

GAR KNOW HOW CONSTRUCTION ARBITRATION

Vietnam

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Legal system

1 Is your jurisdiction primarily a common law, civil law, customary law or theocratic law jurisdiction? Are the laws substantially derived from the laws of another jurisdiction and, if so, which? What instruments have legal force and effect? Who are the lawmaking bodies? How and where are new laws published? Can laws be passed with retrospective effect?

Vietnam is a civil law jurisdiction. Its legal system is heavily influenced by French laws and Russian (formerly Soviet Union) laws. Recently, it has imported more common law concepts in areas such as shipping and maritime, insurance, corporate laws, etc.

The system of legislative documents comprises the Constitution, international treaties and agreements to which Vietnam is either a signatory or has ratified, domestic statutes, decrees, resolutions and circulars.

Law-making bodies include National Assembly, president, prime minister, ministers, People's Supreme Court, People's Committees and ministries vested with the power to make laws and by-laws.

New laws are officially published in Legal Normative Documents at: <https://vbpl.vn/TW/Pages/vbpgen.aspx>.

Contract formation

2 What are the requirements for a construction contract to be formed? When is a “letter of intent” from an employer to a contractor given contractual effect?

The construction contract formation follows the general principle of offer and acceptance under the Civil Code. As per article 117 of Civil Code 2015, articles 139 and 141 of Construction Law 2014 (amended in 2020), a construction contract is deemed to have been formed upon satisfaction of the following conditions, (i) a party's legal competence, (ii) it must be in written form and must include contents required by laws, and (iii) it is not against principles of construction law, and adheres with voluntariness, equality, cooperation, non-violation of law and social ethics.

A “letter of intent” is not a defined term under Vietnamese law. In practice, it is normally deemed as a non-binding document unless the language specifies that the parties are legally bound by the terms contained therein. Often, the letter of intent includes provisions to compensate the contractor with a capped amount or otherwise reasonable costs to commence the construction work, pending the conclusion of a construction contract. Under Vietnamese laws, this “temporary agreement” when countersigned by the contractor shall have a contractually binding effect with regard to such temporary work.

Choice of laws, seat, arbitrator and language

3 Are parties free to choose: (a) the governing law of their contract; (b) the law of the arbitration agreement; (c) the seat of the arbitration; (d) any arbitral rules; (e) anyone to act as arbitrator; and (f) the language of the contract and the arbitration? If not, what are the limitations on choice and what happens if the parties act contrary to them?

For (a): The parties to a foreign-related contract (which means either there is a foreign party, the establishment, amendment or termination of the relationship is outside Vietnam, or the subject matter is outside Vietnam) are free to choose the governing law of the contract. In the absence of any agreement

between the parties, the governing law of the contract shall be Vietnamese laws. There are, however, certain exceptions where only Vietnamese laws can apply:

- public-private partnership investment project contract or state-funded construction contract, etc; and
- construction contracts that consist of foreign law that are inconsistent with the fundamental principles of Vietnam.

For (b): The parties to a foreign-related contract are free to agree on the governing law of their arbitration agreement. In the absence of agreement, the governing law of the arbitration agreement shall be Vietnamese law.

For (c) & (d): The parties are free to choose the seat of the arbitration and applicable arbitral rules.

For (e): The parties may freely choose anyone to act as arbitrator or arbitrators as long as the standards mentioned under article 20 of Law on Commercial Arbitration 2010 are fully complied with.

For (f): The language of a construction contract to be performed in Vietnam shall be Vietnamese. When a construction contract involves a foreign party, the language of such contract shall be Vietnamese and any other language agreed by the parties.

Contracts without foreign elements cannot choose foreign laws to govern the substantive contract, the arbitration agreement or the seat of arbitration.

Parties' agreements and actions shall be rendered void if any of the above conditions are violated.

Implied terms

4 How might terms be implied into construction contracts? What terms might be implied?

Terms might be implied into construction contracts in a number of ways: intentions of the parties, by statute, by custom, by analogous law, by case law, by equity.

Implied terms in construction contracts include insurance, governing law of the contract, force majeure, hardship, warranty obligations, compensation for damages and statutory interest for late payment.

Certifiers

5 When must a certifier under a construction contract act impartially, fairly and honestly? To what extent are the parties bound by certificates (where the contract does not expressly empower a court or arbitral tribunal to open up, review and revise certificates)? Can the contractor bring proceedings directly against the certifier?

In Vietnam, "certifier" is understood as "supervisor" under a construction contract. Under article 19 of Decree No. 06/2021/ND-CP dated 26 January 2021, the supervisor must exercise accuracy, honesty, objectivity in his or her report to the employer. In construction projects financed by state capital, the supervisor must be independent from the construction or procurement contractor. Moreover, the supervisor must not be a construction surveyor for the work under his or her supervision.

Under construction laws of Vietnam, the supervisor can be appointed either by a contractor or an employer. A supervisor may request the employer adjust the engineering detail whenever any defects are detected. He or she may demand the contractor comply with the performance requirements under the construction contract or suspend the construction work if construction quality does not meet the technical requirements.

The contractor can only initiate proceedings against the supervisor if the contract is entered into between the contractor and the supervisor. If the supervisor enters into a contract with the employer, the contractor cannot file a lawsuit directly against the supervisor due to the privity of contract between the supervisor and the employer.

Competing causes of delay

6 If an employer would cause (eg, by variation) a two-week critical delay to the completion of the works (which by itself would justify an extension of time under the construction contract) but, independently, culpable delay by the contractor (eg, defective work) would cause the same delay, is the contractor entitled to an extension?

The contractor shall be entitled to an extension if the delay is attributable to the employer's variation. However, it is uncertain under the laws whether the contractor can claim an extension if he or she would independently cause the same delay. Where the completion time is delayed, the contractor must clearly define the responsibility for the damage caused by the delay. If it is disputed, it is up to the courts or the tribunal to determine the extent of culpability of each party causing the delay.

Notably, in state-funded projects, if giving an extension prolongs the contract implementation progress, the employer shall report to the competent authority for examination and decision.

Disruption

7 How does the law view "disruption" to the contractor (as distinct from delay or prolongation to the completion of the works) caused by the employer's breaches of contract and acts of prevention? What must the contractor show for a disruption claim to succeed? If an entitlement in principle can be shown (eg, that a loss has been caused by a breach of contract) must the court or arbitral tribunal do its best to quantify that loss (even if proof of the quantum is lacking or uncertain)?

There is no concept of "disruption" under Vietnamese law. If the employer breaches the contract or in any manner that prevents the contractor's work, then to the extent of such breach, the contractor may, (i) seek damages, and/or (ii) suspend or terminate the contract and claim damages under article 145 and 146 of the Law on Construction. For the claim to succeed, the contractor must show that the breach is a fundamental one (which substantially deprives the contractor of what he or she expected from the contract).

The burden of proof lies on the contractor. The court or tribunal shall quantify such loss, which will be the material and direct loss suffered by the aggrieved party due to the breach of the breaching party and the direct profit that the aggrieved party would have earned if such breach had not been committed. In practice, it is not uncommon for the courts or arbitral tribunals to request or seek independent quantum experts to determine such losses.

Acceleration

8 How does the law view “constructive acceleration” (where the contractor incurs costs accelerating its works because an extension of time has not been granted that should have been)? What must the contractor show for such a claim to succeed? Does your answer differ if the employer acted unreasonably or in bad faith?

As per article 113 of the Law on Construction 2014 amended 2020, the contractor is entitled to claim compensation for damage caused by the employer’s contractual breach, if the employer wrongfully refuses to grant the contractor an extension under the construction contract.

To succeed in its claims, the contractor must demonstrate: (i) the employer’s breach in granting an extension of time to the contractor; (ii) actual damage suffered by the contractor; and (iii) a direct causal link between the employer’s breach and the contractor’s damages.

It is incumbent upon the contractor to adopt all necessary and reasonable measures to prevent or limit its damage, and it can claim reasonable expenses have been undertaken to prevent or mitigate the damages.

Force majeure and hardship

9 What events of force majeure give rise to relief? Must they be unforeseeable and to whom? How far does the express or implied allocation of risk under the contract affect whether an event qualifies? Must the event have a permanent effect? Is impossibility in performing required or does a degree of difficulty suffice? Is relief available where only some obligations (eg, to make a single payment or carry out one aspect of the works) are affected or is a greater impact required? What relief is available and does it apply automatically? Can the rules be excluded by agreement?

According to Civil Code 2015, an event amounts to force majeure if it satisfies the following three conditions:

- objectivity;
- unforeseeability; and
- impossibility to overcome the event despite all necessary and possible measures having been taken.

In a state-funded construction contract, there are several events that constitute a force majeure event such as natural disasters, environmental legislation, enemy-inflicted disaster or conflagration.

Force majeure event does not need to have a permanent effect but must be an unforeseeable impediment and impossible to perform or overcome by the affected party.

In practice, a judge or an arbitrator may accept the express events agreed by the parties as a force majeure event. However, there are all some instances where it has been opined that the express event still needs to pass all three conditions above.

A force majeure event does not ipso facto apply exempting the affected party from performing the contract. The affected party must give written notice to the other party as soon as possible.

Whether a force majeure clause can be excluded by agreement is determined case by case, but it is generally believed that such a clause cannot be excluded by an agreement.

10 When is a contractor entitled to relief against a construction contract becoming unduly expensive or otherwise hard to perform and what relief is available? Can the rules be excluded by agreement?

If a contractor encounters difficulties in the performance of a construction contract due to increased costs or otherwise, the contractor may request for negotiation or termination under the fundamental change of circumstance clause, article 420 of the Civil Code 2015. An event is considered a fundamental change of circumstances if it satisfies the following conditions:

- there is a change to the circumstances due to objective reasons after the contract is entered into;
- at the time when the contract is entered, the parties are unable to foresee the change of circumstances;
- had the said circumstances existed at the time of signing of the contract, then the contract would not have been entered into or would have been entered into with different terms and conditions if the parties had foreseen such change;
- the continuation of performance of the contract without any change to the terms and conditions will cause serious loss and damage to one of the parties to the contract; and
- the affected party has taken all necessary measures to the best of its abilities and appropriate with the nature of the contract but is unable to prevent or mitigate its scale of loss.

Whether a fundamental change of circumstances clause can be excluded in an agreement is determined on case-by-case basis, but it is generally believed that these rules cannot be excluded by agreement.

Impossibility

11 When is a contractor entitled to relief if after the contract is concluded it transpires (but not due to external events) that it is impossible for the contractor to achieve a particular aspect of the contractual specification? What relief is available?

If the contractor's performance becomes impossible after the contract is concluded, the contractor must immediately inform the employer and seek postponement of the performance of the obligation.

If at the time of entering a contract, the employer was aware or should have been aware that it was impossible to perform the contract but failed to notify the contractor, the contract shall be rendered invalid and the employer shall be liable for compensation, if any.

When a contractor is unable to perform the contract due to a fault by the employer, the contractor shall demand the performance of the contract by the employer or rescind the contract and claim damages.

In cases where the contractor is unable to perform its obligation but there is no fault of any party and there is no external event, the contractor does not have the right to demand the performance of the contract from the employer.

Clauses that seek to pass risks to the contractor for matters it cannot foresee or control

12 How effective are contractual provisions that seek to pass risks to the contractor for matters it cannot foresee or control, for example, making the contractor liable for: (a) a specified event of force majeure; (b) ground conditions that no reasonably diligent contractor could have foreseen; or (c) errors in documents provided by the employer, such as employer’s requirements in design and build forms?

Vietnamese laws do not require damages to be foreseeable to enable a claim causing such damages. Generally, the contractual provisions seeking to pass the risk to a contractor for any unforeseeable circumstance are enforceable under Vietnamese laws. However, in the event of force majeure as defined by Vietnamese law, the contractor may rely on such force majeure to deny its liability, despite the contractual provisions of the contract.

Specific events, such as unforeseeable ground conditions, or errors in documents provided by the employer shall not release the contractor from contractual liability unless they meet the conditions of force majeure.

Duty to warn

13 When must the contractor warn the employer of an error in a design provided by the employer?

Article 13 of Decree 06/2021/ND-CP provides that the contractor shall notify the employer in reasonable time when a discrepancy between design documentation or construction contract and the work done is detected. This notification must also outline the reasonable and necessary steps taken by the contractor to prevent or limit the damage.

Good faith

14 Is there a general duty of good faith? If so, how does it impact upon the following (where they are otherwise permitted under the construction contract): (a) the level of intervention in the works that is allowed by the employer; (b) a party’s discretion whether to terminate or suspend the contract; or (c) the employer’s discretion to claim pre-agreed sums under the contract, such as liquidated damages for delay?

Duty of good faith is provided in article 3 of the Civil Code 2015. Parties to a contract shall exercise and perform their obligations with good faith and honesty.

Duties of good faith enumerated under the Civil Code 1995 include:

- to respect the interests of the state and public; or
- to respect legitimate rights and interests of the other party (or third parties), assisting each other to exercise their civil rights and obligations; or
- not to deceive or mislead others.

In respect of construction contracts, courts and arbitral tribunals will have to take into consideration whether the parties have exercised good faith (and may be in breach of good faith obligation) during the performance of the contract.

For the level of intervention in the works that is allowed by the employer, good faith will not normally interfere with express obligations under the contract. Without prejudice to its own rights specified under the contract, the employer has the general duty to cooperate with the contractor to allow it to perform the contract (including no intervention in the work causing delays and/or difficulties for the contractor to perform its work).

Due to the abstract nature of the concept, it is difficult to qualify good faith as a material breach of the contract. Thus, generally it is a risk for a party to terminate the contract on the sole ground of breach of the good faith obligation. Instead, a good faith obligation shall be presented in the form of a duty to mitigate loss (even if the other party committed a fundamental breach).

It is not clear whether L/D is recognised under Vietnamese laws. Generally, good faith duty will not bar the employer from claiming damages as long as it could be proved.

Time bars

15 How do contractual provisions that bar claims if they are not validly notified within a certain period operate (including limitation or prescription laws that cannot be contracted out of, interpretation rules, any good faith principles and laws on unfair contract terms)? What is the scope for bringing claims outside the written terms of the contract under provisions such as sub-clause 20.1 of the FIDIC Red Book 1999 (“otherwise in connection with the contract”)? Is there any difference in approach to claims based on matters that the employer caused and matters it did not, such as weather or ground conditions? Is there any difference in approach to claims for (a) extensions of time and relief from liquidated damages for delay and (b) monetary sums?

Article 44, Decree 37/2015 provides that, if claims are not notified within the period agreed by the parties or within the period provided under the law of limitation (56 days), the parties must continue to perform the contract as agreed (ie, no claim is allowed). Vietnamese laws also provide certain limitation periods for certain types of claim, and the parties may agree a shorter, but not a longer, period than such limitation periods.

Vietnamese laws are rather strict on claims brought outside the written terms of the contract. Courts do not usually facilitate non-contractual claims in connection with the contract.

There is a difference in approach to claims when the employer caused delay/damage or objective events occurred. The contractor shall be not liable for claims if the contractor’s failure was due entirely to the employer. If a party breaches the contract due to the weather or ground conditions constituting a force majeure event, the party in breach will be exempt from liability; however, it cannot claim for damages (eg, for an extension of time), except if otherwise agreed by the parties.

Liquidated damages have not been clearly defined and recognised under Vietnamese law. It is a controversial topic.

Suspension

16 What rights does the employer have to suspend paying the contractor or performing other duties under the contract due to the contractor’s (non-)performance, or the contractor have to suspend carrying out the works (or part of the works) due to the employer’s (non-) performance?

Pursuant to article 411 Civil Code 2015, the employer or contractor has the right to suspend the performance of its obligation if the other party performing the obligation first failed to do so.

Further, article 145 of Law on Construction 2014 allows the employer to suspend the contract if the contractor fails to satisfy the requirements on quality, labour safety and schedule in accordance with the contract. For its part, the contractor is entitled to suspend performance of the contract if the employer commits a breach of its payment obligation.

Omissions and termination for convenience

17 May the employer exercise an express power to omit work, or terminate the contract at will or for convenience, so as to give work to another contractor or to carry out the work itself?

Unless expressly agreed by the parties, the employer cannot terminate the contract at will or for convenience to give work to another contractor or execute the work itself. In such a case, the employer shall be deemed to have committed a breach of obligation and becomes liable to pay for penalty or compensation for damage to the contractor.

The employer may omit work if such right is expressly provided in the contract, as long as it conforms with the relevant laws.

Termination

18 What termination rights exist? Can a construction contract be terminated in part? What are the practical and financial consequences?

A contract can be terminated either by the parties' agreement or by certain circumstances that are provided in law.

The Civil Code 2015 and Construction Law 2014 provide the following circumstances for termination:

- the contractor or the employer is bankrupt or dissolved or either party assigns the contract without the consent of the other party;
- the contractor refuses or continuously fails to perform the contractual work resulting in a breach of the implementation schedule as agreed in the contract;
- the work is continuously suspended in excess of the period agreed by the parties due to the employer's fault;
- the employer fails to make a payment to the contractor within the agreed time limit, unless otherwise agreed between the parties;
- a party commits a serious breach of contract; or
- the parties are unable to amend the contract in case of a fundamental change of circumstances.

Vietnamese laws are silent on the issue of partial termination. Absent any express provision, a contract can only be terminated in whole.

The practical consequence of the contract termination is that the parties will be released from any future obligations.

The financial consequences of the termination will depend on whether the termination is lawful or not. If a party unilaterally terminates the contract based on invalid grounds, such party shall assume liability for wrongful termination, which is a penalty or damages to the other party.

19 If the construction contract provides for the circumstances in which each party may terminate the contract but does not expressly or impliedly state that those rights are exhaustive, are other rights to terminate available? If so, what are they and what are the practical and financial consequences?

Yes, the statutory termination rights are still available. These termination rights exist in the following cases: bankruptcy of a party or assignment of contract by a party without the consent of the other party; default on the contractual performance by the contractor resulting in the delay; suspension of the work exceeding the agreed period due to the employer's default; employer's default on payment obligations; the substantial change of circumstances.

The practical consequence of the contract termination is that the parties will be released from any future obligations.

The financial consequences of the termination will depend on whether the termination is lawful or not. If a party unilaterally terminates the contract based on invalid grounds, such party shall assume liability for wrongful termination, which is a penalty or damages to the other party.

20 What limits apply to exercising termination rights?

Under Civil Code 2015, the terminating party shall notify the other party promptly of its termination of the contract and shall compensate if the failure to notify causes loss and damage. Particularly, in state-funded construction contracts, prior to the termination of the contract, the terminating party shall deliver a written notice to the other party within the agreed time limit but no later than 28 days, unless otherwise agreed.

If a party served its first notice of termination for whatever reason, regardless of whether the termination is legal or not, such a party cannot give a second notice citing another reason for termination as the contract as it has already been terminated by the first notice.

In the case of a substantial change of circumstances, if parties fail to reach an agreement on modifying the contract, either party may request the court to rule on the termination at a specific time.

Completion

21 Does the law of your jurisdiction deem the works to be completed (irrespective of what the contract says) if, say, the employer takes beneficial possession of the works and starts using them?

Acceptance cannot be implied. Article 123 of Construction Law 2014 provides that the completed items of works or completed construction works shall be only permitted to be put into operation after they have passed the acceptance process. The works are completed when they are accepted and handed over to the employer.

If the employer fails to comply with this requirement, he or she must make an inspection to accept the work, and an administrative penalty shall be imposed against the employer.

22 Does approval or acceptance of work by or on behalf of the employer bar a subsequent complaint? What constitutes acceptance? Does taking over the work by the employer constitute acceptance? Does this bar subsequent complaint?

Pursuant to article 123.1 of Construction Law 2014, the acceptance of constructed works shall comprise:

- acceptance of building works during the execution of building works and acceptance of phases for shifting to the next step of execution of building works when necessary;
- acceptance of completed items of works or completed construction works for commissioning.

In the case of the first scenario, the acceptance does not bar a subsequent complaint. However, in the latter case, following the acceptance, the employer may bring claims against the contractor under the warranty clause, only for hidden defects, if any. The warranty liability is limited to a certain period of time and it is calculated from the date of acceptance.

Signing the acceptance certificate will constitute the acceptance and shall conclude that the construction works are accepted.

Under the laws of Vietnam, taking over the work occurs after the employer conducts the acceptance test. If the employer takes over the work without conducting the acceptance test and signing the acceptance certificate, this does not constitute the acceptance and will breach the regulations on acceptance. The remedy for such a breach is that the employer must conduct the acceptance test. Taking over does not bar the subsequent complaints unless the parties so agree.

Liquidated damages and similar pre-agreed sums ('liquidated damages')

23 To what extent are liquidated damages for delay to the completion of the works treated as an exhaustive remedy for all of the employer's losses due to (a) delay to the completion of the works by the contractual completion date; and (b) delays prior to the contractual completion date (in the absence of, say, interim milestone dates with liquidated damages for delay attaching to them)? What difference does it make if any critical delay is caused by the contractor's fraud, wilful misconduct, recklessness or gross negligence? If so, what constitutes such behaviour and can it be excluded by agreement?

Whether the liquidated damages for delay are treated as an exhaustive remedy for all of the employer's losses depends upon the parties' agreement.

In Vietnam, the liquidated damages clause is a controversial topic. There are several conflicting views on it:

- A liquidated damages clause is valid and enforceable;
- liquidated damages shall not be recognised as it does not satisfy the requirement of "actual" and "direct" loss (Decision on protest based on judicial review procedures No. 11/2020/KN-KDTM);
- a liquidated damages clause should be considered as a penalty agreement; and
- liquidated damages shall be compensation for damage but the extent of damages should be verified and it should be an actual and genuine loss.

If the court or the tribunal considers it as compensation for damages and the parties also agree on the penalty clause in addition to the liquidated damages, the court will award both the amount of penalty and liquidated damages to the employer pursuant to article 418.3 of Civil Code 2015.

The concepts of fraud, wilful misconduct, recklessness or gross negligence are not stated expressly under Vietnamese law. Rather, there is only the concept of "fault in civil liability". Fault in civil liability comprises intentional fault and unintentional fault. A party failing to fulfill its obligation is presumed to be at fault under the Civil Code 2015.

24 If the employer causes critical delay to the completion of the works and the construction contract does not provide for an extension of time to the contractual completion date (there being no “sweep up” provision such as that in sub-clause 8.4(c) of the FIDIC Silver Book 1999) is the employer still entitled to liquidated damages due to the late completion of works provided for under the contract?

Pursuant to article 351.3 of the Civil Code 2015, the contractor shall not be held liable if the critical delay is attributable to the employer (given that the construction contract does not provide for the extension of time). In other words, the employer is not entitled to claim liquidated damages.

25 When might a court or arbitral tribunal award less than the liquidated damages specified in the contract for delay or other matters (eg, substandard work)? What factors are taken into account?

In Vietnam, the liquidated damages clause is a controversial topic. There are several views on it:

- a liquidated damages clause is valid and enforceable;
- liquidated damages shall not be recognised as it does not satisfy the requirement of “actual” and “direct” loss (Decision on protest based on judicial review procedures No. 11/2020/KN-KDTM);
- a liquidated damages clause should be considered as a penalty agreement; and
- liquidated damages shall be compensation for damage but the extent of damage should be verified to be actual and genuine loss.

Thus, this concept risks not being recognised in Vietnam. Consequently, a court or arbitral tribunal might award an amount less than the liquidated damages specified in the contract if it establishes that the actual loss is less than the liquidated damage.

26 When might a court or arbitral tribunal award more than the liquidated damages specified in the contract for delay or other matters (eg, work that does not achieve a specified standard)? What factors are taken into account?

The enforceability of the liquidated damage clause is uncertain under Vietnamese law. If the actual loss is higher than the liquidated damage amount, the court might recognise the liquidated damage agreement and consider such agreement as a waiver or limitation of liability clause, which is allowed under the Civil Code.

Assessing damages and limitations and exclusions of liability

27 How is monetary compensation for breach of contract assessed? For instance, if the contractor is liable for a defect in its works is the employer entitled to its lost profits? What if the lost profits are exceptionally high?

Under Vietnamese law, monetary compensation for breach of contract is equivalent to actual losses, comprising loss of property, reasonable expenses to prevent, mitigate or restore damage, and actual loss of profit.

There is no upper limit for the lost profits, which assumes that it could be any value. In any case, loss of profit must be quantified and proved as an actual loss and not just opportunity costs or pure economic loss.

28 If the contractor’s work is technically non-compliant, is the contractor liable for remedying it if the rectification cost is disproportionate to the benefit of the remedy? Can the parties agree on a regime that is stricter for the contractor than under the law of your jurisdiction?

The cost of remedying the defects is the onus of the contractor. If the rectification cost is disproportionate to the benefit of the remedy, the contractor can replace such defective equipment with a new one. The parties can agree on a regime that is stricter for the contractor than under Vietnamese law (based on the principle of freedom of contract).

29 If there is a defects notification period (DNP) during which the contractor must or may remedy any defect in its works that appears during a certain period after their completion, if the construction contract is otherwise silent, does it affect the employer’s rights to claim for any defects appearing after the DNP expires?

As per article 29.6 of the Decree 06/2021/ND-CP, the contractor shall be responsible for the quality of the work performed on their part even after the expiry of the warranty period. Further, the time for lodging complaints shall be nine months from the date of expiry of the warranty period.

30 What is the effect of a construction contract excluding liability for “indirect or consequential loss”?

Vietnamese law only recognises losses that are direct and actual but has no clear definition of each term. Thus, it is safe and advisable for the parties to exclude liability for “indirect or consequential loss” with a definition or explanation at reasonable level of detail. Loss of profits is deemed a direct loss under Vietnamese laws. Therefore, to exclude liability for loss of profits, it must be expressly agreed.

31 Are contractually agreed limits on – or exclusions of – liability effective and how readily do claims in tort or delict avoid them? Do they not apply if there is fraud, wilful misconduct, recklessness or gross negligence: (a) if the contract is silent as to such behaviour; or (b) if the contract states that they apply notwithstanding such behaviour? If so, what causation is required between the behaviour and the loss?

Based on the freedom of contract principle, an agreement with limitation on liability or exclusions of liability are permissible. This may extend to both contractual and non-contractual obligations.

Despite what is agreed by the parties, the limit or exclusion of liability for causing loss to the other party is invalid if fraud is discovered. Fraud will make the whole contract invalid and the fraudulent will be liable for damages caused by its default.

Vietnamese law distinguishes unintentional and intentional caused damage, which terms are respectively similar to negligence (or recklessness) and willful misconduct, but remedies for both types are not distinguished. “Gross negligence” is not a recognised concept under Vietnamese law. Therefore, in both cases (a) and (b), the cap of liability still applies.

The parties, however, may state in the contract that the parties shall not limit liability in case of fraud, deliberate default or reckless misconduct by the defaulting party and that clause is valid and enforceable.

Liens

32 What right does a contractor have to claim a lien (or similar) in the works it has carried out? If so, what are the limits of the right if, for example, the employer has no interest in the site for the permanent works? How is the right recognised and enforced?

The concept of “lien” does not exist under the laws of Vietnam. The article closest to being applied to this concept is the provision on retention of title in article 331 of Civil Code 2015. Accordingly, the title in property shall remain with the contractor until the employer clears all the outstanding dues.

The law in Vietnam requires the retention of title to be made in a separate document or included in the contract.

Subcontractors

33 How do conditional payment (such as pay-when-paid) provisions operate under the law of your jurisdiction (including interpretation rules, any good faith principles and laws on unfair contract terms)?

There is no embargo on conditional payment under Vietnamese law. Under article 144 of the Law on Construction 2014, the payment must be based on contractual conditions that the parties agreed upon while concluding the contract.

34 May a subcontractor claim against the employer for sums due to the subcontractor from the contractor? How are difficulties with the merits and proof of the subcontractor’s claim addressed, including any rights the contractor has to withhold payment? What if aspects of the project suggest that the law of your jurisdiction should not apply (eg, the parties to both the main contract and the subcontract have chosen a foreign law as the governing law)?

No. Under construction law, a subcontractor cannot claim against the employer for sums due to the subcontractor from the contractor. The law allows the employer to make payments directly to a subcontractor if there is an agreement between the contractor and the employer. Under the legal position of privity of contract, only the contractor could enforce its right against the employer.

If there is a dispute over non-payment of dues between employer and contractor; or contractor and subcontractor, the court will usually summon the remaining party as the third party having related rights and obligations to settle the disputed payment. For disputes settled by arbitration, the tribunal may only summon them as witnesses upon request of one or more parties.

If the agreement is not governed by Vietnamese laws, the rights and obligations of both parties shall be determined according to the agreed applicable law.

35 May an employer hold its contractor to their arbitration agreement if their dispute concerns a subcontractor (there being no arbitration agreement between the contractor and the subcontractor or no scope for joining two sets of arbitral proceedings) or can the contractor, for example, require litigation between itself, the employer and the subcontractor? Does it matter if the arbitration agreement does not have its seat in your jurisdiction?

Owing to the privity of contract and given the absence of an arbitration agreement between the contractor and the subcontractor, the employer and the contractor cannot initiate a proceeding against the subcontractor.

Since the employer and the contractor have an arbitration agreement between them (assuming that it is a valid agreement); thus, the court shall not accept its jurisdiction to settle the dispute. The contractor could only initiate litigation against the subcontractor if there is no arbitration agreement between them.

It does not matter if the seat of arbitration is outside Vietnam.

Third parties

36 May third parties obtain rights under construction contracts? How readily can those connected with the employer (such as future or ultimate owners) bring claims against the contractor in respect of (a) delays and (b) defects? To what extent are exclusions and limitations of liability in the construction contract relevant?

Under Vietnamese laws, third parties (such as future or ultimate owners) may not obtain rights under construction contracts unless such rights have been lawfully assigned to them by a contracting party.

Exclusions and limitations of liability under the construction contracts are only binding between the employer and contractor, unless it is assigned to a new employer.

37 How readily (absent fraud, wilful misconduct, recklessness or gross negligence) can those connected with the contractor (such as affiliates, directors or employees) face claims in respect of (a) delays (b) defects and (c) payment? To what extent are exclusions and limitations of liability in the construction contract relevant?

By a reason of privity of contract between the employer and the contractor, those connected with the contractor (such as affiliates, directors or employees) do not face contractual claims by the employer in relation to delays, defects or payment. They remain liable to the employer for tort causing damages to the employer.

The parties may agree to exclude or limit liability by third parties (those connected to the contractor) toward the employer and they are enforceable against him.

Limitation and prescription periods

38 What are the key limitation or prescription rules for claims for money and defects (and insofar as you have a mandatory decennial liability (or similar) regime, what is its scope)? What stops time running for the purposes of these rules (assuming the arbitral rules are silent)? Are the rules substantive or procedural law? May parties agree different limitation or prescription rules?

The statute of limitation for breach of a contract dispute is three years from the date on which the party became aware (or must have become aware) of the infringement of its rights and interests.

The time period during which one of the following events occurs shall be excluded from computation of the period of limitation:

- Force majeure event or any objective hindrance that renders the person with the right to initiate legal action not able to do so within the limitation period.
- The court decided that the dispute does not fall within an arbitral tribunal's jurisdiction, the time period, from the date on which the Tribunal received the request for arbitration to the date on which the court accepts such dispute to resolve at the court, shall be excluded.
- In all cases, the time spent carrying out procedures to cancel an arbitral award pursuant to the order of the court will not be included in computing the period of limitations.

Article 184 of Procedure Civil Code 2015 provides that limitation rules are governed by the Civil Code, which indicates that it is a matter of substance. In practice, courts are not consistent in considering a statute of limitation substantive or procedural law.

The parties cannot deviate from the statute of limitation as it is mandatory. However, a party who benefits from the application of the status of limitation may waive such application, as long as such waiver is not aimed at avoiding obligations.

Other key laws

39 What laws apply that cannot be excluded or modified by agreement where the law of your jurisdiction is the governing law of a construction contract? What are the key aspects of, say, the FIDIC Silver Book 1999 that would not operate as its plain words suggest?

If the governing law is Vietnamese, the mandatory rules of the law and regulations cannot be excluded. The relevant laws are, inter alia, the Civil Code, the Commercial Law, the Law on Construction, etc.

Several clauses in Silver Book 1999 may not operate specifically clauses on liquidated damages, limitation of liability, variation and adjustments (for state investment projects).

40 What laws of your jurisdiction apply anyway where a foreign law governs a construction contract? What are the key aspects of, say, the FIDIC Silver Book 1999 that would not operate as its plain words suggest?

Irrespective of being referred to as “foreign governing law”, the Law on Construction will in the event govern construction activities performed in Vietnam.

Moreover, Vietnamese laws shall supersede if there is any discrepancy between Vietnamese law and foreign law. Vietnamese laws shall apply if the application’s consequences are inconsistent with the fundamental principles of the law of Vietnam; and It is impossible to determine the contents of the foreign law, although necessary measures have been applied in accordance with the law on civil proceedings.

A few clauses in the Silver Book 1999 may not operate for the reasons mentioned above, such as limitation of liability, variation and adjustments (for state investment projects).

Enforcement of binding (but not finally binding) dispute adjudication board (DAB) decisions

41 For a DAB decision awarding a sum to a contractor under, say, sub-clause 20.4 of the FIDIC Red Book 1999 for which the employer has given a timely notice of dissatisfaction, in an arbitration with its seat in your jurisdiction, might the contractor obtain: a partial or interim award requiring payment of the sum awarded by the DAB pending any final award that would be enforceable in your jurisdiction (assuming the arbitral rules are silent); or interim relief from a court in your jurisdiction requiring payment of the sum awarded by the DAB pending any award?

According to article 424 of Civil Code 2015, a Vietnamese court shall only recognise and enforce a tribunal award if it is final and resolves the entire dispute, which ends the arbitral proceeding and is effective.

Under article 49, the Law on Commercial Arbitration 2010, the contractor can apply an interim relief to a court requesting payment of the sum awarded by the DAB pending any award.

Courts and arbitral tribunals

42 Does your jurisdiction have courts or judges specialising in construction and arbitration?

There is no court in Vietnam specialising in construction. There are, however, judges who are frequently engaged in construction trials.

There is no court specialising in arbitration, but provincial courts are set up to conduct procedure relating to arbitration, such as dealing with applications for interim emergency measures; setting aside the award; and recognising and enforcing the award, etc. There are judges who are engaged in arbitration matters more frequently than others.

43 What are the relevant levels of court for construction and arbitration matters? Are their decisions published? Is there a doctrine of binding precedent?

The courts in Vietnam dealing in construction matters are divided into 4 levels: Supreme Court; High Court; Provincial Court and district court. Pursuant to article 7.3 of the Law on Commercial Arbitration 2010, courts dealing with arbitral activities are provincial courts.

Court decisions may be published but there are exceptions stipulated by relevant laws where the cases involving state secrets, commercial secrets and personal privacy should not be published. A number of court decisions are published on the website: <https://congbobanan.toaan.gov.vn/> or from monographs of Vietnamese legal experts but there is a major part of decisions (especially those courts at low levels) that is not published.

Precedent is a source of law in Vietnam and they are binding. However, there are only 52 precedents up to now.

44 In your jurisdiction, if a judge or arbitrator (specialist or otherwise) has views on the issues as they see them that are not put to them by the parties, can they raise them with the parties? Is the court or arbitral tribunal permitted or expected to give preliminary indications as to how it views the merits of the dispute?

Pursuant to article 5.1 of the Code of Civil Procedure 2015, the court shall only resolve the issues within the scope of the lawsuit. Therefore, the court cannot raise issues that are beyond the scope of the lawsuit, unless those issues are intended to clarify the content of the lawsuit. There's no equivalent restriction for arbitral proceedings but practice shows that arbitral tribunals rarely do so to avoid going beyond their jurisdiction.

There is no rule prohibiting the court or arbitral tribunal giving preliminary indications as to how it views the merits of the dispute. In practice, the court at times gives indication or its opinion on the merits of the case. In contrast, an Arbitral Tribunal rarely does so as that would raise doubts as regards the fairness and neutrality of the Tribunal.

45 If a contractor, say, wishes to arbitrate pursuant to an arbitration agreement, what parallel proceedings might the employer bring in your jurisdiction? Does it make any difference if the dispute has yet to pass through preconditions to arbitration (such as those in clause 20 of the FIDIC Red Book 1999) or if one of the parties shows no regard for the preconditions (such as a DAB or amicable settlement process)?

Pursuant to article 6 of the Law on Commercial Arbitration, if parties to the contract have a valid arbitration clause, the employer shall be barred from filing a petition in court. If the suit is filed, the court will reject it. The only way for the employer to protect its rights is to participate in the arbitral proceeding and counterclaim if any.

In the case of a multi-tiered arbitration clause, the LCA is silent on the consequence of a party failing to conduct the pre-action agreement by the parties (eg, negotiation, mediation) before proceeding with arbitration. In practice, Vietnamese courts have the tendency to consider the pre-action requirement as a condition for the arbitration agreement to take effect, the failure of a party to conduct the pre-action will bar that party from initiating an arbitral proceeding.

46 If the seat of the arbitration is in your jurisdiction, might a contractor lose its right to arbitrate if it applied to a foreign court for interim or provisional relief?

Pursuant to article 48.2 of Law on Commercial Arbitration 2010, a request for a court to apply interim relief shall not be deemed a rejection of the arbitration agreement or waiver of the right to dispute settlement by arbitration.

Expert witnesses

47 In your jurisdiction, are tribunal- or party-appointed experts used? To whom do party-appointed experts owe their duties?

As per article 46.4 of the Law on Commercial Arbitration 2010, the Tribunal itself or at the request of one of the parties has the right to consult an expert's opinion. There are no express regulations on experts' duties. It is normal practice that the role of experts (regardless of who appoints them) is only to assist the Tribunal with their independent professional view. In the case of an expert engaged and appointed by a party under a contractual basis, such an expert has a duty towards the appointing party and the said expert's report will be part of the evidence annexed to the appointing party's submission.

State entities

48 Summarise any specific limitations or requirements that apply when the employer is a state entity or public authority (including, for example, public procurement rules, limits on rights to suspend or terminate, excluded lien rights and arbitrating – as well as enforcing an award – against such an employer).

If the employer is a state entity or public authority, there are several limitations or requirements:

- according to bidding laws, the contractor must be selected through bidding;
- the applicable law of the construction contract shall be Vietnamese law;
- language used in a construction contract is Vietnamese. if involving foreign-related elements, the language used is Vietnamese and other language agreed by the parties; in case of no agreement, English shall be used; and
- other requirements to comply with mandatory provisions of the Construction Law and Decree 37/2015. Settlement offers

49 If the seat of the arbitration is in your jurisdiction, on what basis can a party make a settlement offer that may not be put before the arbitral tribunal until costs fall to be decided?

Vietnamese law gives discretion to parties to make a settlement offer any time during the proceedings. The settlement offer has not been recognised in Vietnam. Therefore, it could be disclosed by the other parties.

In normal practice in Vietnam, the tribunal will allocate the costs of arbitration based on the cost-follow-event principle.

Privilege

50 Does the law of your jurisdiction recognise “without prejudice” privilege (such that “without privilege” communications are privileged from disclosure)? If not, may it be agreed that a sum is payable if communications to try to achieve a settlement are disclosed to a court or arbitral tribunal?

Vietnamese does not have the legal concept of “without prejudice”. Therefore, documents marked “without prejudice” can be submitted to the court as evidence.

In practice, the arbitral tribunal will respect the parties’ agreement on costs, including an agreed sum payable for breach of the “without prejudice” principle. However, in court practice, the parties are accountable for their own legal costs. The court only awards court fees to the winner of the case.

51 Is the advice of in-house counsel privileged from disclosure under the law of your jurisdiction? Is the relevant law characterised as substantive or procedural law?

There is no concept of lawyer privilege under Vietnamese law. Under the code of conduct for Vietnamese lawyers, they are obliged not to disclose information. Thus, it is understood that the court or tribunal will not require the in-house counsel to disclose their advice.

Guarantees

52 What are the requirements for a guarantee under the law of your jurisdiction? Are oral guarantees effective?

Circular 18/2016/TT-NHNN stipulates that bank guarantees must be made in writing. Thus, when credit institutions act as guarantors, the guarantee shall be made in writing. If the guarantor is not a credit institution, the guarantee is not required to be made in writing.

53 Under the law of your jurisdiction, will the guarantor’s liability be limited to that of the party to the underlying construction contract, if the guarantee is silent? Can the guarantee’s wording affect the position?

Yes. The wording of the guarantee can change the default position by deviating this limit of the guarantor’s liability.

54 Under the law of your jurisdiction, in what circumstances will a guarantor be released from liability under a guarantee, if the guarantee is silent? Can the guarantee’s wording affect the position?

A guarantor shall be released from liability under a guarantee if (i) the beneficiary discharges the guarantor from performing (ii) a guarantee is terminated, eg, the guaranteed obligation terminates; the guarantee is cancelled or is substituted by another security; the guarantor has satisfied the guaranteed obligation.

The wording of the guarantee can change the default position by deviating this limit of the guarantor’s liability.

On-demand bonds

55 If an on-demand bond is governed by the law of your jurisdiction on what basis might a call be challenged in your courts as a matter of jurisdiction as well as substantive law? Assume the underlying contract is silent on when calls may be made.

Vietnamese law does not have any specific regulations on an on-demand bond. If the calls are challenged in court by the guarantor, the court will have the jurisdiction to determine the case. The call may be challenged in courts based on the evidence that the guarantee is not entitled to call the bond.

56 If an on-demand bond is governed by the law of your jurisdiction and the underlying contract restrains calls except for amounts that the employer is entitled to (such as sub-clause 4.2 of the FIDIC Red Book 1999), when would a court or arbitral tribunal applying your jurisdiction's law restrain a call if the contractor contended that: (i) the employer does not have an entitlement in principle; or (ii) the employer has an entitlement in principle but not for the amount of the call?

An on-demand bond is issued by a guarantor, who is not a party to the EPC contract. Pursuant to article 49.1 of the Law on Commercial Arbitration 2010, one party can only request the arbitration tribunal to apply interim urgent measures to the disputing parties. Because the guarantor is not a party in the EPC contract, there is no ground under Vietnamese law for a contractor to request the arbitral tribunal apply an urgent interim measure for the guarantor to restrain the call. If the contractor knows that the employer called wrongly, the contractor can only arbitrate the employer to claim for damage.

The contractor, however, may apply to the court for restraining a call on the basis that the employer does not have an entitlement in principle. On-demand bonds are unconditional guarantees and the guarantor has the obligation to pay when called. However, the court may restrain the calls if it is satisfied that the contractor has merits.

Further considerations

57 Are there any other material aspects of the law of your jurisdiction concerning construction projects not covered above?

No.



**Nguyen Trung Nam
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Tony is among the few top-tiered project & energy lawyers in Vietnam who are highly regarded by Chambers, Legal500, Asialaw Profiles and other international publications. He is dual-qualified and practices in both Vietnam and England and Wales as a senior partner of EPLegal.

Tony has spent nineteen years practicing in the projects and energy industry. Prior to co-founding EPLegal in 2010, Tony worked in managerial and legal positions in leading oil & gas operators and contractors in Vietnam such as PTSC, Cuu Long JOC, and PVTrans. Tony has 2 decades of massive transactions experience through various development and financing projects related to drilling campaigns; oil and gas production operations; sales and purchasing and technical services contracts; chartering of vessels/FPSO/FSO; and EPC/EPIC contracts. He acts as leading counsel and works on both contentious and non-contentious matters in energy and infrastructure construction contracts and related dispute settlement, including hydro-power plants, thermal power plants, refineries and solar energy installation projects, etc.

Tony is a counsel acting in litigation and ADR dispute cases in Europe, Asia and often represents clients in disputes in Vietnam International Arbitration Center (“VIAC”) and international institutions such as THAC, SIAC, ICC, LCIA, GATT, NUTS. He is the first mediator and Vietnamese fellow member certified by CI Arb. In 2017, he was appointed by VIAC to be a member of the Scientific Advisory Council and actively participated in training, research and drafting of VIAC rules and sets of VIAC rules. In 2019, he became one of the arbitrators of VIAC and also be elected as the Chair of Committee of prospective CI Arb Branch in Vietnam. In January 2020, he was appointed as Deputy Director of Vietnam Mediation Center (“VMC”). He is also the Managing Director and co-founder of Vietnam Institute for International Arbitration (“VI Arb”), the first independent organisation of arbitration and ADR training institute in Vietnam.



**Nguyen Van Son
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Son Nguyen is an associate of EPLegal in Ho Chi Minh City, Vietnam. Son Nguyen becomes a key member of EPLegal in several projects for both domestic and international clients.

Son Nguyen has spent many years focusing on energy, corporate & investment, construction, shipping, litigation and dispute resolution. He has valuable experience through various projects in relation to energy (production sharing, joint operating, cooperation, consortium and joint venture agreements, oil field services, and EPC/EPCI contracts, as well as dispute management); corporate & investment (registration of investment and enterprise, merge and acquisition, business restructuring service); construction (contract formation, property damage claims, import-export products, public-private partnership (PPP) projects); shipping (registration of vessels and flagging out, preparation of documents for ship arrest, vessel sale and purchase agreement, dispute resolution on compensation for damage).

Son Nguyen acts in litigation and alternative dispute resolution (“ADR”) practices. He supported advising claimants and respondents in disputes in Vietnamese courts, Vietnam International Arbitration Center (“VIAC”), Singapore International Arbitration Center (“SIAC”), International Chamber of Commerce (“ICC”).

Son Nguyen comprehends the law of Vietnam in numerous fields as civil law, contract law, labor law, business law, commercial law, shipping law, etc. Specially, Son Nguyen together with Mr. Tony – Founding Partner have in depth studied and written a chapter of the book about the Force Majeure event and Hardship in Vietnam. Not only does he apprehend legislation, but he exploits it effectively in advising. Having grasped clients’ demands, he always submerges himself completely in his role to derive substantial benefit from cases for clients.

Son Nguyen speaks native Vietnamese and fluent English.

EPLegal Limited

Established in 2009, EPLegal is the first Vietnamese law firm which is specialized in oil & gas Industry with the foremost legal practice to support clients' needs in the energy industry In Vietnam. Since then, the firm has been providing comprehensive legal services in support of local Vietnamese and international commercial transactions, incorporations, mergers & acquisitions, maritime and aviation and other legal interests.

EPLegal distinguishes itself by focusing on its corporate clients with a philosophy grounded on personal service to its valued clients, and a disciplined approach to advancing clients' interests in a balanced way in order to produce the quickest and most advantageous commercial solutions. Based on this philosophy the firm is able to offer effective services while ensuring clients' control of their timing and legal expenses budget.

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