

AN OVERVIEW OF EMERGING ARBITRATION IN VIETNAM¹

- Mr. Dzung Manh Nguyen²

1. What legislation applies to arbitrations in your jurisdiction? To what extent has your jurisdiction adopted the UNCITRAL Model Law on International Commercial Arbitration?

Arbitration in Vietnam is mainly governed by Law No. 54/2010/QH12 on Commercial Arbitration (“LCA”) which further guided by Resolution No. 01/2014/NQ-HDTP of the Supreme People’s Court of Vietnam (“Resolution No. 01”).

With regard to the enforcement of arbitral awards (both domestic and foreign arbitral awards), the Law on Enforcement of Civil Judgments 2008, as amended in 2014 (“LECI”) shall be applied. However, the foreign arbitral awards must seek recognition by the Vietnamese Court before being coercively enforced in Vietnam. The recognition of foreign arbitral awards is regulated by Part Seventh (VII) of Civil Procedure Code 2015 (“CPC”) which came into force on 1st July 2016 which incorporates provisions of New York Convention 1958.

Although not officially recognised by the UNCITRAL as a Model Law country, the LCA was drafted based on the 1985 UNCITRAL Model Law as amended in 2006 (“UNCITRAL Model Law”) with some local adaptations regarding the language of arbitration, the conditions for applying for interim reliefs, the grounds for setting aside arbitral awards, etc.

2. In your practice when dealing with domestic arbitration, have you experienced more ad hoc or institutional arbitrations? If so, which arbitral institution(s) is/are commonly used to resolve commercial disputes in your jurisdiction? In your opinion, how effective are the products and services offered by the named institution(s)?

Arbitration in Vietnam is often conducted in the form of institutional arbitration. Ad hoc arbitration is rarely used. Among 31 arbitration institutions in Vietnam³, Vietnam International Arbitration Centre (“VIAC”) is the leading and most commonly used arbitration centre.

The current VIAC Rules of Arbitration adopt international best practice, such as rules on multiple contracts (Art. 16), consolidation (Art. 15) and expedited procedure (Art. 37)⁴. It has also been observed that in certain VIAC-administered matters involving international arbitral tribunals, the proceedings have been conducted in

¹ Over the course of the past 40 years, arbitration, as an international dispute resolution mechanism, has gained significant global traction. Certain jurisdictions, such as London, Hong Kong, Singapore, Geneva, and New York, are considered arbitration powerhouses, not only for being home to preeminent arbitration firms and boutiques, but also due to the strength of the *lex arbitri*, and the relevant supporting framework, in promoting these jurisdictions as preferred seats of arbitration. Nevertheless, the role of the UNCITRAL Model Law in harmonising the global arbitration framework, as well as the proactiveness of individual arbitral institutions and the support of the judiciary, has enabled lesser-known jurisdictions to reposition themselves as emerging centres ready to have a piece of the proverbial “arbitration pie”. In this regard, the Asian International Arbitration Centre (AIAC) decided to dedicate a portion of the Newsletter published in August, 2020 and the next edition thereafter to survey emerging arbitration jurisdictions, through the lens of leading practitioners from the relevant jurisdictions. Part I of this survey is showcased in this edition of the AIAC Newsletter and canvasses four emerging jurisdictions in the Asia-Pacific region – Malaysia (by Tan Sri Dato’ Cecil Abraham), the Philippines (by Patricia-Ann T. Prodigalidad), Thailand (by Vanina Sucharitkul), and Vietnam (by Dzung Mahn Nguyen).

² Dzung Mahn Nguyen recently established ADR Vietnam Chambers LLC, a new platform for full time & independent arbitrators and mediators in Vietnam. He also founded Dzungsr & Associates LLC in 1997 which has now become one of the leading arbitration law firms in Vietnam. Mr. Nguyen has served as an expert witness, and legal counsel in international arbitrations conducted under various international arbitration rules such as ICC, SIAC, JCAA and UNCITRAL and he has also been appointed as co-arbitrator and presiding arbitrator in VIAC arbitrations. He has assisted international clients in pursuing enforcement proceedings in Vietnam of many arbitral awards rendered by the ICC, ICA, GAFTA, JCAA, LMAA and SIAC.

³ The information of 31 arbitration institution can be found at the Web Portal of Ministry of Justice at <<https://bttp.moj.gov.vn/qt/Pages/trong-tai-tm.aspx?Keyword=&Field=&&Page=4>>, accessed on 22 July 2020.

⁴ The VIAC’s Rule of Arbitration can be found at the Web Portal of VIAC at <<http://viac.org.vn/en/rules-of-arbitration.html>>, accessed on 22 July 2020.

accordance with high-quality international standards, for example, having Procedure Orders issued and applying the IBA Rules on the Taking of Evidence.

According to VIAC's Report, the average duration of an arbitral proceeding conducted at VIAC is less than six (6) months. VIAC is also one of the first arbitration institutions in Vietnam to have issued its own Code of Ethics for Arbitrators.

3. What, if any, requirements must be met by an individual to become an arbitrator in your jurisdiction? Are there any barriers for foreign practitioners to serve as arbitrators or parties' representatives in your jurisdiction?

According to Art. 20 of the LCA, arbitrators must satisfy the following criteria:

- (i) Having full civil legal capacity as prescribed in the Civil Code;
- (ii) Possessing university degrees and having worked in the branches of their study majors for five years or more;
- (iii) Not currently being a judge, prosecutor, investigator, enforcement officer, or official of a people's Court, of a people's procuracy, of an investigative agency or a judgment enforcement agency; and,
- (iv) Not being the one who under a criminal charge or prosecution or who are serving a criminal sentence or who have fully served a sentence but whose criminal record has not yet been cleared.

Nonetheless, in exceptional cases, an expert with high qualifications, and considerable practical experience, who only fails to satisfy the above second requirement may still be selected to act as an arbitrator.

The foreigners who meet these requirements can serve as arbitrators in both institutional and ad hoc arbitrations in Vietnam since the LCA does not impose any restriction on the nationality of the arbitrator. The VIAC's list of arbitrators includes 28 foreign arbitrators. From 2015 to date, parties have appointed 38 international arbitrators, both within and outside the VIAC's list of arbitrators.

Further, as regards the representation of parties, Vietnamese law allows foreign lawyers or non-lawyers to act as parties' representative in the arbitration proceedings in Vietnam by way of a power of attorney or letter of appointment of lawyers.

4. Does the law in your jurisdiction consider certain disputes as non-arbitrable? If so, what disputes are non-arbitrable?

Pursuant to Art 2 of the LCA, the following disputes can be resolved by arbitration:

- (1) Disputes between parties arising from commercial activities;
- (2) Disputes arising between parties at least one of whom engages in commercial activities; and,
- (3) Other disputes between parties which the law stipulates that it may be resolved by arbitration.

As provided by the Commercial Law, "commercial activities" are defined as activities for profit-making purposes including sale and purchase of goods, services, investment, trade promotion, etc. Therefore, matters such as criminal, administrative, matrimonial, and labour disputes are considered to be non-arbitrable. Furthermore, the dispute may be regarded as non-arbitrable if it falls within the exclusive jurisdiction of Vietnamese laws under Article 470 of the CPC, such as cases involving rights to immovable property in Vietnam. Notably, tort claims may not be arbitrable in Vietnam.

The latest Draft Resolution guiding certain provisions of Civil Procedure Code on recognition and enforcement of foreign arbitral awards of the Supreme People's Court also clarifies some disputes which are considered as non-arbitrable, such as disputes over registration or validity of patents, industrial designs, semiconductor integrated circuit layout designs, trademarks, trade names, geographical indications, and other intellectual property rights, and disputes relating to enterprise registration, and other obligations to register or notify under the Law on Enterprise.

5. What is the procedure for commencing arbitration in your jurisdiction? Does the law provide default rules governing the commencement of arbitral proceedings? Is there a period of limitation that parties should be aware of?

In accordance with Article 31 of the LCA, the time of commencement of arbitration proceedings, in case of institutional arbitration, shall be upon the receipt by the arbitration centre of the Statement of Claim from the Claimant. As regards ad hoc arbitration, the arbitration proceedings are deemed to have commenced when the Respondent receives the Statement of Claim from the Claimant.

In addition to the rules on determining the commencement date, the LCA requires the Statement of Claim to contain these following contents:

- (a) The date on which the statement of claim is made;
- (b) Names and addresses of the parties, and names and addresses of witnesses, if any;
- (c) Summary of the matters in dispute;
- (d) Grounds and evidence, if any, of the claim;
- (e) Specific relief sought by the claimant and value of the dispute;
- (f) Name and address of the person whom the Claimant selects as arbitrator or Request for an arbitrator to be appointed.

The statute of limitations to initiate arbitration proceedings is a complicated issue which shall be subject to the substantive law, such as the commercial law, the civil code, the maritime code, etc. In case the substantive law does not specify, the limitation period for commencing an arbitration shall be two years from the date of the infringement of a party's legal rights and interests⁵.

6. What is the procedure for commencing arbitration in your jurisdiction? Does the law provide default rules governing the commencement of arbitral proceedings? Is there a period of limitation that parties should be aware of?

For foreign-seated arbitration, Vietnamese laws do not allow the courts to intervene in the arbitral proceedings.

Whereas, when the arbitration is administered by a foreign institution and has the seat of arbitration in Vietnam, such arbitration is still considered as a "foreign arbitration" under Vietnamese laws. According to Art. 5(5)(a) of Resolution No. 01, the Vietnamese Courts have authority to intervene in the arbitral proceedings, except for considering the annulment of arbitral awards, and registering foreign ad-hoc arbitral awards. Accordingly, local courts can intervene to assist foreign arbitrations seated in Vietnam through the:

- appointment of an arbitrator to establish an ad hoc arbitral tribunal;
- replacement of an arbitrator in an ad hoc arbitral tribunal;
- consideration of a petition against the decision of an arbitral tribunal that the arbitration agreement is void or incapable of being performed or about the jurisdiction of the arbitral tribunal;
- collecting evidence;
- granting interim reliefs; and
- summoning witnesses.

7. What are the grounds to challenge arbitral awards in your jurisdiction's local court? What is the judiciary's approach to determining whether or not to grant a challenge to an arbitral award?

The LCA prescribes five (5) grounds for setting aside arbitral awards, which resemble the grounds under the UNCITRAL Model Law, save for the following:

⁵ Art. 33 of the LCA.

- The evidence supplied by the parties on which the Arbitral Tribunal relied to issue the award is forged; or an arbitrator receives money, assets or some other material benefits from one of the parties in dispute which affects the objectivity and impartiality of the arbitral award; and,
- The arbitral award is contrary to the fundamental principles of the law of Vietnam.

In practice, it could be said that the number of arbitral awards being set aside by Vietnamese courts is still high. From 2011 to 2014, around 50% of the challenges to VIAC arbitral awards were granted⁶. From 2015 through 2017, the situation seemed to be better with only 3 VIAC awards being set aside⁷. Nevertheless, the number of awards being set aside has recently been increasing. In 2019, based on the public data of the Supreme People's Court, 5 out of 17 (or 29%) applications for annulment of arbitral awards were accepted by Vietnamese courts⁸. One of the most common grounds that the Vietnamese courts often rely on to review the arbitral award and/or grant the challenge to arbitral awards was "the violation of the fundamental principle of Vietnamese laws".

8. The jurisdiction of an arbitral tribunal is often denied by a party to an arbitration proceeding. Does your jurisdiction recognise the principle of kompetenz-kompetenz?

Yes, the principle of kompetenz -kompetenz is recognised in Art. 43 of the LCA. Accordingly, prior to dealing with the merits of a dispute, the Tribunal is required to rule on its own jurisdiction. The Resolution 01 of the Supreme People's Court further provides that where a Statement of Claim has been filed, and the Arbitral Tribunal has been dealing with the dispute, even though the Court realises that the dispute is not subject to the jurisdiction of the Tribunal, there is no arbitration agreement, or the arbitration agreement is incapable of being performed, and one party requests the Court to resolve the dispute, the Court shall return the petition to the petitioner. Where the Court has enrolled the case, the Court shall decide to suspend the case. However, the local courts, at a request of a party, shall have the power to review such Tribunal's decision on jurisdiction. The decision of Court shall be final and binding on the parties and the Tribunal.

9. Are the courts and arbitral tribunals entitled to award interim relief in your jurisdiction? If, so what types of relief are available to each?

Under Article 49.2 of the LCA, the Arbitral Tribunal or the Court can grant one or more of the following interim reliefs:

- (i) Prohibition of any change in the status quo of the assets in dispute;
- (ii) Prohibition of acts that are adverse to the arbitration proceedings or ordering one or more specific actions to be taken by a party in dispute in order to prevent those acts;
- (iii) Attachment of the assets in dispute;
- (iv) The requirement of preservation, storage, sale, or disposal of any of the assets of one or all parties in dispute;
- (v) A requirement of interim payment of money as between the parties; and
- (vi) Prohibition of transfer of property rights of the assets in dispute.

Besides the interim reliefs listed above, the local Court has exclusive power to grant other interim reliefs under Art. 114 of the Civil Procedure Code, including inter alia:

- (i) Freezing of accounts at banks, other financial institutions, or state treasuries;
- (ii) Freezing of assets at places of deposit; and
- (iii) Freezing of obligor's assets.

⁶ <http://www.viac.vn/tin-tuc-su-kien/to-tung-trong-tai-toa-an-phai-ho-tro-dac-luc-n378.html>, accessed on 22 July 2020.

⁷ <http://www.viac.vn/thong-ke>, accessed on 22 July 2020.

⁸ Nguyen Ngoc Minh, Nguyen Thi Thu Trang and Nguyen Thi Mai Anh, Enforceability of arbitral awards in Vietnam- alarming practice, *The Asia- Pacific Arbitration Review 2021*, Law Business Research, p. 103.

Notably, a party cannot request the Arbitral Tribunal and the local Court concurrently to order the same interim relief in an arbitration proceeding.

10. Your jurisdiction is a party to Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention). Do the grounds for refusing enforcement of an arbitral award in your jurisdiction differ from those specified in the New York Convention? Is there any limitation period applicable to enforce a foreign arbitral award in your jurisdiction?

The recognition of foreign arbitral awards is regulated by Part Seven of the CPC. To be considered for recognition and enforcement by Vietnamese courts, the arbitral award must “settle the entire dispute, terminate the arbitral proceedings and be effective”⁹. Therefore, interim awards cannot be recognised and enforced in Vietnam. Besides, as mentioned above, regardless the seat of arbitration, arbitral awards issued by a foreign arbitral institution shall be considered as foreign arbitral awards, meaning that such award must be recognised by Vietnamese courts to be enforced in Vietnam.

The grounds to refuse recognition of foreign arbitral awards in the CPC are provided in Article 459 of the CPC, which resemble the grounds under the New York Convention and the UNCITRAL Model Law, except for the replacement of the public policy concept with the fundamental principles of Vietnamese law.

The time limit for a party to submit an application for the recognition and enforcement of foreign awards in Vietnam is three (3) years as from the date the arbitral award became legally effective.

11. What are the current trends or issues affecting the use of arbitration in your jurisdiction? Would you describe your jurisdiction as pro-arbitration in nature? Why or why not?

Firstly, in 2016, Vietnam adopted the Decree on Commercial Mediation No. 22/2017/ND-CP. The mediated settlement agreement could be recognised by the Vietnamese court and on that basis, shall be enforced as a court judgment in Vietnam¹⁰. Accordingly, it is expected that the multi-tiered dispute resolution with ‘Med-Arb’ and ‘Arb-Med-Arb’ regimes will be more and more favoured by foreign investors, as well as their local partners.

Secondly, Vietnam currently has 31 arbitration centres¹¹. In December 2019, the Korean Commercial Arbitration Board was also permitted to establish an overseas office in Vietnam. The rising number of arbitral institutions in Vietnam demands that all these institutions provide the highest quality services and procedural rules to compete with each other. Also, the judicial support of the courts towards foreign arbitration seated in Vietnam has received more attention.

Thirdly, to mitigate the adverse consequences of COVID-19 pandemic, or any other pandemic may occur in the future, virtual hearings and e-documents will be more popular in Vietnam. However, it may take more time for Vietnam to study and implement virtual hearings/meetings in accordance with international standards.

Lastly, to date, Vietnam has become a party of 67 Bilateral Investment Treaties (“BITs”)¹², 13 Free Trade Agreements (“FTAs”), and is in the negotiation process for three others¹³. The investor-state dispute settlement clauses under these BITs and FTAs certainly affect how the Vietnamese Government handles investment claims, as well as improve investment arbitration in Vietnam.

As stated above, the LCA has adopted fundamental principles under the UNCITRAL Model Law; the grounds to refuse the recognition and enforcement of foreign arbitral awards in the CPC basically resemble the

⁹ Article 3.10 of the LCA.

¹⁰ Art. 419 CPC.

¹¹ The information of 31 arbitration institution can be found at the Web Portal of Ministry of Justice at <<https://bttp.moj.gov.vn/qt/Pages/trong-tai-tm.aspx?Keyword=&Field=&&Page=4>>, accessed on 22 July 2020.

¹² <https://investmentpolicy.unctad.org/international-investment-agreements/countries/229/viet-nam>, accessed on 22 July 2020.

¹³ <http://www.trungtamwto.vn/thong-ke/12065-tong-hop-cac-fta-cua-viet-nam-tinh-den-thang-112018>, accessed on 22 July 2020.

grounds under the New York Convention. To be specific, the Claimant shall have the right to select the arbitration forum and the arbitration institution to resolve the dispute, in case parties agreed to settle their dispute by arbitration but failed to clarify the arbitration forum or a particular arbitration institution. Additionally, the Court must refuse to enrol or dismiss the case if the dispute is subject to an existing arbitration agreement¹⁴. Therefore, it could be said that the domestic arbitration legal regime of Vietnam adopts an arbitration-friendly approach.

However, Vietnam has not been described as a pro-arbitration jurisdiction due to some gaps between Vietnamese law, the UNCITRAL Model Law, and the New York Convention, as mentioned above. In addition, Vietnam is regarded as a jurisdiction where it is difficult to enforce foreign arbitral awards¹⁵. In fact, from 2015 to 2019, around 21% of the applications for recognition and enforcement were rejected by Vietnamese courts. The said situation, nevertheless, is expected to improve due to the Vietnamese government's policy to encourage the use of arbitration and ADR, as well as the upcoming legal reforms in Vietnam.

12. In your opinion, is there a shift from Western jurisdictions to Eastern jurisdictions with regards to the preferred seat of arbitration? If so, how should ASEAN countries capitalise on this opportunity?

We do believe that Eastern countries could potentially compete with Western countries to become a preferred seat of arbitration due to the increase in Asia -related disputes arising out of cross-border transactions, and the rise of the preferred seat in Asia which could satisfy the high-quality international standards, such as Singapore and Hong Kong. In addition, recently, the Belt & Road Initiative also encouraged a shift from Western jurisdictions to Eastern jurisdictions.

To capitalise the opportunity of the shift with regards to the preferred seat of arbitration, Vietnam, as well as other ASEAN countries, should improve its shortcomings in the field of arbitration to create an attractive arbitration destination for commercial investors, including, inter alia, (i) the adoption of UNCITRAL Model law; (ii) the development of arbitration legal framework; (iii) the reputation and quality of arbitral institutions and arbitrators; (iv) judicial support for arbitration in the jurisdiction; (v) the level of foreign direct investment and free trade; and (vi) reducing the level of corruption. Also, the ASEAN governments may, as Singapore has done, have financial policies or funds to support the arbitration and ADR activities.

In fact, the Vietnamese Government has reviewed the LCA and is considering the possibility of adopting the UNCITRAL Model Law in Vietnam. Besides, many arbitration institutions in Vietnam have revised and re-structured their respective institutional rules, such that those rules have become more foreign-friendly. It is expected that this will bring more opportunities and develop the arbitration market in Vietnam.

13. How open is your jurisdiction to foreign young dispute resolution professionals?

The Vietnamese Government does encourage the participation of foreign young dispute resolution professionals in Vietnam. As mentioned above, there is no restriction to the participation of foreign lawyers or arbitrators in arbitral proceedings. In fact, many foreign lawyers are practising at Vietnamese law firms, and many VIAC arbitration cases have seen the participation of young foreign lawyers.

Recently, a number of workshops and conferences were held to encourage cooperation between the Vietnamese and the foreign young dispute resolution professionals. Last year, the Young ICCA had organised the first event in Vietnam on Witnesses and Experts in International Arbitration. Such activities are expected to connect the young Vietnamese practitioners with young foreign practitioners. Further, Young Vietnam ADR Group, under the auspices of VIAC, was established recently and is aimed at creating a growing community where young dispute resolution practitioners in Vietnam can share their knowledge and working experiences.

¹⁴ Art. 2(2) Resolution 01.

¹⁵ Anselmo Reyes, Weixia Gu, *The developing World of Arbitration: A comparative Study of Arbitration Reform in the Asia Pacific*, Bloomsbury Publishing, 2018.