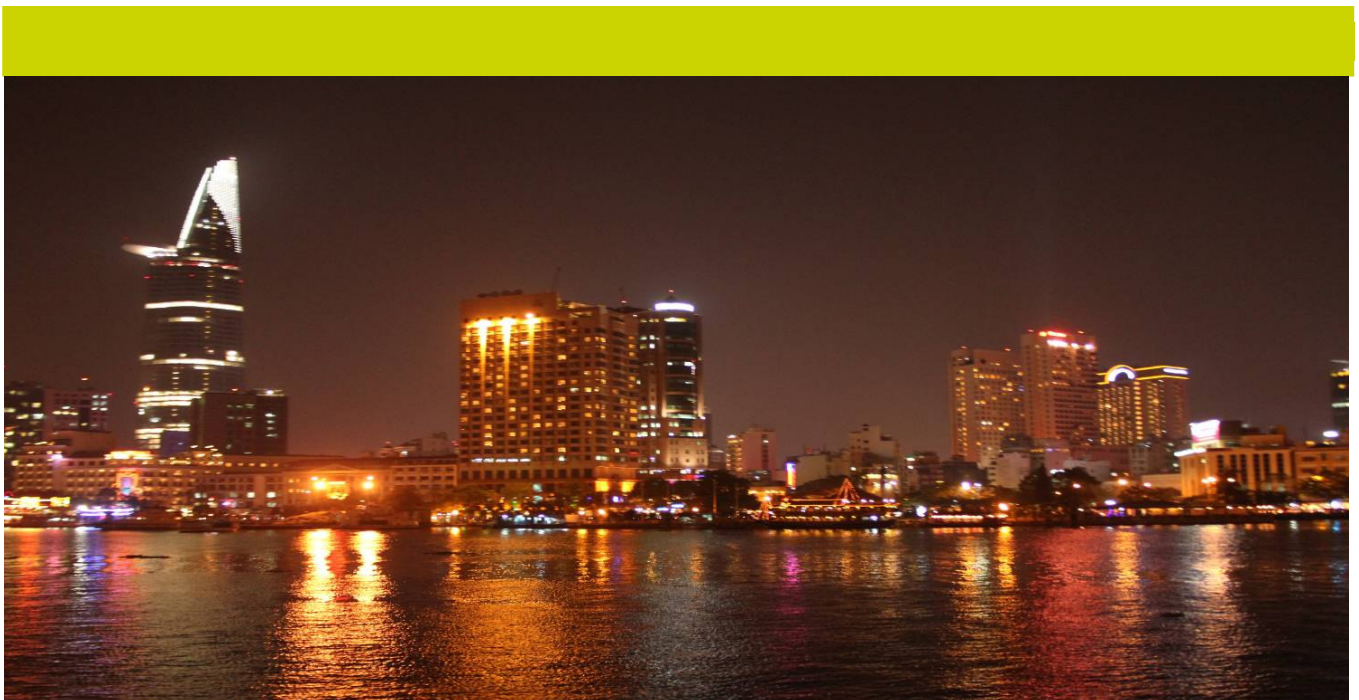


**Arbitration in Vietnam**  
Current Status



**Further information**

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This note is written as a general guide only. It should not be relied upon as a substitute for specific legal advice.

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## Arbitration in Vietnam

### VIETNAM'S ARBITRATION LAW

In 2003, arbitration became an official mechanism for resolving disputes arising from “commercial activities” with the passage of the Ordinance on Commercial Arbitration (“Arbitration Ordinance”). On 17 June 2010, the Vietnam National Assembly passed the Law on Commercial Arbitration No. 54-2010-QH12, which took effect on 1 January 2011 (“Arbitration Law” or “Law”) and replaced the Arbitration Ordinance. The Arbitration Law is aimed at encouraging dispute resolution by arbitration and facilitating the development of commercial arbitration activities in Vietnam in accordance with the country’s ongoing socio-economic development.



### DISPUTES THAT MAY BE ARBITRATED

The Arbitration Law lists three categories of disputes that may be resolved through arbitration, including: (1) disputes arising from “commercial activities”; (2) disputes where at least one party is engaged in commercial activities; (3) other disputes where the law stipulates that arbitration is a permissible means of resolution.

Regarding disputes arising from commercial activities, “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 “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 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. Even where there is a standard arbitration clause in the supply of goods or services contract, the dispute may not be arbitrated 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.

### 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 in an arbitration clause in a contract, the arbitration clause is considered independent of the contract. Any modification, extension, termination, or invalidity of the contract does not 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. Moreover, an arbitration agreement will not be deemed invalid for failure to specify dispute matters and/or the arbitration organisation authorised to resolve disputes without supplemental agreement.

The Law allows the parties to refer their disputes to an arbitral tribunal empanelled by an arbitration centre or to an arbitral tribunal established by the parties. Parties are granted flexibility in specifying the terms of arbitration and the arbitral tribunal. Moreover, if the parties do not expressly address a particular point, the Arbitration Law will apply by default.

### 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 could serve as arbitrators. The Arbitration Law requires arbitrators to have similar knowledge, education and experience, yet notably makes no mention of nationality. It remains to be seen whether arbitration centres in Vietnam will admit foreigners, and if so, how many.

Arbitration centres in Vietnam include:

- the Pacific International Arbitration Centre based in Ho Chi Minh City;
- the Hanoi Commercial Arbitration Centre based in Hanoi;
- the Ho Chi Minh City Commercial Arbitration Centre;
- the Can Tho Commercial Arbitration Centre;
- the Vien Dong Arbitration Centre based in Hanoi;
- the Asia Arbitration Centre based in Hanoi; and
- the Vietnam International Arbitration Centre (“VIAC”) based in Hanoi.

The Vietnam International Arbitration Centre (“VIAC”) is the most well-known institutional arbitration centre in Vietnam.

VIAC has about 117 Vietnamese arbitrators and 6 Foreign arbitrators. According to VIAC, it settled 23 disputes in 2006, 25 in 2007, 58 in 2008 and 48 disputes worth a total of USD 34 million in 2009. 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 in which the parties request application of arbitration rules other than VIAC’s. VIAC has recently added a limited number of foreign arbitrators to its list of arbitrators from which disputing parties may choose. This 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, it does not provide establishment procedures. Thus, foreign arbitration centres await implementing regulations from the Government.

#### **ARBITRATION OF INVESTOR-STATE DISPUTES**

Under the 2005 Law on Investment, disputes between foreign investors 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. disputes where the law stipulates (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 proceeding or if an international treaty to which Vietnam is a signatory so provides otherwise, e.g. 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 relation involving a foreign element means: (i) a relation where at least one of the participating parties is a foreign body, organisation or individual; (ii) a relation 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 arbitrate 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 to the language to be used in the arbitration proceedings. If the parties do not agree, the arbitral tribunal will determine the language.

### ARBITRATION PROCEDURES

As is the case in court proceedings, if other legal documents provide a limitation period for a certain type of dispute, then that limitation period will apply. Otherwise, the general limitation period will apply, i.e. two years from the date the dispute arose.

Under the Arbitration Law, a party may request injunctive relief from either the court or the arbitral tribunal, but not both. 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 dispute in order to prevent conduct which negatively affects the arbitration proceedings; (iii) attachment of assets in dispute; (v) prohibition of the transfer of assets in dispute; and (vi) 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.

The party initiating arbitration will advance the arbitration fees, but the losing party will bear the arbitration fees upon resolution of the dispute, unless the parties stipulate otherwise.



### Arbitration proceedings by an arbitration centre

Arbitration proceedings 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 of assets 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. 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.

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 does not 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 counted from the date by which the respondent is required to respond. If there are multiple respondents, then they must collectively select an arbitrator. In a dispute involving foreign elements, the parties may also have a competent foreign court appoint an arbitrator. The two arbitrators will appoint a third arbitrator, who will head the arbitral tribunal. Moreover, if a sole arbitrator is desired, then the parties must jointly appoint 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 provides for *ad hoc* proceedings, but in practice *ad hoc* proceedings are rarely, if ever, used in Vietnam. Rather, foreign parties in Vietnam usually prefer to arbitrate disputes in either Hong Kong or Singapore.

To initiate *ad hoc* arbitration in Vietnam, the claimant sends the respondent a statement of claim, certified copies of the arbitration agreement, supporting evidence and the claimant's choice of arbitrator. The respondent has thirty days from the date the statement of claim was received to provide the claimant with a statement of defence and select an arbitrator. If the respondent fails to appoint an arbitrator, the claimant can request the local Provincial People's Court to appoint an arbitrator for the respondent. The two arbitrators will appoint a third arbitrator who will head the arbitral tribunal. If a single arbitrator is desired, then the parties must jointly appoint an

arbitrator or one of the parties may request a competent court to appoint an arbitrator.

Counterclaims may be filed by the respondent in the same way counterclaims are filed in arbitration proceedings at an arbitration centre.

Arbitration hearings may be attended by authorised representatives of the parties and invited witnesses. Arbitral decisions are decided by a majority vote and minutes of the proceedings must be kept by the arbitration centre.

At a party's request, an *ad hoc* arbitral award may be registered with the local court where the arbitral tribunal issued the award. However, the registration or non-registration of an award does not affect the contents and validity of the award.



### **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 circumstances. A party may request a domestic arbitral award to be set aside within thirty 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 notify the applicant to pay fees. The court will accept review of the

matter only after the applicable fees have 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.

#### **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.

Courts may also choose to recognise and enforce foreign arbitral awards on the basis of reciprocity without requiring membership to the New York Convention. In practice, however, 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 enforcement agencies 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 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 (7) days, the MOJ must forward the petition to the appropriate Vietnamese court. The court assigned to consider the petition will notify relevant parties, agencies, or organisations.

If the consideration process is not suspended, the court will formally meet to consider the petition. Ten (10) days prior to the court's meeting, the procurator of the same jurisdiction may review the petition files. 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 consideration of whether the procedural and provisional requirements are 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 organization 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 made in respect of a dispute which was not referred to arbitration by the parties, or which 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 shall 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 revoked 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.
- The court of Vietnam concludes that:
  - The relevant dispute cannot be resolved by arbitration in accordance with the laws of Vietnam;
  - 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 compared to the Arbitration Ordinance provides improved and more detailed provisions on arbitration procedures and is a positive step towards building an arbitration regime that is on par 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 time-consuming.

We await the issuance of guidelines and implementing regulations. In particular, we look forward to Vietnam eventually enforcing foreign arbitral awards, which in turn will make arbitration a more attractive method of dispute resolution in Vietnam.

## HOGAN LOVELLS INTERNATIONAL ARBITRATION OVERVIEW

Hogan Lovells' International Arbitration practice brings extensive experience to the resolution of complex, high-value international business disputes through commercial or investment treaty arbitration.

We are familiar with the major arbitral tribunals of the world, represent a wide variety of clients, and understand parties and witnesses from various legal and commercial cultures. With access to the most sophisticated technology, our multilingual and multicultural lawyers operate from offices all over the world, including in Caracas, Dubai, Frankfurt, Hong Kong, London, Madrid, Miami, Milan, Moscow, Munich, New York, Paris, Singapore, Washington D.C. and Vietnam.

Our experience embraces the most important tribunals and institutions in the world, including:

- International Court of Arbitration of the International Chamber of Commerce (ICC)
- International Centre for Settlement of Investment Disputes (ICSID)
- London Court of International Arbitration (LCIA)
- American Arbitration Association (AAA) / International Centre for Dispute Resolution (ICDR)
- Iran-U.S. Claims Tribunal
- Singapore International Arbitration Centre (SIAC)
- Dubai International Financial Centre (DIFC)
- Deutsche Institution für Schiedsgerichtsbarkeit e.V. (DIS)
- Cairo Regional Centre for International Commercial Arbitration
- China International Economic and Trade Arbitration Commission (CIETAC)
- Stockholm Arbitration Institute
- Ad hoc arbitrations under United Nations Commission on International Trade Law (UNCITRAL) Rules and under a variety of national legal systems.

In addition to representing clients in commercial disputes, we frequently advise on the protections afforded by bilateral and multilateral investment treaties and have acted in a number of investment treaty claims (including before ICSID). One such claim was the first to allege breaches of both the Energy Charter Treaty and a bilateral investment treaty.

### Awards and Rankings

- Ranked third, Global Arbitration Review "GAR30", 2010
- Legal 500: "excellent response time, profound business knowledge, in-depth analysis and thorough understanding of the client's business," 2010
- Chambers Europe: "this top-brand team delivers 'a Rolls-Royce service' - the lawyers are fantastic and knowledgeable and their work is perfect, meeting their clients' expectations on all matters and providing extremely high-quality and thorough advice," 2010
- Chambers Latin America: "The team has an extraordinary ability to communicate bilingually in complex strategic matters," 2011
- Ranked in Chambers Global, 2010
- Ranked in Chambers USA, 2010

- Ranked in Chambers Latin America, 2011

### Our presence in Asia

Hogan Lovells has made a significant commitment to servicing the legal and business needs of our clients in Asia for nearly 30 years.

Hogan Lovells has one of the strongest networks in Asia, with over 210 lawyers, including 34 partners, based in our seven offices in Beijing, Hanoi, Ho Chi Minh City, Hong Kong, Shanghai, Singapore, and Tokyo.

We regularly act on complex matters involving our clients' regulatory affairs, multi-jurisdictional transactions and business ventures as well as some of the most high-profile commercial disputes in the region. Demonstrative of this we received over 35 awards for our work in 2010.

Hogan Lovells in Asia has particular and distinctive strengths in the areas of dispute resolution, regulatory, antitrust, corporate, finance, intellectual property and real estate; as well as a significant depth of legal knowledge and resource in many key industry sectors, including energy, financial services, telecommunications media and technology, life sciences and pharmaceuticals, consumer goods, real estate, transport, natural resources, and infrastructure

In Asia, Hogan Lovells' arbitration practice is an integral part of the wider commercial dispute resolution practice. It is being led by Mark Lin. Mark and his partner, Timothy Hill, are co-authors of 'Arbitration in Hong Kong: A Practical Guide' (Sweet & Maxwell) and 'Arbitration in China: A Practical Guide' (Sweet & Maxwell). Our lawyers have considerable experience in the conduct of arbitrations and have conducted numerous ad hoc arbitrations and arbitrations under the rules of the major international arbitration institutions mentioned in the previous section.

The firm has partners who are Fellows of the Chartered Institute of Arbitrators and the Hong Kong Institute of Arbitrators, .hk domain names Panel arbitrators and .cn domain names Panel arbitrators. Both the immediate past Honorary Secretary of the Chartered Institute of Arbitrators (East Asia branch) and the Hong Kong representative of the London Court of International Arbitration are members of the firm's arbitration team in Hong Kong.

Our arbitration experience includes conducting hearings in Hong Kong, Beijing, Singapore, Vietnam, London, Paris, Stockholm and other international centres. We have advised on the enforcement of CIETAC awards in Hong Kong on behalf of PRC companies and in the Mainland on behalf of foreign companies.

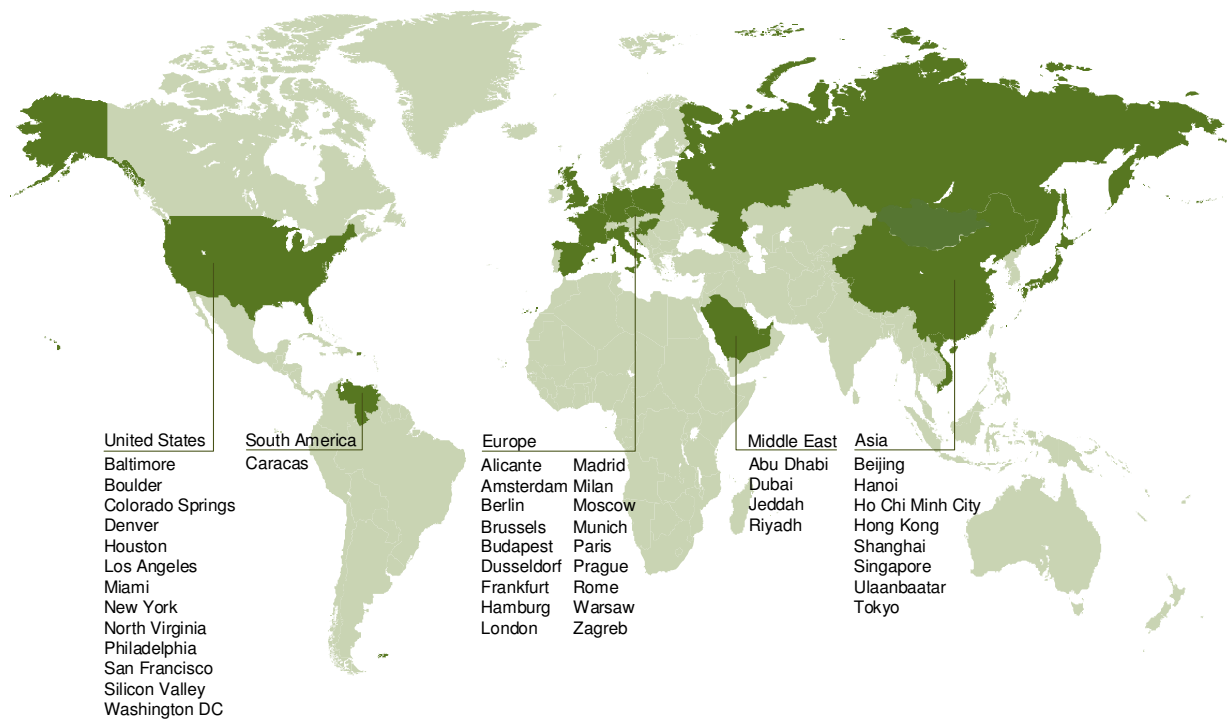
In Vietnam, our Ho Chi Minh City and Hanoi Offices have experience with dispute resolution and arbitration, both domestic and international.

Our lawyers have been involved in real estate and construction disputes, including property-related arbitrations in a foreign venue between Vietnamese and foreign joint venture parties.

In Vietnam's uncertainty legal environment, our specialists can help you identify regulatory risks and respond appropriately.

Of note, Nasir PKM Abdul (based in our Vietnam Office) was recently chosen by the Vietnam International Arbitration Centre (VIAC, in Hanoi) to serve as one of the only 6 foreign experts in its set panel of arbitrators, which are unprecedented appointments by a Vietnam-based international arbitration centre.

## Our offices



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