

COUNTRY Q&A: GENERAL AND GOVERNING LAW
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1. Please give a brief overview of general trends in the use of courts, arbitration and alternative dispute resolution for the settlement of large disputes between companies in your jurisdiction.

Only in the last decade has the Vietnamese economy opened up to private sector participation. As a result, the courts do not have extensive experience in handling complex commercial disputes. Although the number of cases is on the increase, court settlement is usually the last resort as proceedings are time-consuming and there is no effective mechanism to enforce judgments.

Arbitration is also not a preferred choice as arbitral awards are not enforceable. If asked to enforce an arbitral award, the courts will either:

- (i) Review the case again from the beginning; or
- (ii) Reject the hearing if the parties have chosen arbitration.

Arbitration law is now being considered for substantial revision with an emphasis on enhancing the enforceability of arbitral awards.

Given the limitations of litigation and arbitration, alternative dispute resolution (ADR) has started to develop in recent years. Many business want ADR as a preliminary step to litigation or arbitration.

Sales and construction contracts usually contain a clause requiring parties to attempt one of the following dispute resolution methods before initiating litigation or arbitration proceedings:

- (i) Mediation;
- (ii) Expert determination;
- (iii) Dispute resolution board.

2. If a contract has some connection with your jurisdiction, are there any areas of local law that would apply to the contract irrespective of the choice of law?

Contracting parties are entitled to choose the law governing their contract. However, this is subject to the general conflict of laws rules. According to conflict rules, local law will apply where the contract is executed and performed entirely within the territory of Vietnam irrespective of the choice of law. In addition, the application of foreign governing law must not be contrary to the fundamental principles of Vietnamese law.

COURTS

3. In which court are large commercial disputes most likely to be brought? (Please answer the following questions on the basis of procedures that apply to this court.)

The nature of a transaction will affect the adjudication of disputes arising out of it. Economic and commercial disputes are settled by an economic court or an arbitration institution. Civil disputes are heard by civil courts.

Civil and economic court procedures differ in a number of important respects including:

- (i) The make-up of the bench at first instance;
- (ii) The level an payment of court fees;
- (iii) The statutory limit for filing a petition in court;
- (iv) The limitation periods for settlement of cases.

Under economic procedural law, provincial municipal courts, including at first instance over economic and commercial disputes relating to a claim of more than VND50 million (approximately US\$ 3,300). The Supreme Court has jurisdiction at the appellate level.

4. Is each party to a dispute obliged to disclose all documents in its possession whether helpful or harmful to its case?

There are no legal procedures requiring a defendant to reply to a claim or permitting a pre-trial exchange of evidence and documents. In addition, there is no concept of discovery.

Although a defendant may send the court his comments on the petition and supporting documents filed by a plaintiff, he is only obliged to give statements and evidence to the court as and when requested. Neither the plaintiff nor the defendant is required to disclose documents to one another. The court may, if necessary, collect evidence and clarify any aspect of the dispute by itself, or by assignment to other courts or applicable authorities.

5. Are any documents privileged (that is, they do not need to be shown to the other party)? (In particular, would documents written by an in-house lawyer (domestic or foreign) be privileged in any circumstances?)

Documents, including those prepared by an in-house lawyer, are generally privileged except when a litigant is required to submit to the court any documents in his possession. In such cases, the court may, in limited circumstances, show documents to the other litigant for the purpose of verification.

6. Are court proceedings confidential or public?

Court proceedings are public.

7. What remedies are available? Are any of these available at an interlocutory stage (that is, before the full trial)?

The main remedies available in economic and commercial disputes are:

- (i) Damages;
- (ii) Specific performance;

(iii) Injunctions.

Damages include compensation and liquidated damages. In general, the non-defaulting party has the option of requesting either compensation or liquidated damages, or both. Depending on the nature and complexity of the breach of contract, and the actual consequences of the breach, the court will award liquidated damages, based on a range set out by law, of up to 12% of the total value of the obligation breached. Compensation covers actual and direct losses, and limited types of indirect losses, for example loss of profits.

Vietnamese law attaches great importance to the remedy of specific performance. The non-defaulting party is entitled to request specific performance of the contract unless certain factors make awarding this remedy impossible.

In order to preserve the *status quo* of the parties' interests, injunctions may be used for any of the following purposes:

- (i) To take an inventory of the assets in disputes;
- (ii) To freeze a bank account;
- (iii) To prohibit a party from doing something;
- (iv) To require a party to do something;
- (v) To permit harvesting or the preservation of products;
- (vi) To permit the sale of perishable products.

Injunctions are generally available at the interlocutory stage of the litigation proceedings.

8. How long does it take to obtain judgment after formal commencement of proceedings?

After formal commencement of proceedings, the court will verify the claims made by the plaintiff and will issue one of the following decisions within 40 days, 60 days in complex cases:

- (i) Temporary suspension of the settlement of the case;
- (ii) Suspension of the settlement of the case;
- (iii) Moving of the case to a trial.

The court will hear a case within ten days of the date of the decision to move to trial, or 20 days in complex cases.

In practice, proceedings usually take longer than the procedural timetable set out above and can often take from six months to several years.

9. How much does litigation cost? (Please give a broad overview of legal fee structures. For example, do local lawyers commonly use task based billing? Are fees fixed by law?)

Fees are negotiated between clients and their lawyers. Hourly rates are not common and Vietnamese lawyers are used to offering task based billing to clients.

It may cost in excess of US\$10,000 (EUR9, 277) to take large commercial cases to trial.

10. Is the loser liable to pay the winner's costs?

Court fees are calculated as a percentage of the amount the plaintiff is claiming. In addition, the plaintiff is required to pay 50% of the court fee in advance.

The loser is liable for paying the entire court fee and may also be held liable for other costs, for example the winner's travel and accommodation expenses, if such costs are reasonable and supported by lawful documents. However, in practice a claim for legal costs will normally be dismissed by the court because the parties are required to bear such costs themselves.

ARBITRATION

11. Are there any arbitration bodies in your jurisdiction that are commonly used for the resolution of large commercial disputes? (Please give details.)

The following arbitration bodies exist to resolve large commercial disputes:

- (i) Vietnam International Arbitration Center (VIAC) under the Vietnam Chamber of Commerce and Industry.
- (ii) Economic Arbitration Centres (EACs) set up in most large cities and provinces under the supervision of the Ministry of Justice. EACs are non- government arbitral institutions.

Most of the large commercial cases are handled by the VIAC. VIAC hearings take place in Hanoi. However, the VIAC chairman or the sole arbitrator appointed to hear the case may agree to hold the hearings elsewhere.

To date, the number of cases referred to arbitration in Vietnam is quite small.

12. Is an arbitration agreement binding?

In both domestic and international cases, an arbitration agreement may take the form of an arbitral clause included in the contract or a separate arbitration agreement. The Vietnamese courts accept entry into an arbitration agreement through the exchange of correspondence. The legal effect of an arbitration agreement is unclear as few statutory provisions exist. However, as a matter of practice, in order to be legally binding, an arbitration agreement must:

- (i) Be in writing; and
- (ii) Refer to the exact name of the arbitration body chosen.

13. Are there any restrictions on the number or method of selection of arbitrators?

The parties may agree freely on the number of arbitrators. However, the method of selection is usually provided in the arbitration rules of the VIAC or EACs.

The parties may challenge an arbitrator, orally or in writing, at any time before the end of proceedings, if they have reason to believe that his impartiality might be impaired.

14. What procedural rules are arbitrators likely to follow? Can parties determine the procedural rules that apply?

The VIAC and each EAC has its own procedural rules. Arbitrators are required to follow such rules in the proceedings. The parties are not entitled to agree on any rules that are different from those of the selected arbitration body.

15. Is pre-hearing discovery/disclosure available?

The concept of pre-hearing discovery or disclosure does not exist under Vietnamese law and the parties are not obliged to provide all documents and information in their possession. However, arbitrators may request any party involved to provide information and evidence, and disclose it to the other party.

16. Is arbitration confidential?

Yes, arbitration is confidential.

17. How far will be the local courts intervene to assist an arbitration, for example, by granting an injunction or by compelling witnesses to attend?

Statutory law is silent on judicial aid and intervention in support of the arbitral process in Vietnam. In practice, no intervention has been made by local courts to assist an arbitration.

18. What is the danger of local courts intervening to frustrate the arbitration: can one party stall proceedings by frequent court applications?

Local courts will normally respect a binding arbitration agreement and will not intervene to frustrate proceedings. However, if one of the parties fails to implement the award rendered by the arbitration, the other party may have recourse to the court, which will then hear the case again.

19. Can the parties effectively exclude any right of appeal to the local courts?

Statutory law is silent on the judicial review of an arbitral award by local courts. There is therefore no concept of appeal against an arbitral award. However, if one of the parties fails to implement the award rendered by the arbitration, the other party may have recourse to the court for re-hearing the case (see *Question 18*).

20. Will an arbitration award be enforceable in other countries?

An arbitral award rendered by a Vietnamese arbitration body is subject to the local law of the jurisdiction where enforcement is being sought. Enforcement is not a problem if the relevant jurisdiction is party to the New York Convention.

21. What is the likely cost and duration of arbitration proceedings?

Cost. The average fee for arbitration in large commercial disputes may cost in excess of US\$10,000 (EUR9, 277).

Duration. Generally, arbitration tends to be faster and less expensive than litigation although this is not so in every case. It may last several months in complex cases.

22. Is your country to the New York and/or Geneva Convention?

Vietnam is a signatory to the New York Convention but not the Geneva Convention.