IV. RESOLUTION OF BUSINESS DISPUTES THROUGH THE COURT SYSTEM

1. Jurisdiction of the people's courts over economic disputes

In accordance with Article 1 of the Amended Law on the Organisation of the People's Courts adopted by the National Assembly on 28 December 1993, the People's Supreme Court, people's local courts, military tribunals and other courts shall be the only body in the Socialist Republic of Vietnam which has jurisdiction to hear criminal, civil, marriage, labour and economic cases and handling other matters as may be prescribed by the law.

Thus in comparison with its competence as stipulated in Article 1 of the Law on the Organisation of the People's Courts adopted by the National Assembly on 6 October 1992, since the end of 1993, the court's jurisdiction has been broadened to cover economic cases under the Ordinance on the Procedures for Settlement of Economic Cases dated 10 March 1994.

By the substance of cases, pursuant to Article 12 of the Ordinance on the Procedures for Settlement of Economic Cases, economic courts have competence to judge the following cases:

- Disputes over economic contracts between legal persons, and between legal persons and individuals with business registration. In accordance with Inter-branch Circular No. 04/TT-LN of the People's Supreme Court and People's Supreme Procuracy Office providing guidance on the implementation of Article 12 of the Ordinance, individuals with business registration include not only private enterprises but also other individual who are issued with a certificate of business registration as prescribed by the law.

- Disputes between a company and its members; disputes between members of the companies over the establishment, operation and dissolution of the company. Official Correspondence No.442-KHXX of the People's Supreme Court dated 18 July 1994 gives detailed guidelines on this matter as follows:

    + Disputes between a company and its members may be defined as disputes over: capital contributions of each member to the limited liability companies which may take the form of cash, or in kind or industrial property right; face value of shares and the number of shares to be issued by a joint stock company; ownership to part of a company's asset in equivalence to its capital contribution; right to dividends or obligation to bear losses in proportion to a member's capital contribution to the company; claim to company's asset or liability or payment of company's debts; liquidation of assets and the contracts that are entered by the company; other issues relating to the incorporation, operation and dissolution of the company.

+ Disputes between members of a company include disputes between company members over the valuation of capital contributions by company's members; transfer of capital contributions to the company between members of a limited liability company or transfer of capital contributions from a company's member to an outsider; transfer of shares, the number of shares to be issued and corporate bonds of a joint stock company; ownership to assets corresponding to the number of shares held by a member; right to dividends or obligation to bear losses, payment of company's debts; liquidation of assets and distribution of liabilities between company members in case of its dissolution; other problems arising between company members in relation to the incorporation, operation and dissolution of the company.

- Disputes over sales and purchases of shares and bonds that have been issued, or will be issued by joint stock companies.

- Other economic disputes as may be prescribed by the law include those disputes which may, in the future be classified by a legislation as economic disputes and hence fall under the jurisdiction of the people's courts.

By levels of adjudication, the economic courts' jurisdiction over economic cases may be determined as follows:

- District courts have jurisdiction over first-instance trial of economic disputes that meet all three conditions as described bellows:

    + Disputes over economic contracts;

    + Disputed value fall below VND 50 millions;

    + There is no foreign element

- Provincial courts have competence to judge economic cases under first instance procedures in respect of all economic disputes as stipulated in Article 12 of the Ordinance. In case of necessity, the provincial courts may choose to handle cases which fall under the jurisdiction of the district courts (such as complicated cases, or cases relating to many parties who are located in different and remote districts, or cases where the district courts have no qualified judges to handle or which require to replace judges but such a substitute is not available...).

- The Economic Chamber that is affiliated to a provincial people's court has jurisdiction over appellate hearing of economic cases whose first-instance judgement rendered by a district court has not become effective yet but has been appealed or challenged.

- Committee of Judges of the provincial people's courts has competence to review or re-try economic cases whose first-instance judgement rendered by a district court has become effective but has been appealed or challenged.

- People's Supreme Court

    + The Court of Appeal affiliated to the People's Supreme Court has jurisdiction over appellate hearing of economic cases whose first-instance judgement rendered by a provincial court has been appealed or challenged.

    + The Economic Court affiliated to the People's Supreme Court has competence to review or re-try economic cases whose judgement has become effective but has been appealed or challenged by competent persons as stipulated by the laws.

    Unlike the Civil Court or the Criminal Court affiliated to the People's Supreme Court, the Economic Court has no jurisdiction over first-instance-cum-final trials.

    + Committee of Judges of the People's Supreme Court has competence to review or re-try economic cases whose judgement rendered by either the Court of Appeal or the Economic Court has become effective but appealed or challenged by competent persons as stipulated by the laws.

    + Council of Judges of the People's Supreme Court has competence to review or re-try economic cases whose judgement rendered by the Committee of Judges has become effective but appealed or challenged by competent persons as stipulated by the laws.

By territorial jurisdiction, the courts' competence is determined as follows:

- The court of the locality where the defendant's head office is located or where the defendant resides (in respect of individuals with business registration) will have the competence to adjudicate cases under first-instance procedures.

- If the case in question is related to a real property only, the court of the locality where the property is situated will have jurisdiction to settle.

By choice of the plaintiff, the court's jurisdiction is provided as follows:

- If the location of the head office or place of residence of the defendant is unknown, the plaintiff may request the court of the locality where the property, the head office or the last place of residence of the plaintiff is located to handle the case.

- The plaintiff may also request the court of the locality where the branch office of the defendant is located to handle the case if the economic dispute arises from that branch's operations.

- If a dispute arises from the breach of an economic contract, the pplaintiff may request the court of the locality where the economic contract is performed to handle the case.

- In case where there are many defendants whose head offices or places of residence are located in different areas, the plaintiff may request the court of the locality where one of the defendants has its head office or place of residence to handle the case.

- If the case is not only related to a real property, the plaintiff may request the court of the locality where the property is situated or where the defendant is headquartered or resides to handle the case.

- If the case is related to real properties situated in different localities, the plaintiff may request the court of the locality where one of these property is situated to settle the case.

2. Underlying principles of economic proceedings

Apart from principles that are applied to all types of court, due to characteristics of economic relations and economic disputes, the court settlement of these disputes must adhere to the following principles:

2.1. Self-determination and conciliation by parties concerned

This is one of the fundamental principles of economic proceedings which is originated from a fact that in a market economy, where freedom to do business under the laws is respected and secured by the State. Therefore, administrative actions that arbitrarily interfere in the normal business activities will not be justified. As a subject of public powers, the State should not by itself bring an economic dispute to the court for settlement. On its the part, the court can not interfere in the settlement of economic disputes without a request duly submitted by the parties concerned neither. Thus a referral of an economic dispute to the court becomes a precondition for the initiation of a law suit.

The right to self-determination by the involving parties during economic proceedings may be exercised via different means such as conciliation led by a third party who is chosen by the disputing parties or operation of non-governmental arbitration or the courts. In nature, the parties concerned may at their sole discretion choose an appropriate form of dispute settlement that is fit to the disputed economic relation or authorise a lawyer or another person to represent their interest during the proceedings.

The right to withdraw an action, change the substance of a lawsuit, or the right to conciliation may be exercised at any point of time during the dispute settlement process. Particularly, the right to conciliation during the settlement of economic disputes is more widely exercised in comparison with civil proceedings. For example, in lawsuits that are brought against illegal marriage or relations deriving from illegal civil transactions will not be subject to conciliation.

As mentioned above, the courts will only handle disputes at the request of the parties concerned if and when the following conditions are satisfied:

- There is no prior agreement to refer the case to an arbitration.
- Parties concerned fail to conciliate or negotiate on a mutual basis.

2.2. Equality before the law

In a multi-sectoral commodity economy, the equality between different economic sectors is widely seen as a crucial and indispensable factor without which there will be no good business environment, no economic growth or even it may hinder the development of the whole economy. During the settlement of an economic dispute, it is required to ensure an equal footing between all types of enterprises or business persons regardless of their ownership or economic strength. Parties concerned will have the right and obligations to comply with procedural law. In this spirit, there should not be any discrimination between all economic sectors when participating in the court settlement of disputes.

2.3. Court rulings are not based on investigations but on a verification and gathering of evidence

Article 3 of the Ordinance on the Settlement of Economic Cases provides: "Parties concerned shall have obligation to provide evidence and a burden of proof to protect their own interests". During the settlement of economic disputes, the courts will base mainly on evidence submitted by the disputing parties to render a well-reasoned and legally-justified judgement. In so doing, the courts will gather and verify evidence and listen to the defence of each party relating to the subject mater of the dispute. On their part, the parties concerned are entitled and obliged to present to the court those facts and arguments that they deem to be necessary. In case where there is a need to clarify any issue in order to ensure a proper handling of the case, the court may take appropriate measures to verify but not to conduct investigation as they do in civil proceedings.

2.4. Prompt and swift resolution of the case

Capital and time are viewed as elements of vital importance to the success or failure of business persons or enterprises. Therefore, any resolution of economic disputes should not only be legally justified but also prompt and complete to secure peace in mind of the business persons and remove any barrier to the full utilisation of their capital. Any delaying or lengthening of the case may cost unnecessary time and energy of the parties concerned.

This principle is apparently demonstrated in the Ordinance on the Settlement of Economic Cases in efforts to shorten the time limits for bringing an action or completing a stage during the whole process of dispute resolution including first instance, appellate, reviewing and retrying procedures. In addition, the time period for lodging a protest or an appeal is also reduced.

Apart from the underlying principles as prescribed above, economic proceedings also require a strict compliance with other principles such as open hearing or the use of certain languages as may be applied to civil procedures.

3. Procedures for settlement of economic cases

3.1. Time limit for taking actions

Paragraph 1 of Article 31 of the Ordinance on the Settlement of Economic Cases states: "The initiator [suer] must file a petition for the court settlement of an economic case within 6 months from the date on which the dispute arises, except otherwise provided by the law".

Thus under the Ordinance, the right to bring an economic law suit is ranked as the first procedural right of the plaintiff. Under the current economic mechanism, the State and other relevant agencies are restricted from directly interfering in economic relations and economic disputes between business entities and individuals. Instead, the parties concerned may at their sole discretion determine an appropriate way to handle their dispute provided that any referral of a potential dispute to a court must be later backed by a written petition.

Also under the Ordinance, the time limit for initiating an economic case is fixed at "6 months from the date on which the dispute arises" with a view to resolving the dispute in a prompt and complete way by the parties concerned to stabilise their production and business activities. However, practices from settlement of economic dispute indicate that the aforesaid provision on time limit of action is inappropriate as it fails to promote the co-operation, negotiation and self-conciliation of the disputing parties. Since the statutory time limit of action is too short, the legitimate rights and interests of the parities concerned are not effectively safeguarded.

On the other hand, in the absence of specific and clear guidance, there is a perceptional inconsistency in the time limit of action between judges of courts at all levels, especially as regard the starting point of the time limit (or the time at which the dispute is deemed to arise).

3.2. Procedures for first instance settlement of an economic case

3.2.1. Initiation and registration of a lawsuit

Article 1 of the Ordinance recognises the right to file a lawsuit by relevant parties whereby "individuals and legal persons may, under the procedures provided by the law, initiate an economic lawsuit to request the court's protection of their legitimate rights and interests".

Initiating an economic lawsuit is thus the first procedural right of a plaintiff in an economic case which is not available to any State body including the procuracy office although such a body is assigned to supervise law obedience and hence help to uncover offences committed during business transactions.

In initiating an economic lawsuit, the potential plaintiff must lodge a petition with a competent court seeking its resolution of the economic dispute.

In accordance with clause 2 of Article 31 of the Ordinance, such a written petition should contain the following details and particulars:

- Date, month and year when the petition is made;
- Name of the specific court that is requested to handle the case;
- Names of the plaintiff and defendant;
- Addresses of the plaintiff and defendant;
- A brief summary of the facts, substance and pecuniary value of the dispute;
- Negotiation process that has been undertaken by the parties concerned;
- Specific requests to be considered by the court.

Accompanying his petition, the plaintiff must also present relevant documents or evidence to support his claim such as the economic contract in question, receipts, invoices, correspondence, minutes or other materials etc.

Registration of a case is understood as the acceptance by a competent court of a petition which is lodged by the plaintiff. Such a registration is officiated by a notice to be given to the plaintiff asking this party to pay the court fee in advance. Since the economic procedural law does not provided on exemption or reduction of court fee payments, any advanced payment will be determined on the basis of the petition (in respect of unquoted cases) or the disputed value (in respect of quoted cases) subject to Decree No. 70/CP of the Government dated 12 June 1997 on court fees and charges. Upon the plaintiff's presentation of the receipt of advanced payment of court fee, the competent court will record the case in a registry book.

The court will, however only register the case when the following conditions are met:

- The suer has the right to file a lawsuit;
- The case in question falls within the jurisdiction of the court;
- The time limit of action has not yet expired;
- The case has not yet been determined by an effective judgement or decision rendered by the court or another competent authority; and
- The disputing parties has no prior agreement whereby the dispute with be referred to an arbitration body.

3.2.2. Preparation for trial

Under the Ordinance, the time limit for preparing a trial of an economic case will be 40 days from the date on which the case is registered. In respect of complicated cases, the above mentioned time limit may be extended to 60 days. In reality, the trial preparation should be considered as a major stage including many important works that

are needed to be carried out during the settlement of the case. In particular, the court is expected to complete the following preparatory works:

- Notifying the defendant and relevant parties whose rights and obligations are related to the case of the contents of the petition within 10 days from the date of registration. Also within 10 days from the date of their receipt of the notice, the aforesaid parties are obliged to submit to the court their opinions and arguments in writing as regard the petition which is accompanied by supporting documents and evidence.

- Obtaining testimony of relevant parties. Although, during economic proceedings, the burden of proof is placed on the parties concerned, the court should also verify and gather evidence to ensure objective and accurate findings and rulings.

- The verification and gathering of evidence by the court may be undertaken by a variety of means such as requesting the relevant parties to present and provide evidence or request the witnesses to give justification on related issues; request the relevant state bodies and organisations to provide materials, documents and other evidence needed for the settlement of the case. Additionally, inspection/examination bodies and asset evaluation councils may also be called for to provide professional opinions to facilitate the case settlement. There are also cases where after registration of a case, the competent court may authorise another court in another locality to obtain testimony and gather evidence relating to the case on its behalf.

- Conducting a conciliation between relevant parties. During the settlement of a dispute, in order to assists the judges in verifying files, taking appropriate hearing approaches and help the relevant parties to better understand the causes of their dispute and hence to enable the conciliatory process, the relevant parties are arranged to directly meet to determine the nature of their dispute and problems arising from the conclusion and performance of an economic contract. Cross examination of relevant parties will be held before the conciliation.

  On its part, conciliation represents an obligatory process provided by the economic procedural law. In conducting the conciliation of a case, the court must summon all relevant parties to the court. The judge should provide an analysis and explanation of legal issues to ensure a full and accurate understanding of the State policies and laws by the relevant parties and a voluntary settlement of the case. During the conciliation process, the court should act as an impartial mediator to avoid possible imposition of opinions on the parties concerned or any bias.

  + If the parties concerned could reach a mutual agreement on the settlement of the case, the court will prepare a minutes of successful conciliation and issue a decision to “recognise the agreement of the parties”.
  + If the parties concerned could not reach a mutual agreement on the settlement of the case, the court will prepare a minutes of unsuccessful conciliation and issue a decision to “bring the case to trial”.

During this stage of hearing preparation, the court may also have the right to make the following decisions:

+ Taking temporary emergency measures, alter or cancel the introduction of the temporary emergency measures (as provided for in Articles 41, 42, 43 and 44 of the Ordinance).

+ Temporarily suspending the case settlement (as provided for in Article 39 of the Ordinance).

The above-described provisions reveal an irrationality that the right to initiate a law suit is vested to the parties concerned but the court may exercise sole discretion in registering the case. In other words, the disputing parties have no influence on the court decision to register or deny the petition.

Furthermore, in the absence of specific and clear guidance from competent bodies, there may be inconsistent understanding and interpreting of the time limits or jurisdiction by registrar and the presiding judge. Consequently, in some cases, a decision to suspend the case settlement has been made without any legal grounds.

3.2.3. First instance court session

Clause 3 of Article 32 of the Ordinance states: "Within 10 days from the date of issuance of a decision to bring the case to a trial, the court should open a court session. In case of force majoure or legitimate reason, such a time limit may be extended to no more than 30 days".

Before the opening of a first instance hearing session, the court must summon all parties concerned who are indicated as proceeding participants and give a notice thereof to the procuracy. Other persons such as the witnesses, interpreters, examiners or professionals may be summoned on a case by case basis...

Adjournment of the court session or trying in absentia of certain involving parties are stipulated in Article 39 of the Ordinance.

A first instance hearing session of an economic case may be conducted with a three-member tribunal including 2 judges (including a presiding judge) and one juror. All decisions at the court session will be made by the tribunal subject to principles of equality and majority voting.

Similar to other first instance trials of criminal, civil and labour cases, the first instance hearing session of an economic case undergoes 4 stages. However, there are also some points of interest. In particular:

Opening of the hearing session

This stage is undertaken by the presiding judge and includes the following steps:

- Reading out the decision to bring the case into trial on behalf of the tribunal.

- Examining the identity and legitimacy of the proceeding participants. In case of a legal person, its transaction name, location of head office, name and title of its representative must be verified. Legitimacy of the attorney and authenticity of the power of attorney are also required to be examined. In particular, a letter of introduction should not be admitted as a power of attorney.

- Introducing the proceeding conductors (including members of the tribunal, prosecutor, secretary etc.; notifying and explaining rights and obligations of proceeding participants (such as plaintiff, defendant, and parties whose rights and obligations are related to the case); summoning other individuals to the hearing session (e.g. witnesses, translator or examiner and so on).

- Requesting the parties concerned to provide additional evidence, if any; asking the parties concerned as to whether more witnesses are needed to be summoned. (Lawyers or prosecutor may also make the same request). However, it is the hearing tribunal that has a sole discretion in deciding to accept or rebut such a request.

Cross-examination

The presiding judge and other members of the hearing panel will conduct the cross-examination so that the plaintiff may give the first presentation, and next are the defendant and other proceeding participants. After the end of the cross-examination by the hearing panel, the prosecutor may participate in the process to clarify the facts. Lawyers may also raise questions subject to approval of the hearing panel.

More importantly, the hearing panel and parties involved in the cross-examination are expected to make objective questions that focus on the substance of the case to clarify key points.

Debating during the hearing session

Parties concerned may submit detail, evidence and views to protect their legitimate rights and interests. At the same time, they may also give suggestions on the settlement of the case. If a party is represented by a lawyer to defend its legitimate rights and interests, the lawyer will represent the party concerned to make presentation which may be added or supplemented by the relevant parties. Under the chairmanship of the hearing panel, parties concerned may engage and open debates for at least two times (if they are requested to involve in such debates).

At the end of the debate by the parties concerned, the procuracy's representative will put forward his view on the settlement of the case.

During the course of the hearing session, the plaintiff may be entitled to withdraw the entire or part of his/her petition, or supplement or alter the petition.

Parties concerned also have the right to conciliate at the court session and the hearing panel will make relevant decision on a case-by case basis such as suspending or recognising the agreement between the disputing parties...

If, during the court session, the hearing panel finds out grounds for a temporary suspension or [permanent] suspension of the case, a decision thereon with be issued. Such a decision may be subject to protest or appeal.

Deliberation and declaration of a judgement

Procedures for deliberation and declaration of a judgement will be carried out in accordance with Articles 51, 52 and 53 of the Ordinance.

Since a judgement represents a "legal document" demonstrating both the State powers and views of the hearing panel relating to the settlement of the disputes between relevant parties, the judgment must be adequate, short, accurate and well reasoned. Otherwise, it will not ensure the persuasiveness and educational effects on businessmen in particular and the public in general.

3.3. Appellate procedures

The first-instance judgement of an economic case and a number of decisions issued by the first-instance court (including decisions to suspend or temporarily suspend the case) which are appealed or protested against may be retried under appellate procedures by a next higher court.

The rights to appeal or protest, the contents, duration and procedures for appeals or protests are provided for in Articles 59, 60, 61 and 63 of the Ordinance.

The duration for an appellate trial as stipulated in Article 66 of the Ordinance is one month from the date of full receipt of relevant documents submitted to the appellate court by the first-instance court. In fact, this provision is proven unsuitable to the specific conditions of courts at all levels, particularly as regards the first instance trials of economic cases which fall within the competence of provincial courts. There are many reasons that result to the poor enforceability of this provision. For example:

- The case in question is too complicated;

- Parties concerned provide additional evidence to the court of appeal which may take time for the court to verify the authenticity of the evidence. In fact, the time limit for such a verification of evidence is not provided for in the Ordinance.

- The appellate hearing is delayed by one of the parties concerned (particularly the appellant who claims that the first instance judgement fails to meet his/her expectation).

- Other objective reasons such as a lengthy consideration of the case file by the procuracy, or uneasy travel by the parties concerned etc.

The appellate court session is conducted by 3 judges including a presiding judge and follows the same procedures as applicable to the first instance court sessions. The only difference lies in the fact that before the cross-examination, the presiding judge

will represent the hearing panel to summarise the contents of the case and decisions issued in the first-instance court session.

The appellate consideration of first instance court decisions that are protested or appealed does not require a hearing session to be opened or parties concerned to be summoned unless there is a need to listen to their opinions before the issuance of an appellate decision.

The court of appeal jurisdiction in reviewing the first instance court decisions or judgement that are protested or appealed is stipulated in Article 70 of the Ordinance.

3.4. Reviewing procedures

Article 75 of the Ordinance states: "Court judgements and/or decisions that took effect may be challenged under reviewing procedures upon the occurrence of one of the following events:

- There is a serious violation of the proceeding rules;

- Findings and/or rulings given in the court judgement and/or decision are proven inappropriate to the established facts of the case;

- There is a serious mistake in applying the laws".

Thus, there are three triggers for a protest to be lodged under reviewing procedures. However, the borderline between a "serious violation" and a "less serious violation" of procedural rules is ill defined and heavily dependent on the subjective perception of each individual. Therefore, more efforts should be made to improve the consistency of this provision.

Right to lodge a protest, competence to handle such a protest, hearing session at reviewing level, and mandate of the hearing panel are specified in Articles 74, 78 and 79 of the Ordinance.

In accordance with clause 1 of Article 77, the time limit for lodging a protest is "*9 months from the date on which the court judgement or decision in question takes effect*".

In reality, such a time limit is proven too short and impractical as:

- It is the responsibility of the Economic Court of the People's Supreme Court to identify those judgements or decisions that are qualified to be reviewed, but in fact such a responsibility is rarely fulfilled due to its limited resource.

- Since "decisions that are issued to recognise the agreement between parties concerned" take immediate effect without protest or appeal, after the end the case, case files are often closed and shelved off.

- In some cases where a protest may be lodged under reviewing procedures but the time limit for such a submission of protest has expired, the legitimate rights or relevant parties may be adversely affected.

3.5. Retrying procedures

Grounds for making a protest under retrying procedures are prescribed in Article 82 of the Ordinance as follows:

- Important facts of which the parties concerned can not be expected to know during the settlement of the case have been uncovered;
- It is proven that conclusion of the examiner or translated text are untrue or evidence were falsified.
- Judges, jurors, prosecutors or secretary of the court intentionally distort/deviate the case file.
- The court judgements or decisions, or decisions that are issued by a State body and based on which the case was determined has been repealed.

All court judgements or decisions which took effect but later fall under one of the four circumstances as mentioned above may be protested under reviewing procedures.

Right to protest, time limit for opening a hearing session, competence and mandate of the hearing panel are specified in Articles 81, 84 and 86 of the Ordinance.

The time limit within which a protest may be made is one year. In general, such a time limit is said to be short and cause time restraints for lodging a protest under these procedures.