**CASE LAW NO. 12/2017/AL**

The case law was adopted by the Judicial Council of the Supreme People’s Court on 14 December 2017 and promulgated under Decision 299/QD-CA dated 28 December 2017 of the Chief Justice of the Supreme People’s Court.

## Source of the case law:

Cassation Decision 14/2017/KDTM-GDT dated 6 June 2017 of the Judicial Council of the Supreme People’s Court on a commercial case named *“Dispute over the sale of goods contract”* in Quang Tri Province between the Plaintiff being Q Joint Stock Company (the legal representative is Mr. Dang Cong D, the authorized representative is Mr. Ho Nghia A) and the Defendant being T Company Limited (the legal representative is Mr. Vo Van T, the authorized representative is Ms. Vo Thi T).

## Location of contents of the case law:

Paragraph 1 of the “Findings of the Court”.

## Overview of the case law:

### Background of the case law:

The court ruled to postpone the hearing and the reason for the postponement of the court hearing was not caused by the fault of the involved parties (the plaintiff, the defendant, the persons with related rights and obligations) or the representative, the lawyer protecting lawful rights and interests. The court was re-opened, however, the involved party or the legal representative, the lawyer protecting lawful rights and interests of the involved party were absent from the hearing.

### Legal resolution:

The court must determine that this situation is where the legal representative, the lawyer protecting lawful rights and interests of the involved party, who were properly summonsed, were absent for the first time from the court hearing.

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

Article 199.1, Article 202, Article 266.2 of the Civil Procedure Code 2004, (Article 227.1, Article 228, Article 296.2 of the Civil Procedure Code 2015).

## Key words of the case law:

*“Summonsed properly”, “summonsed properly for the first time”, “the involved party was absent from the court hearing”, “Postponement of the court hearing”*

## CONTENTS OF THE CASE

*Pursuant to the Statement of Claims dated 5 November 2012; the amended and supplemented Statement of Claims dated 26 May 2013 and the testimonies in the Court, the Plaintiff being Q Joint Stock Company presented the following:*

On 3 January 2011, Q Joint Stock Company (hereinafter referred to as Q Company) and T Company Limited (hereinafter referred to as T Company) signed a Sale and Purchase Agreement on rubber plant seedlings No. 011/2011/HDKT; on 23 February 2011, the parties continued to sign Contract No. 021/2011/HDKT with the same contents. The total quantity of rubber plant seedlings under both contracts are 400,000 rubber plant seedlings with two layers of leaves with the value of 2,800,000,000 Lao Kip (each contract 200,000 seedlings valued at 1,400,000,000 Lao Kip). After signing the agreements, Q Company paid an advance of 930,000,000 Lao Kip (equal to VND2,511,000,000).

During the performance of the agreements, T Company requested to borrow 449,455 bare Stump seedlings and Q Company accepted. Q Company signed a purchase contract for such seedlings with V Company for the price of VND6,500/seedling. T Company made payment for over 40,600 seedlings to Q Company and owed the amount for 408,885 seedlings to Q Company. For phase 1, T Company only delivered 79,924 seedlings and then did not perform the contract. Q Company had invited T Company many times to meet to solve the problems, but T Company did not do so. On 5 October 2011, Mr. Vo Van T sent his daughter being Ms. Vo Thi T to work with Q Company. In order to mitigate the damages occurred, Q Company conducted a stock-take on the existing number of seedlings. Up to 14 September 2011, the total number of seedlings was 194,776 seedlings, however this was just the stock-take number and not the actual number of seedlings delivered. Up to the time of delivery of September 2011, the number of seedlings delivered only accounted for 20% of the total amount, which is 76% of the advance payment that T Company received previously from Q Company. Therefore, Q Company agreed with Ms. Vo Thi T to let Q Company designate their workers to use and pick up for phase 2, which was 117,883 seedlings, increasing the total number of seedlings being delivered to 197,757 Stump seedlings, equal to the total value of VND3,623,987,000 dong.

In addition, Q Company lent T Company other types of materials and fertilizers with the total value of VND243,913,211, however, T Company has not returned yet.

T Company delivered 163,376 [bags] of potting soil valued at 39,414,000 Lao Kip, equal to VND105,629,500; a wooden garden valued at 20,491,200 Lao Kip, equal to VND54,916,000 and VND18,096,000; the total amount is VND178,641,500. Therefore, Q Company requested the court to resolve the dispute as follows:

* To compel T Company to compensate damages for failure to perform both above- mentioned contracts with the total number of seedlings that were not fully delivered being 202,243 seedlings (valued at VND3,706,102,975). Pursuant to the contract, the parties had an agreement on the penalty in which the breaching party shall bear

a penalty of 5 times the value of the undelivered seedlings being VND18,530,514,875;

* To compel T Company to return 408,885 bare Stump seedlings that were borrowed from Q Company, the monetary value of these seedlings is VND2,657,557,500.
* To compel T Company to return the materials belonging to Q Company including: PE growbags (18x40) 5,170 kg, Kali fertilizer 500 kg, DAP fertilizer 1,000kg, phosphorus fertilizer 2,800 kg with the total value of 91,212,392 Lao Kip, equal to VND243,913,211.

At the court hearing, Q Company only requested for application of the penalty amount of 8% of the value of the undelivered seedlings being VND296,488,000 dong for breach of the contract. The total amount that T Company is required to pay to Q Company is VND3,088,822,500. After setting off the amount of VND1,367,934,000, T Company must pay to Q Company an amount of VND1,720,888,500.

*The defendant being T Company Limited presented the following:*

It confirmed that the contents of the contract are the same as presented by Q Company. T Company fully performed the contract, however, at the time of delivery of the seedlings, Q Company postponed and did not receive the seedlings because there was a lack of workers and means of transportation for transporting the seedlings. The representative of Q Company stated that at that moment due to the Company’s planting plan for rubber plants compared to the previous year’s planting plan, therefore, Q Company did not know where to plant the seedlings after receiving. Thus, until 19 July 2011, Q Company accepted to receive 79,924 seedlings in the phase 1 and until 21 September 2011, the aforesaid- mentioned seedlings were fully received. T Company had repeatedly requested Q Company to receive the remaining seedling, however, Q Company did not come to receive those seedlings. At the beginning of September 2011, Q Company told T Company that on 14 September 2011, their technical staff will be sent to T Company to inspect the remaining seedlings. If the remaining seedlings can still be used, they would count and receive such seedlings and request to leave those seedlings temporarily in the nursery garden of T Company, until Q Company has a new planting plan to plant such seedlings. The number of seedlings that Q Company counted on 14 September 2011 was 194,766 seedlings, and adding the 79,924 seedlings received in phase 1, then the total quantity of seedlings received by Q Company was 274,690 seedlings. The seedlings that Q Company did not receive on time and died were 125,310 seedlings. Thus, with respect to 400,000 seedlings under both agreements, T Company had fully provided them. The failure of not receiving the seedlings, leading to seedlings dying was caused by Q Company. The obligations of delivery of seedlings under the two agreements have been fully performed by T Company, and T Company had repeatedly requested Q Company to pay. However, Q Company did not agree to pay.

Q Company had advanced an amount of 930,000,000 Lao Kip for T Company under the two contracts, equal to VND2,511,000,000, the amount of fertilizer and materials that Q Company lent to T Company is 91,212,932 Lao Kip. The total amount of money that T Company is required to pay to Q Company is 1,021,212,392 Lao Kip, equal to VND2,757,273,454.

The total value of both contracts that T Company had made payments were 2,800,000,000 Lao Kip. Q Company received the wooden garden valued at 20,491,200 Lao Kip and VND18,096,000. PE growbags that Q Company has received from T Company valued at 32,865,000 Lao Kip, the value of PE growbags for phase 2 is 7,875,000 Lao Kip, the money spent for the potting soil is 39,406,291 Lao Kip. As such, the total amount of money that Q Company is required to pay to T Company is 2,900,637,491 Lao Kip, equal to VND7,831,721,225. After setting off the obligations of the parties, T Company made a counterclaim to request Q Company for the payments of 1,879,425,009 Lao Kip (equal to VND5,074,447,767) and VND18,096,000. The total value is VND5,092,543,767.

At the court hearing, T Company only requested the following payments:

* The value of 400,000 seedlings that has been performed under the contract being 1,870,000,000 Lao Kip (after the deduction of an advance 930,000,000 Lao Kip) equal to VND4,895,288,000.
* The value of the wooden garden is 20,491,200 Lao Kip, equal to VND53,642,000 and VND18,096,000.
* The value of 163,376 bags of soil is 39,414,000 Lao Kip, equal to VND103,158,000. The total value that T Company requested Q Company to make payment is VND4,967,026,000.
* For 449,445 seedlings that T Company borrowed from Q Company, T Company returned 40,600 seedlings and kept the remaining 408,885 seedlings. T Company agreed to pay by materials, T Company did not accept to pay in cash.

In First-instance Commercial Judgment No. 08/2013/KDTM-ST dated 4 September 2013, the People’s Court of Quang Tri province ruled:

*To apply Article 34.1, Article 35.1, Article 37.1, Articles 54, 55, 56, 300, 301 of the Commercial Law, Article 131.1 of the Civil Procedure Code, Articles 27.4 and 27.5 of the Ordinance on Case Fees, Fees for Dispute Resolution in the Courts.*

* *To accept the claims of the plaintiff, to compel the defendant being T Company Limited to make payment to the plaintiff being Q Joint Stock Company for an amount of VND1,720,888,500.*
* *Not to accept the counterclaim of the defendant to the claim for payment of VND3,602,837,000*

The first-instance court ruled on the court fees and the right to appeal of the involved parties.

On 4 September 2013, T Company submitted an appeal against the first-instance judgment in its entirety.

On 1 October 2013, the Chief Prosecutor of the People’s Procuracy of Quang Tri Province issued Protest Decision No. 2110/QDKNPT-P12 to protest against First-instance Commercial Judgment No. 08/2013/KDTM-ST dated 4 September 2013 of the People’s Court of Quang Tri Province.

In the appellate Commercial Judgment No. 19/2014/KDTM-PT dated 26 February 2014, the appellate court of the Supreme People’s Court in Da Nang ruled:

* *To suspending the appellate hearing with respect to the appeal of defendant being T Company Limited.*
* *Not to accept the Protest Decision 2110/QDKNPT-PT12 dated 1 October 2013 of the Chief Prosecutor of the People’s Procuracy of Quang Tri Province. Uphold the first- instance judgment.*
* *After the appellate hearing, T Company submitted a petition requesting cassation review with respect to the above-mentioned appellate commercial judgment.*

In the Cassation Protest No. 01/2017/KN-KDTM dated 24 February 2017, the Chief Justice of the Supreme People’s Court protested against the appellate Commercial Judgment No. 19/2014/KDTM-PT dated 26 February 2014 of the appellate court of the Supreme People’s Court in Da Nang and requested the Judicial Council of the Supreme People’s Court to set aside the appellate commercial judgment as above-mentioned and First-instance Commercial Judgment No. 08/2013/KDTM-ST dated 4 September 2013 of the People’s Court of Quang Tri Province, to transfer the case to the People’s Court of Quang Tri Province to re-conduct the first-instance procedures as provided by the laws.

In the cassation hearing, the representative of the People’s Procuracy requested the Judicial Council of the Supreme People’s Court to accept the protest of the Chief Justice of the Supreme People’s Court.

## FINDINGS OF THE COURT

1. Procedures: Pursuant to the Minutes of appellate hearing dated 26 November 2013, in the court hearing, the involved parties were all present pursuant to the summons of the court. However, the Council of Adjudicators ruled to postpone the hearing so that the involved parties can provide additional evidence. In the appellate hearing re-opened on 26 February 2014, the defendant and the lawyer protecting the lawful rights and interests were absent. Where the Council of Adjudicators ruled to postpone the court hearing and the postponement of court hearing was due to the court, in the re-opened hearing, the

absence of the involved parties or the representative, the lawyer protecting lawful rights and interests of the involved parties shall be deemed as the first absence from the court.

The appellate court should have determined that the defendant and the lawyer protecting lawful rights and interests of the defendant were summonsed properly but were absent for the first time at the court hearing in accordance with Article 199.1 and Article 266.2 of the Civil Procedure Code to postpone the hearing. The appellate court found in the appellate hearing that the defendant and the lawyer protecting lawful rights and interest of the defendant were validly summonsed and were absent at the court hearing for the second time. Therefore, the court’s decision on suspend the appellate hearing with respect to the defendant’s appeal did not comply with Articles 199, 202, and 266 of the Civil Procedure Code, depriving the right to appeal and affect the lawful rights and interests of the defendant.

1. On determination of the parties’ faults: Pursuant to Article 3 of the Sale and Purchase Agreement on rubber plant seedlings dated 3 January 2011, the parties agreed that at the latest on 31 July 2011, Party B (T Company) must fully deliver 200,000 seedlings meeting the quality requirements to Party A (Q Company). The Working Minutes dated 15 July 2011 on carrying out the examination and assessment of the quality of seedlings in the gathering area until 15 July 2011 between Mr. Ho Duy Ly being the staff of the Agriculture Technique Department of Q Company and Ms. Vo Thi T being the representative of T Company recorded the conclusions: “15,550 Stumps with layer of leaves were delivered to the gathering area; Stumps with 2-3 layers of leaves were delivered to the gathering area; the layer of leaves is stable, the quality of Stump with layer of leaves is good”. From 15 July 2011 to 31 July 2011 (the last date for delivery of the seedlings under the contract) the parties did not deliver and receive seedlings and had no written agreement on extension of the deadline for delivery of the seedlings. Q Company stated that on 15 July 2011, T Company had 15,550 seedlings that met quality requirements, therefore, on 31 July 2011 it would be impossible for T Company to have all 400,000 seedlings for delivery of seedlings. Therefore, T Company breached the agreement. T Company stated that until 31 July 2011, Q Company only received 3,268 seedlings (although T Company had 15,550 seedlings for delivery), therefore Q Company breached the agreement.
2. In the Minutes of the appellate court hearing dated 26 November 2013, Q Company explained the following: until 31 July 2011 (the last day of delivery of seedlings under the contract), Q Company did not make a Minutes on Handover of Seedlings and until September 2011, Q Company continue to perform the contract by receiving the seedlings because Q Company examined those seedlings, however, T Company only delivered 79,000 seedlings. The remaining seedlings did not meet the standards for delivery as specified in the agreement. Therefore, Q Company agreed to lengthen the time of delivery the seedlings for deduction of debt and allowing T Company to take care of the seedlings until they qualified for delivery. Simultaneously, Mr. H (the head of the Agriculture Technique Department of Q Company being the witness) explained that on 31 July 2011, Q Company only received 3,000 seedlings because Q Company only had 3 vehicles to transport (2 Kazma cars and 1 Isuzu car). At this time, it was raining in Laos, the road was slippery, Ms.

T had a cellphone therefore Q Company asked her to pick up the seedlings. However, due to the difficulties, Q Company did not pick up the seedlings.

1. With regards to the above-mentioned developments, it can be determined that the parties agreed on the time of delivery shall be from 30 June 2011 to 31 July 2011 with the total quantity of seedlings is 200,000. (The total quantity of seedlings to be delivered under the 2 contracts is 400,000). Although, up to 15 July 2011, T Company had 15,500 seedlings for delivery, Q Company only received 3,200 seedlings due to the rainy weather and slippery roads and there were only 3 vehicles to transport. Although these facts were not presented in writing, until 5 October 2011, Q Company accepted to extend the time for delivery of the seedlings and continued to receive the seedlings within 12 days. Up to 21 September 2011, Q Company received 79,924 seedlings and until 24 October 2011, the parties continued to deliver the seedlings (pursuant to the Minutes on Handover of the seedlings dated 24 October 2011, in which the court determined that from 6 October 2011 to 24 October 2011, Q Company delivered 83,867 PB260 seedlings with 2 layers of leaves and good quality seedlings). Therefore, there were grounds that both T Company and Q Company had faults in delivering the seedlings. The first-instance court and the appellate court determining that the faults belong to T Company and applied the highest penalty level pursuant to Article 301 of the Commercial Law (8%) to T Company was not appropriate, the court should re-determine the level of fault of the parties to rule correctly on penalty.
2. On the borrowed seedlings: The case file presented that the parties did not have any agreement on borrowing the seedlings. However, both parties confirmed that Q Company lent 449,455 seedlings to T Company, T Company has returned 40,600 seedlings, and owed 408,855 seedlings. T Company stated that there were enough seedlings for a return and agreed to return those seedlings, but did not agree to pay in cash. Q Company stated that T Company does not have the capacity to return those seedlings, therefore Q Company requested T Company to pay in cash. Articles 471 and 474 of the Civil Code 2005 on the contract for property loan, Article 514 of the Civil Code 2005 on property borrowing provided on the repayment obligations that the borrower (the property borrower) must return the same type of property, however, the first-instance and the appellate court did not review on whether or not T Company was able to return the same type of seedlings, which were not consistent with the laws. If T Company is incapable of return the same type of seedlings, T Company is required to pay in cash.

For the above reasons:

## RULES

Based on Article 337.2, Article 343.3, Article 345 of the Civil Procedure Code 2015; Resolution No. 103/2015/QH13 dated 24 November 2015 of the National Assembly on implementation of the Civil Procedure Code.

1. Accept the Cassation Protest No. 01/2017/KN-KDTM dated 24 February 2017 of the Chief Justice of the Supreme People’s Court to the appellate Commercial Judgment No. 19/2014/KDTM-PT dated 26 February 2014 of the appellate court of the Supreme People’s Court in Da Nang on the commercial case named “Dispute over the sale of goods agreement” between the plaintiff being Q Joint Stock Company and the defendant being T Company Limited.
2. To set aside the appellate Commercial Judgment No. 19/2014/KDTM-PT dated 26 February 2014 of the appellate court of the Supreme People’s Court in Da Nang and First-instance Commercial Judgment No. 08/2013/KDTM-ST dated 4 September 2013 of the People’s Court of Quang Tri Province.
3. To transfer the case to the People’s Court of Quang Tri Province to re-conduct the first-instance procedures as provided under the laws.

## CONTENTS OF THE CASE LAW

*“[1] Procedures: Pursuant to the Minutes of appellate hearing dated 26 November 2013, in the court hearing, the involved parties were all present pursuant to the summons of the court. However, the Council of Adjudicators ruled to postpone the hearing so that the involved parties can provide additional evidence. In the appellate hearing re-opened on 26 February 2014, the defendant and the lawyer protecting the lawful rights and interests were absent. Where the Council of Adjudicators ruled to postpone the court hearing and the postponement of court hearing was due to the court, in the re-opened hearing, the absence of the involved parties or the representative, the lawyer protecting lawful rights and interests of the involved parties shall be deemed as the first absence from the court. The appellate court should have determined that the defendant and the lawyer protecting lawful rights and interests of the defendant were summonsed properly but were absent for the first time at the court hearing in accordance with Article 199.1 and Article 266.2 of the Civil Procedure Code to postpone the hearing. The appellate court found in the appellate hearing that the defendant and the lawyer protecting lawful rights and interest of the defendant were validly summonsed and were absent at the court hearing for the second time. Therefore, the court’s decision on suspend the appellate hearing with respect to the defendant’s appeal did not comply with Articles 199, 202, and 266 of the Civil Procedure Code, depriving the right to appeal and affect the lawful rights and interests of the defendant”.*