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Arbitration in Vietnam

Vietnam’s arbitration law


In January 2013, the Vietnamese Supreme Court published a draft resolution which is intended to provide additional guidance on the Arbitration Law. As of the date of this note, the draft remains under discussion and the timeline as to when it will be adopted is unclear. It is expected that the resolution will be an important resource which further clarifies the interpretation and application of the Law. The draft resolution includes guidance on, amongst other things, the identification of Vietnamese courts which have competence in respect of arbitration in Vietnam, validity of arbitration agreements, ad hoc arbitration and grounds for annulment of arbitral awards.

Disputes that may be arbitrated

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

1. disputes arising from “commercial activities”;
2. disputes where at least one party is engaged in commercial activities; and
3. other disputes where the law stipulates that arbitration is a permissible means of resolution.

Regarding disputes arising from commercial activities, the concept of “commercial activity” is not specifically defined in the Arbitration Law. Instead, this term is given meaning with reference to the Commercial Law No. 36/2005/QH11 dated 31 December 2005. Under the Commercial Law, “commercial activity” 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.”

The second category of disputes eligible for arbitration is non-commercial disputes, such as civil disputes where at least one party to the dispute is not engaged in commercial activities. However, an exception to this category is where the dispute is between a goods and/or service provider and a consumer. In this case, the Law protects the consumer by allowing the consumer to choose between the court or arbitration as a method of dispute resolution. As a result, even where there is a standard arbitration clause in a supply of goods or services contract, the dispute may not be referred to arbitration without the consumer’s consent.

The third category of disputes, i.e. arbitration as permitted by law, leaves room for legislators to expand the types of disputes that may be resolved through arbitration in the future. At present, for example, disputes arising from investment activities governed by the Law on Investment may be submitted to arbitration.

One area where the Law is uncertain is whether land-related disputes may be arbitrated.
Arbitration agreements

There must be a valid arbitration agreement in order for a dispute to be referred to arbitration. An arbitration agreement must be in writing, either as an arbitration clause within a contract or by way of a separate agreement. If the arbitration agreement is included as an arbitration clause in a contract, the clause is considered to be independent of the contract. Any modification, extension, termination, or invalidity of the contract would therefore not normally affect the validity of the arbitration clause. A written arbitration agreement may now take the form of a letter, telegram, facsimile, electronic mail, or any other written form, so long as the writing clearly shows the parties’ intent to resolve their dispute by arbitration.

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

The Law allows the parties to refer their disputes to an arbitral tribunal appointed by an arbitration centre or to an arbitral tribunal nominated by the parties. Parties are granted flexibility in specifying the procedure for the arbitration and the terms of appointment of the arbitral tribunal members. Moreover, if the parties do not expressly address a particular point of procedure, the Arbitration Law will apply by default. It should be less likely that an arbitration clause will be deemed invalid under the Arbitration Law than under the prior Arbitration Ordinance.

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 Law provides that an arbitral tribunal shall consist of three arbitrators.

Under the Arbitration Ordinance, only Vietnamese nationals with certain knowledge, education and experience were able to serve as arbitrators. However, although the Arbitration Law, which replaced the Arbitration Ordinance, requires arbitrators to have similar knowledge, education and experience, notably it makes no mention of nationality.

Arbitration centres in Vietnam include:

- the Pacific International Arbitration Centre ("PIAC") based in Ho Chi Minh City;
- the Ho Chi Minh City Commercial Arbitration Centre ("TRACENT") based in Ho Chi Minh City;
- the Vietnam Finance and Banking Commercial Arbitration Centre ("VIFIBAR") based in Ho Chi Minh City;
- the Finance Commercial Arbitration Centre ("FCCA") based in Ho Chi Minh City; and
- the Can Tho Commercial Arbitration Centre ("CCAC") based in Can Tho City;

VIAC is the most well-known institutional arbitration centre in Vietnam.

VIAC has about 132 Vietnamese arbitrators and 17 foreign arbitrators. According to VIAC, as of 2012 it had settled over 630 disputes, with 83 cases in 2011 and 64 in 2012, 71% of which involved foreign parties. Unlike its predecessors, VIAC is a non-governmental organisation and operates in accordance with the Arbitration Law and its own Rules of Arbitration. VIAC will likely refuse to accept cases where parties have specified the application of arbitration rules other than VIAC’s. The recent addition by VIAC of a limited number of foreign arbitrators to its panel of arbitrators from which disputing parties may choose is a positive sign that Vietnam is trying to strengthen access to and the flexibility of arbitration in Vietnam.

At present, there are no foreign arbitration centres in Vietnam although the Arbitration Law permits foreign arbitration centres to enter Vietnam’s dispute resolution market by establishing branch or representative offices, and Decree 63 includes the relevant licensing procedures.
Arbitration of investor-state disputes

Under the 2005 Law on Investment, disputes between a foreign investor and a Vietnamese State body relating to investment activities in Vietnam may be settled by a Vietnamese arbitration body or by a Vietnamese court. As noted above, the Arbitration Law is consistent with the Law on Investment in that disputes relating to investment activities would fall within the third category of disputes that may be resolved through arbitration, i.e. where expressly stipulated by the law (in this case the Law on Investment).

Moreover, disputes between a foreign investor and State agency or State body may be resolved outside of Vietnam if the parties contractually agree to a different venue or if an international treaty to which Vietnam is a signatory so provides, for example, the US-Vietnam Bilateral Trade Agreement.

Choice of law and language of arbitration proceedings

The choice of law applicable to an arbitration proceeding depends 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 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 establishment or modification of such relationship was the law of a foreign country, or such basis arose in a foreign country, or the assets involved in the relationship are located in a foreign country.

If a dispute involves a foreign element, the arbitral tribunal applies 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 applies 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.

However, it should be noted that if the arbitral tribunal or the competent court determines that the choice of foreign law is contrary to the fundamental principles of the law of Vietnam, such choice of law will be invalid.

Further, foreign law may not apply if such application would conflict with local regulations. Vietnamese law provides specific limitations to the choice of law where: (i) it is 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.

Regarding the language of 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

As is the case in court proceedings, the general limitation period under Vietnamese law will apply to arbitration proceedings in Vietnam, i.e. two years from the date the dispute arose, unless otherwise specified for particular types of dispute (for example, the Law on Insurance Business fixes a 3-year limitation period for disputes arising from insurance contracts).

Under the Arbitration Law, a party may apply for injunctive relief from either a competent court 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 between the parties.

The burden of proof is on the claimant. The arbitral tribunal may 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.

Arbitration proceedings administered by an arbitration centre

Arbitration proceedings administered by an arbitration centre are initiated when the claimant files a “statement of claim,” which provides information about the disputing parties, a summary of the dispute, the desired remedy, the value claimed, and the arbitrator selected by the claimant from the arbitration centre. Other requisite documents include certified copies of the arbitration agreement and evidence to support the claim. Unless the relevant rules of the arbitration centre provide otherwise, within ten (10) days of receipt of the claimant’s statement of claim and other required documents, the arbitration centre is responsible for sending a copy to the respondent.

Unless the relevant rules of the arbitration centre provide otherwise, the respondent then has thirty (30) days from the date the statement of claim was received to file a “statement of defence.” If the respondent fails to select an arbitrator or requests the chairman of the arbitration centre to choose an arbitrator on its behalf, the chairman will have seven (7) days to select an arbitrator from the date by which the respondent is 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 (15) days to select an arbitrator.

Counterclaims may be filed by the respondent in the same way an initial statement of claim is filed, except the respondent is responsible for providing the arbitration centre and the claimant with a copy of the statement of counterclaim and other required documents.

Arbitration hearings may be attended by authorised representatives of the parties and invited witnesses. 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), but in practice ad hoc proceedings are rarely, if ever, used in Vietnam.

Competence of the Court in arbitration proceedings

The Arbitration Law provides guidelines for determining which local Provincial People’s Court has jurisdiction over arbitration activities. If the parties agree to a specific court, then that court shall be the competent court. However, if no agreement is reached, the Law provides a list of default rules for court selection depending on the issue. For example, (i) application for interim relief should be made to the court where the relief needs to be granted; (ii) application for aid in the collection of evidence should be made to the court where the evidence exists; and (iii) application to set aside an arbitral award should be made to the court where the arbitral tribunal rendered the award.

Challenges to arbitral awards

Arbitral awards are final and binding, and may be challenged only in certain limited circumstances. A party may request a domestic arbitral award to be set aside on certain grounds within thirty (30) days of the date the award was granted. Upon receipt of a request to set aside an arbitral award, the local Provincial People’s Court will request the applicant to pay the applicable fee. The court will accept review of the matter only after the applicable fee has been paid. The standard of review is de novo.

Under the Arbitration Law, 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.

Lastly, the court’s decision on a petition to set aside an award may not be appealed and is final and valid for enforcement.
Enforcement of arbitral awards

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.

Enforcement of domestic awards

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 court’s judgment enforcement agency to enforce compliance with the arbitral award. However, in our experience, the enforcement of a domestic arbitral award can still have its own stumbling blocks including that some local enforcement agencies are not yet very familiar with their enforcement powers or the application of the Law.

Enforcement abroad of awards made in Vietnam

Enforcement abroad of awards issued in Vietnam will depend on the applicable arbitration law and whether there is reciprocity between Vietnam and the country in which enforcement is sought. The enforcement process should be easier in countries that are signatories to the New York Convention. This requires the courts of a country that has ratified the New York Convention to recognise and enforce foreign arbitral awards as court judgments unless one or more of the limited exceptions apply.

Provisions of the New York Convention have been incorporated into Vietnamese law. The Civil Proceedings Code (“CPC”) allows for bilateral enforcement of arbitral awards in accordance with the principles of the New York Convention.

Enforcement of foreign arbitral awards in Vietnam

Like foreign court judgments and decisions, foreign arbitral awards cannot be enforced in Vietnam until they are formally recognised by the local Provincial People’s Court. The court’s judgment regarding enforcement of a foreign arbitral award is appealable. Foreign arbitral awards are arbitral awards made outside of Vietnam or within Vietnam by a foreign arbitrator mutually appointed by the parties.

As indicated above, 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 difficult. To date, only a limited number of foreign awards have been submitted to the Ministry of Justice (“MOJ”) and local courts for enforcement.

For a foreign arbitral award to be recognised and enforced by the Provincial People’s Courts, a petition must be lodged with the 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 (7) 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 (2) 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 person against whom the petitioner is trying to enforce the award.

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

Foreign arbitral awards will not be recognised when:

- 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 recognized 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 Vietnamese law” is still very vague and is the subject of some concern in relation to the enforcement of foreign arbitral awards in Vietnam.

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 CPC 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 Law on Commercial Arbitration, as compared to the Arbitration Ordinance, provides improved and more 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;
- the enforcement of foreign arbitral awards in Vietnam remains largely untested and subject to many uncertainties; and
- the arbitral award enforcement process is often time-consuming.

We await the finalisation and issuance of the Supreme Court resolution which was published in draft in January 2013 (referred to above).
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