

Arbitration in Vietnam

An introduction

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Arbitration in Vietnam

Notwithstanding a fairly comprehensive legal and regulatory framework for arbitration, the success rate of foreign parties enforcing arbitral awards in Vietnam remains low. There have however been some positive recent developments, which allow for some cautious optimism.

This note describes the arbitration and enforcement process in Vietnam, the recognition process for foreign arbitral awards and concludes with some practical advice.

Vietnam's arbitration law

With the passing of the Ordinance on Commercial Arbitration ("Arbitration Ordinance") in 2003, arbitration became an officially recognised method for resolving disputes arising from "commercial activities".

On 17 June 2010, the Vietnam National Assembly passed the Law on Commercial Arbitration No. 54/2010/QH12 ("Arbitration Law"), which took effect on 1 January 2011 and replaced the Arbitration Ordinance. Decree 63/2011/ND-CP of the Government dated 28 July 2011 ("Decree 63") includes further implementing regulations in relation to the Arbitration Law. On March 2014, the Supreme People's Court promulgated Resolution 01/2014/NQ-HDTP ("Resolution 01"), providing additional guidance on the Arbitration Law.

Disputes that may be arbitrated

The Arbitration Law lists three categories of disputes that may be resolved through arbitration:

- a) disputes arising from "commercial activities";
- b) disputes where at least one party is engaged in commercial activities; and
- c) other disputes where the law stipulates that arbitration is a permissible means of resolution.

The concept of "commercial activity" is not specifically defined in the Arbitration Law. Instead, this term is given meaning with reference to Commercial Law No. 36/2005/QH11 dated 31 December 2005 ("Commercial Law"), where it is broadly defined to mean any "activity for profit-making purposes comprising the purchase and sale of goods, provision of services, investment, commercial enhancement, and other activities for profit-



making purposes". Category (c) above leaves room for legislators to expand on the types of disputes that may be resolved through arbitration in the future. For the time being, there remain areas of uncertainty. For example, the Arbitration Law does not specify whether disputes relating to land may be arbitrated.

Arbitration agreements

There must be a valid arbitration agreement in order for a dispute to be referred to arbitration. Under Vietnamese law, an arbitration agreement must be in writing, either as an arbitration clause within a contract or by way of a separate agreement. A written arbitration agreement may however now take the form of a letter, telegram, facsimile, email, or any other written form, so long as the wording clearly shows the parties' intent to resolve their dispute by arbitration. Where there is more than one arbitration agreement made by the parties covering the same dispute, the arbitration agreement concluded last in time shall prevail.

If a dispute falls within the scope of a valid arbitration agreement, but a party attempts to initiate court proceedings, the court will not have jurisdiction over the matter.

Arbitrators and arbitration centres

An arbitral tribunal may consist of one or more arbitrators as agreed by the parties to a dispute. If the

parties do not agree, the Arbitration Law provides that an arbitral tribunal shall consist of three arbitrators.

The Arbitration Law requires arbitrators to have knowledge, education and experience, notably it makes no mention of nationality. In addition, each arbitration centre is entitled to provide other criteria applicable to its own panel of arbitrators.

The Vietnam International Arbitration Centre (“VIAC”), with operations in Hanoi and Ho Chi Minh City, is the most well-known institutional arbitration centre in Vietnam. According to VIAC, as of 2014, it had settled over 862 disputes, with 99 cases in 2013 and 124 in 2014, almost 50% of which involved foreign parties. Unlike its predecessors, VIAC is a non-governmental organisation and operates in accordance with the Arbitration Law and the VIAC Rules of Arbitration.

VIAC has around 132 Vietnamese arbitrators and 17 foreign arbitrators on its panel. It should also be noted that parties to a dispute may select an arbitrator from outside the VIAC panel, including a foreign arbitrator – their choice is not restricted in any way, although certain practical aspects, in particular the low fees payable to arbitrators, may limit the choice in practice.

Choice of law and language of arbitration proceedings

Vietnamese law provides specific limitations to the choice of foreign law where (i) it is specifically not permitted (e.g. in case of real estate transactions where the land/property is located in Vietnam), or (ii) the contract is signed and entirely performed in Vietnam.

Otherwise, the choice of law applicable to arbitration proceedings will depend on whether a dispute involves a “foreign element”.

“Foreign element” is defined with reference to the Civil Code of Vietnam. Under the Civil Code, a relationship involving a foreign element means: (i) a relationship where at least one of the participating parties is a

foreign body, organisation or individual; (ii) a relationship where at least one of the participating parties is a Vietnamese citizen residing overseas; or (iii) where all of the participating parties are Vietnamese (individuals and/or organisations as the case may be), but the basis for the establishment of their relationship was the law of a foreign country, or the related transaction or assets are located in a foreign country.

If a dispute involves a foreign element, the arbitral tribunal will apply the law (whether Vietnamese law or the law of another jurisdiction) to the dispute as agreed by the parties. In the event that the parties do not agree on the applicable law, the arbitral tribunal will apply the law that it considers most appropriate.

On the other hand, in a dispute between purely domestic parties that does not involve a foreign element, the arbitral tribunal must apply Vietnamese law to resolve the dispute.

With regard to the language of the arbitration proceedings, disputes not involving a foreign element must be conducted in Vietnamese, unless one party is an enterprise with foreign invested capital. For disputes involving a foreign element or in which one party is an enterprise with foreign invested capital, the parties may agree another language to be used in the arbitration proceedings. If the parties do not agree, the arbitral tribunal will determine the language.

Arbitration procedure

The arbitral tribunal is empowered to require the parties to provide such evidence as is necessary to resolve the dispute and may also collect evidence and summon expert witnesses at the request of one or more of the parties.

Under the Arbitration Law, a party may apply for interim injunctive relief from either a competent court (after filing the request for arbitration at the arbitration centre regardless of whether the arbitral tribunal has yet been constituted) or the arbitral tribunal. Examples of available injunctive relief include: (i) prohibition of any change in the status of the assets in dispute; (ii) prohibition of an act (or ordering the performance of an act) by the parties to the dispute in order to prevent conduct which negatively affects the arbitration proceedings; (iii) attachment of assets in dispute; (iv) prohibition of the transfer of assets in dispute; and (v) requiring interim payment of money by one party to another.



Arbitration proceedings administered by VIAC

Arbitration proceedings administered by VIAC are initiated when the claimant files a “request for arbitration”, which provides information about the disputing parties, a summary of the dispute, grounds for the claims, monetary value of the dispute, and the arbitrator selected by the claimant to act as arbitrator or a request to the arbitration centre to appoint an arbitrator. The request for arbitration must also be accompanied by a copy of the arbitration agreement. Unless the parties have agreed otherwise on the period of time, the arbitration centre shall, within 10 days from the date of receipt of the request for arbitration and the arbitration agreement, send to the respondent a copy of the request for arbitration.

The respondent then has thirty days from the date the request for arbitration was received to file a “statement of defence”. If the respondent fails to select an arbitrator or requests that the arbitration centre chooses an arbitrator on its behalf, the chairman will have seven days to select an arbitrator from the date by which the respondent was required to respond. If there are multiple respondents, then they must collectively select an arbitrator. The two arbitrators will appoint a third arbitrator, who will chair the arbitral tribunal. If a sole arbitrator is desired, then the parties must jointly nominate an arbitrator, or the chairman of the arbitration centre shall have fifteen days to select an arbitrator by default.

The respondent may also file a counterclaim, which must be submitted to the arbitration centre at the same time as the statement of defence.

Arbitration hearings may be attended by authorised representatives of the parties and witnesses. Unlike court proceedings, where only qualified Vietnamese lawyers can represent clients, there is no restriction on foreign counsel acting for clients in arbitration in

Vietnam.

Arbitral decisions are decided by majority vote and minutes of the proceedings must be kept by the arbitration centre.

Ad hoc arbitration proceedings

The Arbitration Law allows for *ad hoc* proceedings (i.e. arbitrations which are not administered by an arbitration centre). However, in practice *ad hoc* proceedings rarely, if ever, occur in Vietnam.

Applications to set aside arbitral awards

Arbitral awards are final and binding, and may be set aside on the following grounds only based on a request made to the local Provincial People’s Court within thirty (30) days from the date the award was received:

- there was no arbitration agreement or the arbitration agreement is void;
- the composition of the arbitration tribunal was, or the arbitration proceedings were, inconsistent with the agreement of the parties or contrary to the Arbitration Law;
- the dispute was not within the jurisdiction of the arbitration tribunal;
- the evidence supplied by the parties on which the arbitration tribunal relied to issue the award was forged or an arbitrator received a benefit from a party in dispute which affected the objective and impartiality of the arbitral award; or
- the arbitral award is contrary to the “*fundamental principles of the law of Vietnam*”.

The party seeking to set aside an arbitral award must enclose with its petition sufficient evidence to support the grounds on which the arbitral award should be set aside. The court may adjourn a petition to set aside an arbitral award for up to sixty (60) days. During this time, the arbitral tribunal may correct any errors in the arbitration proceedings to remove the grounds for setting aside the award.



The concept of the "*fundamental principles of the law of Vietnam*" is undefined and very vague, which in practice gives local judges fairly wide discretion in setting awards aside. This is discussed further below in the section regarding the recognition and enforcement of foreign arbitral awards.

Enforcement of arbitral awards

Enforcement of domestic awards in Vietnam

If a party fails to comply with an arbitral award within thirty days after compliance is required, a party may submit a written request to the relevant Vietnamese court's judgment enforcement agency to enforce compliance with the arbitral award. If the debtor still fails to pay after notice from the enforcement agency, that agency may apply coercive measures. The court itself will not be involved.

Enforcement of foreign arbitral awards in Vietnam

In September 1995, Vietnam became a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the "New York Convention"), and its provisions have been incorporated into Vietnamese law.

Unlike domestic awards, foreign arbitral awards cannot be enforced in Vietnam until they are formally recognised by the local Provincial People's Court. Subject to certain exceptions, Vietnamese courts are required to recognise and enforce an arbitral award made in another New York Convention state as if it were a judgment of a Vietnamese court.

In practice, however, even where the New York Convention is applicable, enforcement of foreign arbitral awards in Vietnam can be onerous and time consuming, and the outcome is always uncertain.

For a foreign arbitral award to be recognised and enforced by the Provincial People's Courts, a petition

must be lodged with the Ministry of Justice ("MOJ"). The petition must also include any documentation required by the relevant international treaty, if applicable. If the treaty does not set forth any procedural requirements, the petition must include a valid copy of the foreign arbitral award and a copy of the arbitration agreement of the parties. Within seven days, the MOJ must forward the petition to the appropriate Vietnamese court. The court assigned to consider the petition will notify the relevant parties, agencies, or organisations.

The court will have two months to review the petition before a formal meeting is held to consider it. Court meetings must be attended by a presiding panel of three judges, a prosecutor, and the person or legal representative of the entity against which the petitioner is trying to enforce the award.

Formal recognition and enforcement of a foreign arbitral award should not involve a substantive review of the dispute, but only consideration of whether the procedural and provisional requirements have been met. A foreign arbitral award recognised for enforcement legally has the same effect as any civil judgment or decision of a Vietnamese court.

The courts may refuse to enforce a foreign arbitral award on the following grounds:

- The parties to the arbitration agreement did not have the capacity to sign the agreement in accordance with the applicable law of each party;
- The arbitration agreement is unenforceable or invalid in accordance with the governing law, or the laws of the country in which the award was made if the arbitration agreement does not stipulate the governing law;
- The individual, body or organisation against which enforcement is sought has not been properly notified of the appointment of the arbitrator or the procedures for resolving the dispute by foreign arbitration, or had reasonable cause for failing to exercise his/her/its right to participate in the proceedings;
- The foreign arbitral award was issued in respect of a dispute which was not referred to arbitration by the parties, or exceeds the scope of the request of the parties. If it is possible to sever the arbitration award, that portion which was correctly referred to arbitration by the parties should however be recognised and enforced in Vietnam;



- The composition of the foreign arbitration panel, or the foreign arbitration procedure, was inconsistent with the arbitration agreement or the laws of the country in which the foreign arbitral award was made, in cases where such matters are not stipulated in the arbitration agreement;
- The foreign arbitral award is not yet enforceable or binding on the parties;
- The foreign arbitral award has been set aside or suspended by a competent body of the country in which the foreign arbitral award was made, or of the country whose law governs the arbitration agreement; or
- The court of Vietnam concludes that:
 - The relevant dispute cannot be resolved by arbitration in accordance with the laws of Vietnam; or
 - The recognition and enforcement of the foreign arbitral award is contrary to the "*fundamental principles of the laws of Vietnam*".

The concept of a foreign arbitral award being contrary to the "*fundamental principles of the laws of Vietnam*" is the Vietnamese interpretation of the "public policy" reservation in the New York Convention. However, the concept is vague and undefined, and in practice has been interpreted to encompass broader considerations than public policy.

Judges have applied the concept in varying ways, from not recognising an award in favour of a foreign party who was in technical breach of a Vietnamese legal requirement to obtain a construction permit, to ruling that the application of liquidated damages by a foreign arbitral tribunal under an English law governed contract was in contravention of the Vietnamese Civil Code's

provisions relating to damages and compensation in connection with civil liability under the law.

Anecdotal evidence points to instances where the court has invoked as being grounds not to recognise an arbitral award: (i) failure to comply with formal Vietnamese best practice on contract acceptance (i.e. chopped and sealed documentation) as evidence of potential forgery or questionable contract execution (going to the validity of the arbitration clause); (ii) the denomination of a sales contract in foreign currency where Vietnamese law required it to be denominated in Vietnam dong; and (iii) failure by the claimant and the foreign arbitral tribunal to comply with the Vietnamese Civil Procedure Code in conducting the arbitration.

In summary, although there is only limited public information available, there have been very few instances of successful enforcement of foreign arbitral awards. Public figures show that in early 2014, among twelve foreign arbitral awards submitted to seven Provincial People's Courts for enforcement, only one award was enforced, one award was suspended (because the applicant withdrew the request) and nine awards were refused for recognition by the courts. There is no evidence of how many have been refused or enforced since then.

There have however been some recent positive developments:

- Resolution 01 attempts to clarify that the "*fundamental principles of the laws of Vietnam*" means the "basic principles on conduct with overriding effect in the development and implementation of Vietnamese law" and gives two clear examples based on principles set out in the Civil Code and the Commercial Law. However, the list is not exhaustive.
- On 25 July 2014, the Supreme People's Court issued Official Letter 246/TANDTC-KT providing guidelines for Vietnamese courts regarding the recognition and enforcement of foreign arbitral awards, according to which courts are not entitled to review the merits of a dispute which has been settled. This does not however preclude them from using a wide discretion in respect of the "*fundamental principles of the laws of Vietnam*" or the other grounds to refuse to recognise a foreign arbitral award.



Alternative Dispute Resolution

Alternative Dispute Resolution (“ADR”) is not formally recognised by Vietnamese law as a form of dispute resolution. However, in the judicial setting, the Civil Procedure Code requires the courts to carry out conciliation and create favourable conditions for the parties to resolve their dispute prior to proceeding with a civil trial, except in a few limited cases. Conciliation in Vietnam is based on the principle of respecting the voluntary agreement of the parties and not forcing them to act against their will.

Conclusions

The Arbitration Law provides some detailed provisions on arbitration procedure in Vietnam and is a positive step towards building an arbitration regime that is consistent with international standards.

However, imperfections remain and Vietnam’s arbitration regime has further to go in so far as:

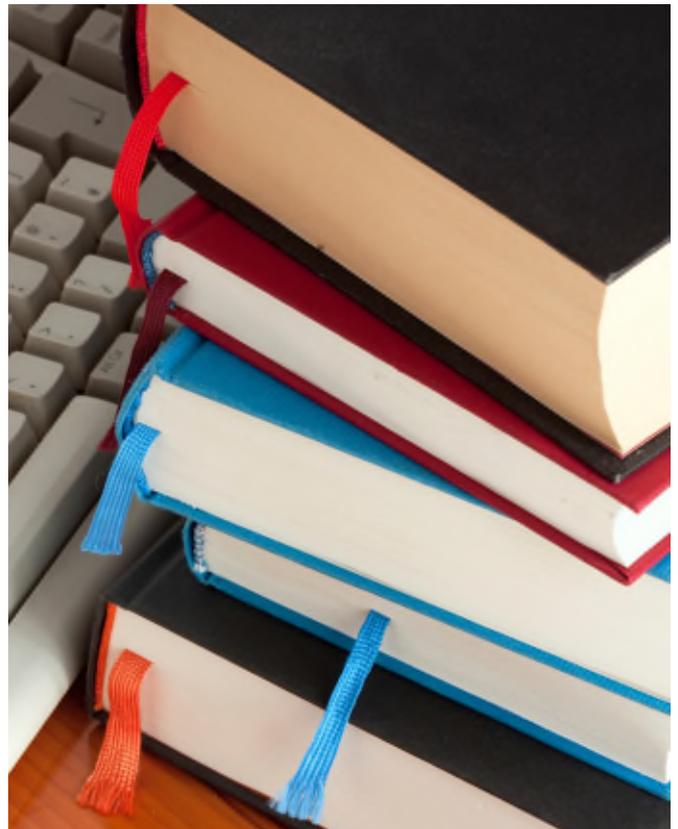
- Vietnamese laws and regulations are still relatively unclear and undeveloped in many important areas, including with respect to the recognition and enforcement of arbitral awards – local courts and agencies retain significant discretion over the interpretation of legal texts; and
- In practical terms, the enforcement of arbitral awards in Vietnam remains subject to many uncertainties in terms of timing and result.

To mitigate some of the uncertainty surrounding the enforcement of contracts with Vietnamese counterparties, parties should anticipate, in advance:

1. Engaging Vietnamese counsel to review all contracts (irrespective of the governing law) to ensure consistency with Vietnamese domestic legislation – to the extent the commercial objectives of the parties cannot be met by the Vietnamese legal framework (e.g. liquidated damages and limitation of liability with any certainty) parties should be aware of the risks associated with future enforcement in the case of a dispute;
2. Ensuring that the arbitration clause is carefully drafted by reference to the relevant institution’s model clause;
3. Ensuring that Vietnamese practical formalities regarding the conclusion of contracts are observed – if possible, retaining hard original signed and sealed copies of all commercial agreements and amendments (as well as correspondence);
4. Complying with Vietnamese Civil Procedure Code requirements, as well as the requirements of any institutional rules chosen by the parties, when serving an arbitration notice on a Vietnamese

counterparty, in order to reduce the potential for the Vietnamese court to rule that the notice was not validly given; and

5. Ensuring that the Vietnamese counterparty is sent all correspondence between the arbitral institution and the court, to avoid a potential argument that the Vietnamese party was not aware of the arbitral proceedings and had the right to be heard – note, however, the requirements for notarisation and legalisation of documents to be presented to Vietnamese courts (which can be time consuming and impractical).



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Our Asia dispute resolution practice

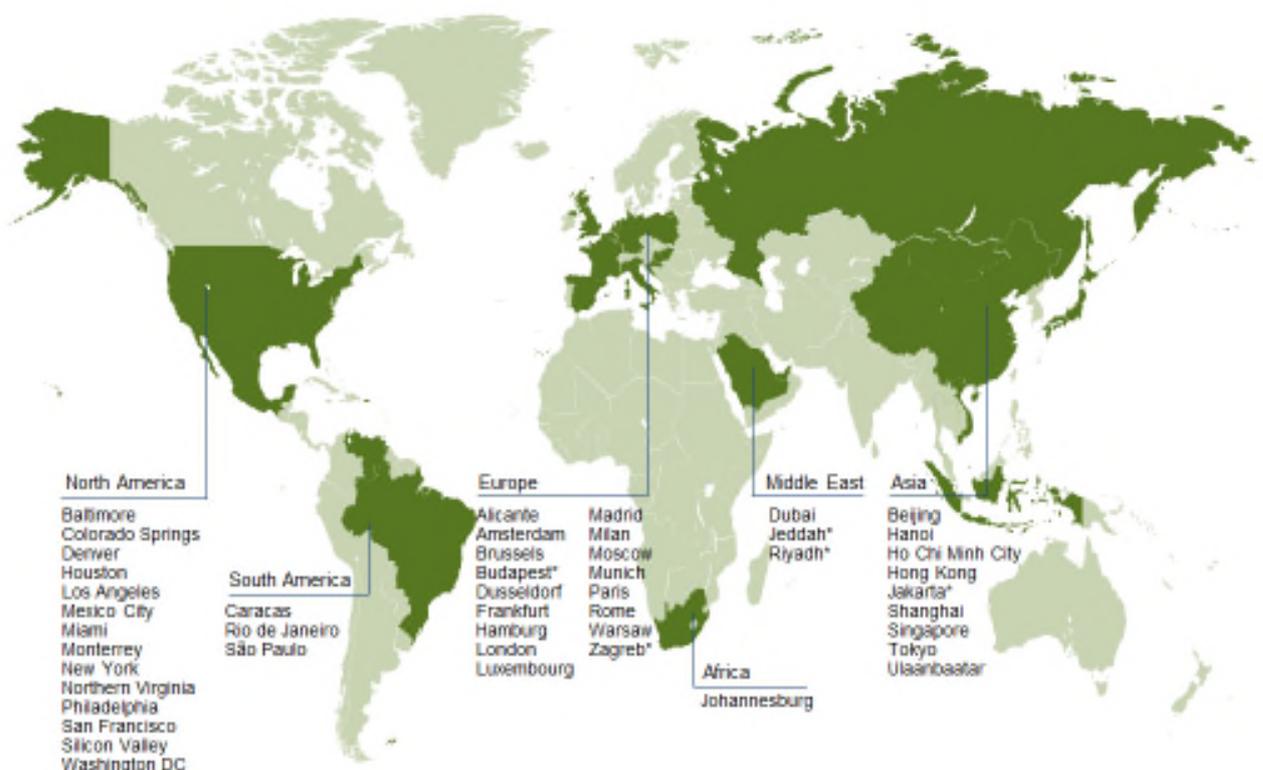
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Our unique global footprint and depth of knowledge in the industries in which our clients operate enables us to work on more multi-jurisdictional disputes than other international firms and in a seamless way.

We have built up a particular expertise in Vietnam related disputes. Vietnam law qualified dispute lawyers in our Hanoi and Ho Chi Minh City offices have acted, together with specialist dispute practitioners in our Singapore, Hong Kong and London offices, for Vietnamese and foreign corporates in various civil and criminal matters in Vietnam, including both international and domestic arbitration proceedings.



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