

KOREAN TRADE AND INVESTMENT ACTIVITIES IN VIETNAM: MECHANISM FOR SETTLING COMMERCIAL DISPUTES AND PRACTICAL ISSUES

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May, 2019 marked 4 years since the signature of the Vietnam-Korea Free Trade Agreement (VKFTA), nearly 14 years since the signature of the ASEAN – Korea Free Trade Agreement in December, 2005 (AKFTA), and 26 years since the signature of the first Agreement Promotion and Protection of Investment (VKBIT) between the two countries in May, 1993.¹



Throughout the past three decades, Korea has become one of Vietnam's most important trade and investment partners. In 2018, the trade balance between the two countries reached over US\$ 65.7 billion;² and as of 2018, there are more than 7,600 active investment projects and a total registered

investment capital of about 63.7 billion USD.³ Most of Korea's leading corporations such as Samsung, LG, Lotte, Posco, Daewoo, Hyundai, Hyosung, SK, CJ. etc.⁴ have injected billions of dollars in projects covering several fields and industries. However, along with

¹ The first VKBIT was signed in May, 1993 and then resigned in 2003 with some amendments and supplements, refer to: <http://www.trungtamwto.vn/chuyen-de/12553-hiep-dinh-khuyen-khich-va-bao-ho-dau-tu-giua-viet-nam-va-han-quoc>

² For the preliminary assessment of Vietnam international merchandise trade performance for 2018, refer to: <https://www.customs.gov.vn/Lists/EnglishStatistics/ViewDetails.aspx?ID=994&language=en-US&Group=Trade%20news%20%26%20analysis>

³ For information on foreign investment attraction in the first 2 months of 2019, refer to: <http://thoibaonganhng.vn/han-quoc-va-viet-nam-tim-kiem-su-phat-trien-ben-vung-va-thinh-vuong-chung-86076.html>

⁴ For more information on trends for Korea's offshore investment, refer to: <http://fia.mpi.gov.vn/tinbai/4159/Xu-huong-dau-tu-ra-nuoc-ngoai-cua-Han-Quoc>

that growth, trade and investment disputes involving Korean and Vietnamese businesses also tend to increase in both quantity and complexity.⁵ This article presents a summary of the mechanisms available for the resolution of such disputes in Vietnam, and provides some practical insights on the matter.

Vietnam and Korea have respectively been members of the WTO since 2007 and 1995. Within the framework of the VKBIT, VKFTA and AKFTA, Vietnam offers Korean entrepreneurs a multitude of commitments relating to tariff reduction and non-tariff measures (based on WTO standards), market opening, policy and legal stability. These treaties also provide Korean investors investing in Viet Nam with favorable treatments and guarantees for their investment activities including, amongst others, Most Favor Nation Treatments (MFN), National Treatment (NT), Fair and Equitable Treatment (FET), and Full Protection and Security for investors and their investments. To date, Vietnam has concluded 66 Bilateral Investment Treaties (BITs), 16 bilateral and multilateral FTAs and 76 double taxation agreements.⁶ Vietnam has also ratified the United Nations Convention on Contracts for the International Sale of Goods (CISG) in 2017 and international standards such as Incoterm, UCP and others are used regularly for international business transactions.⁷ In this context, investments and trades from other countries to Viet Nam may be benefited from these international treaties.

With respect to domestic legal framework, Vietnam follows the civil law system and, since 2015, the Supreme Court of Vietnam has started to apply selected case law in trial activities.⁸ Since the Law on Foreign Investment was first introduced in 1987, Vietnamese laws and institutions have been gradually updated and improved in order to create a favorable and consistent environment for domestic and foreign investors.⁹ The

⁵ The number of disputes involving one Korean party at the VIAC ranked third in 2018, refer to:

https://drive.google.com/file/d/1VN96WDrloAWGnwl_y1OHIcglpqEs1yVP/view

⁶ See <https://investmentpolicy.unctad.org/international-investment-agreements/countries/229/viet-nam>

⁷ Civil code (2015), Article 5.

⁸ Civil Procedure Code (2015), Article 45; Resolution 03/2015/NQ-HDTP of the Supreme People's Court Judges on the process for selecting, announcing and applying case law.

⁹ Oxford Business Group, *A look at Vietnam's legal system*: <https://oxfordbusinessgroup.com/overview/law-land-look-country%E2%80%99s-legal-system>

Government of Vietnam is actively engaged in building and improving the legal and institutional system through exchanges with the Vietnam Business Forum (VBF), international organizations and business associations such as VCCI, KOCHAM, EUROCHAM, AMCHAM.¹⁰ Vietnamese law internalizes the majority of the country's international commitments and Vietnamese courts generally apply the principle of precedence of international commitments in cases of conflict with domestic laws.¹¹ As mentioned above, international treaties such as the VKFTA provide special treatment for foreign investors which go beyond the protections offered under domestic law.¹² Furthermore, individual investment projects may also enjoy specific benefits or commitments usually granted through investment certificates or agreements with Government (e.g. PPP contracts, land lease contracts).

The various BITs and FTA concluded by Vietnam and South Korea provide mechanisms for the resolution of investment disputes between investors and the contracting states, principally through UNCITRAL or ICSID arbitration.¹³ Likewise, commercial disputes involving Korean and Vietnamese parties may also be referred to arbitration under the rules of local (e.g. VIAC) or foreign arbitration centres (eg. AIAC, SIAC, HKIAC, ICC, etc.), except for matters where Vietnamese courts have an exclusive jurisdiction (e.g. real estate disputes).¹⁴ Korean investors thus often prefer resorting to international arbitration centre for the resolution of disputes with their Vietnamese partners as it provides more flexibility in terms records, procedures, language, applicable law and international practices.¹⁵

In this context, VIAC appears to be a popular choice for settlement of trade and investment disputes involving foreign entrepreneurs and their Vietnamese counterparts.¹⁶ The VIAC

¹⁰ Eurocham, *White book 2019*: https://drive.google.com/drive/folders/1UUxNWojr-wZiR12_G8E9gurPWpfHNwd

¹¹ Civil Code (2015), Article 4 (4); Law on Investment, Article 4 (3).

¹² Law on Treaties (2016), Article 6; Law on Investment (2014), Article 4 (4).

¹³ Vietnam-Korea Free Trade Agreement (VKFTA), Article 9 (19).

¹⁴ Land Law (2013), Article 203.

¹⁵ The recent Surveys by Queen Mary University show that arbitration has been the favored mechanism for commercial dispute resolution in recent years. In 2013, 2015, 2016 and 2018, strong trends showed that more than 90% of enterprises considered commercial arbitration as the optimal forum for dispute resolution, refer to: <http://www.arbitration.qmul.ac.uk/research/>

¹⁶ VIAC started operations in 1993. It is the largest and oldest commercial arbitration center in Vietnam with over 100 arbitrators listed on its panel, including many foreign arbitrators. Between 2015 and 2018, VIAC received and

arbitration rules closely follow the UNCITRAL model rules and that VIAC proceedings are usually faster and its awards are easier to enforce comparing to foreign arbitral awards.¹⁷ From 2015 to 2017, the VIAC has handled nearly 30 commercial and investment disputes involving at least one Korean party, with the highest amount in dispute being over 70 million USD.¹⁸ Likewise, from 2016 to 2018, the KCAB has received 14 cases with a Vietnamese disputing party,¹⁹ and a large number of such disputes are also resolved through SIAC, ICC or UNCITRAL arbitration.²⁰ In 2018, the first ICSID arbitration opposing Vietnam and a Korean investor was registered in accordance with the terms of the VKBIT.²¹ In addition to arbitration, Vietnamese courts have dealt with several disputes involving Korean-invested enterprises such as labour disputes,²² corporate governance disputes,²³ shareholder disputes (eg. a), etc.²⁴

The enforcement of arbitral awards and conciliation agreements in Vietnam is governed by the Law on commercial arbitration.²⁵ Since Vietnam ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1995, foreign arbitral awards can be recognized and enforced by the Vietnamese courts.²⁶

resolved an average of 158 cases per year, with an average settlement time of 153.6 days per case. Disputes with foreign elements accounted for over 50% of those cases.

¹⁷ In Viet Nam, awards rendered by VIAC can be enforced directly, like local courts' judgments, without going through the lengthy process of recognition and enforcement applicable to foreign arbitration awards.

¹⁸ *Annual reports of VIAC*, refer to: <http://eng.viac.vn/about-us-c103.html>

¹⁹ *Annual report of KCAB*, refer to:

http://www.kcabinternational.or.kr/user/Board/comm_notice.do?BD_NO=174&CURRENT_MENU_CODE=MENU0017&TOP_MENU_CODE=MENU0014

²⁰ *Annual report of SIAC*, refer to: <http://www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/annual-report>
Annual report of ICC, refer to: <https://cdn.iccwbo.org/content/uploads/sites/3/2018/07/2017-icc-dispute-resolution-statistics.pdf>

²¹ *Statistics of UNCTAD*, refer to: <https://investmentpolicyhubold.unctad.org/ISDS/CountryCases/229?partyRole=2>

²² *Difficulties in resolving labor disputes*, refer to: <http://www.nhandan.com.vn/tphcm/tin-chung/item/22570902-gian-nan-giai-quyet-tranh-chap-lao-dong.html>

²³ *Disputes between the shareholders of Red River Holdings and the manager of Everpia Vietnam Jointstock Company*, refer to: <https://tinnhanhchungkhoan.vn/phap-luat/kien-lanh-dao-doi-boi-thuong-co-dong-gap-kho-164264.html>

²⁴ Eg. the US\$ multi-million dispute between Korean and Vietnamese shareholders in a real estate joint stock company based in Ho Chi Minh City. See at: *Disputes at The Mark project: Latest developments*, refer to: <https://vtc.vn/tranh-chap-o-du-an-the-mark-dien-bien-moi-nhat-d393348.html>

²⁵ Law on the Enforcement of Civil Judgments 2008, as amended and supplemented in 2014, Article 2; Civil Procedure Code (2015), Article 419.

²⁶ Civil Procedure Code (2015), Articles 423 and 431.

However, the proportion of such awards being enforced in Vietnam remains limited, although it has recently improved.²⁷ Foreign court judgments and decisions are also difficult to implement in Vietnam due to the very limited number of mutual legal assistance agreements signed with other countries.²⁸ The enforcement of such judgments is usually based on the application of reciprocity principles between Vietnam and the relevant country.²⁹ It is worth noting here that in its decision No.2083/2007/QDST-KDTM dated November 19, 2007, the Ho Chi Minh City People's Court accepted the request of a Korean company to recognize and enforce a judgment issued by the Dae Cheon Appeal Court in Korea.³⁰

In practice, it is possible to effectively resolve disputes and enforce awards in Vietnam through careful preparation. In order to avoid unexpected risks and costs when drafting and signing contracts, particular attention should be given to *inter alia* the authority of the signing party, the applicable law, and the dispute resolution clauses. At the same time, parties should be advised and assisted by legal counsels as early as possible to prepare for and representing in legal proceedings. The following examples highlight some practical issues faced in the resolution of disputes and the enforcement of arbitration agreements and awards in Vietnam.

Firstly, an arbitration agreement signed by an unauthorized person or without a signature of a party may be declared invalid or non-existent by the Court, resulting in the arbitration award being set aside or non-enforceable. Under the guidance of the Supreme Court, if the person signing the arbitration agreement does not have the authority to do so (e.g. a document authorizing the person to sign the contract, an agreement does not allow the signing of the

²⁷ In the 3 years from 2015 to 2017, only 7 out of 37 petitions for the enforcement of foreign arbitral awards were accepted by Vietnamese Courts. *Number of cases solved by arbitration has not met expectations*, refer to: <http://thoibaotaichinhvietnam.vn/pages/xa-hoi/2018-06-07/so-vu-giai-quyet-qua-trong-tai-van-chua-tao-duoc-nhieu-ky-vong-58411.aspx>

²⁸ As of July 2017, Vietnam had signed 27 agreements in relation to Mutual Legal Assistance, refer to: <https://lanhsuvietnam.gov.vn/Lists/BaiViet/B%C3%A0i%20vi%E1%BA%BFt/DispForm.aspx?List=dc7c7d75%2D6a32%2D4215%2Dafeb%2D47d4bee70eee&ID=414>

²⁹ Civil Procedure Code (2015), Article 423.

³⁰ According to Nguyen Manh Dzong, at "Execution of foreign arbitration awards and decisions in ASEAN countries"

arbitration agreement), then such arbitration agreement is considered invalid.³¹ In 2017, Supreme People's Court of Hanoi rejected the written request for recognition and enforcement an arbitral award issued by a foreign arbitral tribunal in Vietnam on the grounds that the concerned arbitration clause was invalid due to the fact that the defendant had not signed the contract.

Secondly, an arbitration agreement may be considered to be unenforceable in cases where the parties select an arbitral institution (egg. VIAC) to administer the dispute but choose the procedural rules of other arbitration institution (eg. ICC) to govern the proceedings. This was contrary to the rules of the arbitral institution selected by the parties to settle disputes.

Thirdly, contracts related to the implementation of state projects (governed by Vietnamese law) may be unilaterally terminated by a competent state agency or individual (e.g. the Prime Minister) in the event of force majeure under Article 294 of the 2005 Law on Commercial. In such circumstances, the terminating party is exempt from liability and is not required compensate the other party.

Fourthly, an arbitral award may be set-aside or refused to be enforced by the court if it is contrary to the basic principles of Vietnamese law.³² Similarly to the definition of 'public policy' in Article 5 of the 1958 New York Convention, the definition of basic principles of Vietnamese law under Article 68 of the 2010 Law on Commercial Arbitration is vague and controversial. In practice, Vietnamese courts often rely on this provision as a ground for refusing to enforce domestic and foreign arbitral awards alike. For example, arbitral awards were set-aside or not enforced on the basis that: (i) documents were invalidly by notarized by Vietnamese notaries, (ii) decisions were contrary to both Vietnamese law and the law of

³¹ Law on commercial arbitration (2010), Article 18; Resolution No.01/2014/NQ-HDTP dated March 20, 2014, Article 3.

³² The 1958 New York Convention, Article V.I(a); Civil Procedure Code 2015, Article 459; Resolution No.01/2014/NQ-HDTP, Article 14.

the country of the other party in dispute;³³and (iii) clear evidence showed that one of the parties submitted false documents.³⁴

Vietnamese law, together with the various bilateral and multilateral treaties and agreements between Korea and Vietnam, set out the principles for protection of investors and the investments in Vietnam. They also allow the parties to choose from a variety of dispute settlement mechanisms suitable for trade and investment activities. Commercial activities and cross-border investments often involve a large amount and complex legal issues. As such, there are potential risks of disputes arising from differences in the legal systems, commercial practices and cultures of the two countries. Therefore, Korean and foreign investors should be careful in researching and getting legal support for their projects in Vietnam for the negotiation of transactions, the drafting of legal documents and the resolution of disputes.

³³ *Engro Novus (Moscow) vs. VINATEX* (1998), Decision No.60/KTPT dated June 4, 1988 Supreme People's Court of Ha Noi in Đo Van Đai và Tran Hoang Hài (2010), *Collection of Vietnamese judgments and decisions on commercial arbitration*, page 207 – 212.

³⁴ Decision No.02/2017/QĐ-PQTT dated March 27, 2017 of Hanoi's People's Court in Đo Van Đai (2017), *The law on Vietnamese arbitration*, Volume 2, page 120 – 123.