Commercial Law 2005, it did not apply the average overdue interest rate on the market of at least three local banks at the time of payment (at the first-instance hearing) to make the calculation, instead,

the first-instance court was wrong in applying the basic interest of the State Bank at the time of the first-instance hearing at the plaintiff’s request to determine the overdue interest (being 10.5%/year). In this case, the Court needs to apply the average overdue interest on the market of at least three local banks (Agribank, Vietcombank and VietinBank) to calculate the overdue interest in accordance with the law.

As to penalties for breach: both parties agreed that: party B shall be subject to a penalty equivalent to 2% of the value of the approved shipments when party B commits one of the following breaches: either failure to deliver conforming goods, or failure to deliver the goods. As such, Hung Yen Metallurgy Company, since Hung Yen Metallurgy Company failed to deliver sufficient goods, it shall pay a contractual penalty equivalent to 2% of the value of the breached contractual obligation portion to Vietnam – Italy Steel Company in accordance with Article 300 and Article 301 of the Commercial Law 2005. There is a basis for the first-instance court to accept the claim for penalties for breach of Vietnam – Italy Steel Company; however, calculating interest over the penalties for contractual breach is not correct.

As to the compensation for damages: According to Vietnam – Italy Steel Company’s submissions, it was because Hung Yen Metallurgy Company breached the contracts for not delivering sufficient goods, Vietnam – Italy Steel Company had to purchase steel billets at higher price from other manufacturers to ensure the continuity of the production and business of the Company. The first-instance court relied on only the contracts for sale of steel billets which Vietnam – Italy Steel Company signed with other manufacturers to compel Hung Yen Metallurgy Company to pay Vietnam – Italy Steel Company the difference in value due to the purchase of the substitute goods at higher price, but the Court failed to determine whether the purchase of substitute goods from other manufacturers would serve for the purpose of substituting the undelivered and insufficient goods from Hung Yen Metallurgy Company to ensure the continuity of the business operation as planned. In this regard, the Court should have requested Vietnam – Italy Steel Company to submit documents, evidence (such as goods orders from third parties, production and business plan…) to prove that the actual damage had occurred, and from that there would be a basis to compel Hung Yen Metallurgy Company to compensate the damages in a proper manner. Besides, the first-instance court’s calculations of interest on the damages are not compliant with Article 302 of the Commercial Law 2005.

In light of the aforementioned reasons, pursuant to Article 291.3, Article 297.3, Article 299 of the Civil Procedure Code (amended and supplemented in 2011),

## RULES

1. To set aside Appellate Commercial Judgment No. 63/KDTM-PT dated 5 April 2010 of the Appellate Court of the Supreme People’s Court of Hanoi and First-instance Commercial Judgment No. 18/2009/KDTM-ST dated 3 September 2009 of the People’s Court of Bac Ninh Province; to transfer the case to the People’s Court of Bac Ninh Province for re-settlement in accordance with the law.

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*“As to the advance payments with regard to the undelivered goods in the 4 economic contracts, the first-instance court had correctly calculated the correct amount of money that Hung Yen Metallurgy Company had to return Vietnam – Italy Steel Company. However, as to the overdue interest on the aforesaid amount, although the first-instance court applied Article 306 of the Commercial Law 2005, it did not apply the average overdue interest rate on the market of at least three local banks at the time of payment (at the first-instance hearing) to make a calculation, instead, the first-instance court was wrong in applying the basic interest of the State Bank at the time of the first-instance hearing at the plaintiff’s request to determine the overdue interest (being 10.5%/year). In this case, the Court needs to apply the average overdue interest on the market of at least three local banks (Agribank, Vietcombank and VietinBank) to calculate the overdue interest in accordance with the law”.*

*There is sufficient basis for the first-instance court to accept the request for penalties for breach of Vietnam – Italy Steel Company; however, calculating interest over the penalties for breach is not correct”.*

*“That the first-instance court calculated interest over the damages is not compliant with Article 302 of the Commercial Law 2005”.*