

FRASERS
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Arbitration in Vietnam

2024 Edition



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Client Commentary, The Legal 500 Asia Pacific

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1

Introduction

- 1.1 Vietnam continues to enjoy increased use of arbitration as a dispute resolution mechanism alternative to court litigation. This is not surprising. The Vietnamese Government's policy of opening up the economy to global players since the 1980s and Vietnam's accession to the WTO led Vietnam to undertake the required legal reforms necessary for a robust business landscape for both domestic and foreign investors. An increase in investments necessarily leads to the concomitant disputes that may arise from such business relationships. With the proper legal framework for setting up businesses and resolving disputes, Vietnam's economy remained resilient and grew steadily in the past three decades.
- 1.2 During the peak of the COVID-19 pandemic, Vietnam forged and entered into free trade agreements in 2020. The European Union (**EU**)-Vietnam free trade agreement (**EVFTA**) came into effect on 1 August 2020 which eliminated 99% of customs duties between the two parties. The EVFTA is expected to increase trade between the EU and Vietnam, Vietnam's GDP by 4.6% and its exports to the EU by 42.7% by 2025.
- 1.3 Vietnam's resilience and its government's capacity to contain the pandemic were instrumental in buoying up its economy. In January to June of 2022, the General Statistics Office of Vietnam reported that GDP grew by 6.42%, higher than the rates of the comparable periods in 2020 and 2021. On an annual basis, Vietnam's GDP grew from USD 343.24 billion in 2020 to USD 362.64 billion in 2021, representing a 5.65% annual increase. While still lower from the 7-9% rates in 2016 to 2019, the figures suggest further growth is to be expected in the Vietnam economy.
- 1.4 To support sustained economic growth, reliable and transparent dispute resolution mechanisms promote stability and investor confidence. A notable development in 2022 is the establishment of the representative office of the Permanent Court of Arbitration (**PCA**) in Hanoi (which is now home to offices of two foreign arbitral institution the first one being KCAB). The establishment of the PCA's office in Vietnam signals the coming-of-age of Vietnam as an up-and-coming hub for arbitration with PCA's commitment to provide capacity-building programs for Vietnam's state officials and arbitration practitioners. It also supports Vietnam's commitments to its free trade agreements with global partners.
- 1.5 Vietnam's pre-eminent arbitral institution, the Vietnam International Arbitration Center, has also been in operation for more than 3 decades. Its recent statistics show it has administered more than 400+ cases in the year 2023.¹
- 1.6 This Frasers' Arbitration in Vietnam, 2024 edition focuses on commercial arbitration, domestic or international (or "*foreign*", as referred to under the relevant laws of Vietnam) and is intended to provide an overview for local and foreign investors in Vietnam and our local and foreign clients that may wish to consider resolving their commercial disputes by way of arbitration. Whilst

¹ There is yet no official publication or statistical report from the VIAC at the time of the publication of this treatise.

this treatise aims to provide a useful overview of some key legislation in Vietnam, key Supreme Court judgments and Hanoi and Ho Chi Minh People's Court judgments, key case authorities from major hubs for international arbitration, and international best practices, this treatise or any part thereof does not constitute legal advice. For any queries related to arbitration and dispute resolution, please contact your Frasers' legal adviser.

1.7 The structure of this Guide is as follows:

Part 1: Introduction

Part 2: Overview of arbitration in Vietnam

Part 3: Legal framework for arbitration in Vietnam

Part 4: Recognition and enforcement of arbitral awards in Vietnam

Part 5: Review of rejected petitions for recognition and enforcement of foreign arbitral awards in Vietnam

Part 6: Case Study: An Analysis of Arbitration-Assistive Judgments

2

Overview of the arbitration practice in Vietnam



- 2.1 When Vietnam opened its market to foreign investment in 1987, it had to address a major concern from foreign investors: the requirement for a comprehensive, robust, and properly implemented dispute resolution regime alternative to court litigation. Vietnam's rapidly developing and evolving economy brought about an increase in foreign investment which necessarily brought about an increase of disputes arising from the contractual relationships created by such investments.
- 2.2 Most, if not all, foreign investors lack familiarity with the court procedures and the legal system in Vietnam (which are all conducted in Vietnamese). As such, foreign parties look for alternative avenues for dispute resolution to be provided for in the contracts they enter into for transactions with a Vietnam component. This necessitated legal reforms for Vietnam to address.
- 2.3 One major step that Vietnam has taken is its accession to the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* of 1958 (**New York Convention**) on 12 September 1995, one of the key instruments in international commercial arbitration that applies to (a) the recognition and enforcement of foreign arbitral awards in any of the 172 contracting States² and the (b) referral by a court to arbitration.
- 2.4 Vietnam enacted Ordinance No. 08/2003/PL-UBTVQH on Commercial Arbitration in 2003 (**2003 Ordinance**) but this failed to meet international standards and best practices. There had been too many vague terms in the 2003 Ordinance that were subject to various interpretations and potential users for arbitration, at the time, found it confusing.
- 2.5 On 11 January 2007, Vietnam joined the World Trade Organization as a full-fledged member. According to the "*Report of the Working Party on the Accession of Viet Nam*" dated 27 October 2006, one of the key requirements that Vietnam had to make commitment for was the adoption of a legal framework for making and enforcing policies.³ One such policy that was rigorously questioned prior to Vietnam's membership was the procedure for the resolution of commercial disputes by arbitration.⁴
- 2.6 Vietnam enacted the Law on Commercial Arbitration in 2010 (**LCA**) which came into effect on 1 January 2011 and continues to be the law applicable for arbitrations seated in Vietnam. The LCA replaced the 2003 Ordinance and is the current legal framework that governs the conduct of commercial arbitrations in Vietnam.⁵ Whilst Vietnam has not adopted the UNCITRAL Model Law on International Commercial Arbitration (1985) (amended 2006)

² See: https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2 for the current list of contracting States to the New York Convention (last accessed on 15 January 2024).

³ Report of the Working Party on the Accession of Viet Nam dated 27 October 2006, paragraphs 110 to 135.

⁴ *ibid.*

⁵ Article 1, Law 54 on Commercial Arbitration (17 June 2010).

(**Model Law**),⁶ the LCA was nonetheless largely based on the Model Law.

- 2.7 The use of arbitration has become increasingly common in Vietnam in the recent decade. There are currently 10 arbitration centres across Vietnam administering arbitration matters. As mentioned in the previous chapter, the VIAC is at the forefront of this development.
- 2.8 On the basis of the number of cases filed, VIAC is the most popular and is the leading arbitral institution in Vietnam. According to VIAC's statistics:⁷
- (i) It has 274 new matters filed, a 52.3% increase from 2018's 179, and is a significant development from 1993's 6 matters. Forty per cent (40%) of the new matters filed in 2019 had a foreign element, and cases arising from the real estate sector witnessed the most exponential growth;
 - (ii) The numbers have gone down slightly in the year 2020, the year the Covid-19 pandemic started, at 221 cases. Less than 50 cases involve a foreign element (approximately 22% of the total number) with China, Singapore, and South Korea contributing most of those cases with a foreign element. Contracts on sale of goods contributed the most number of cases at 47% of the total number of cases;
 - (iii) From 1993 to 2020, VIAC had administered a total of 2,051 cases spanning both domestic and international commercial arbitrations;
 - (iv) In the year 2022, VIAC administered 292 cases. While as at the time of publication, there has been no updated official statistics yet for VIAC for the year 2023, it has been speculated that VIAC administered more than 400 cases on that year.

⁶ See: https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status for the current list of States that adopted the Model Law. A total of 88 States in a total of 121 jurisdictions adopted the Model Law (last accessed on 15 January 2024).

⁷ See <https://www.viac.vn/thong-ke/thong-ke-hoat-dong-giai-quyet-tranh-chap-nam-2022-s40.html> (last accessed on 24 January 2024).



3

Legal framework for arbitration in Vietnam

A. Vietnam laws applicable to arbitration in Vietnam

- 3.1 The following laws of Vietnam and other documents are applicable to arbitrations seated in Vietnam:
- (i) New York Convention;
 - (ii) LCA;
 - (iii) Law No. 92/2015/QH13, entitled Code of Civil Procedure, passed by the National Assembly on 25 November 2015 (**the Civil Procedure Code 2015**) which deals with, among others, the recognition and enforcement of foreign arbitral awards in Vietnam;
 - (iv) Law No. 91/2015/QH13, entitled Civil Code of Vietnam, passed by the National Assembly of Vietnam on 24 November 2015 (**the Civil Code**);
 - (v) Law No. 26/2008/QH12, entitled Law on Enforcement of Civil Judgments, passed by the National Assembly on 14 November 2008, as amended in 2014, in force since 1 July 2009, and its amendment in force since 1 July 2015, which regulates the enforcement of arbitral awards in Vietnam;
 - (vi) Decree No. 63/2011/ND-CP of the Government of Vietnam providing detailed regulations and guidelines for the implementation of the Law on Commercial Arbitration dated 28 July 2011 (**Decree No. 63**);
 - (vii) Decree No. 124/2018/ND-CP of the Government of Vietnam amending and implementing some of the articles of Decree No. 63 (**Decree No. 124**);
 - (viii) Resolution No. 01/2014/NQ-HDTP of the Council of Judges under the Supreme People's Court guiding the implementation of a number of provisions of the Law on Commercial Arbitration dated 20 March 2014 (**Resolution No. 01**);
 - (ix) Other substantive legislation of Vietnam that may govern the determination of substantive issues arising from the underlying contracts (e.g. Vietnam Maritime Code, Law on Enterprises, Law on Investment).

B. Foreign and domestic arbitration

- 3.2 There is no precise concept described as “international arbitration” under the laws of Vietnam. Instead, the LCA provides for two types of arbitration: (1) domestic arbitration, and (2) foreign arbitration. Foreign arbitration means arbitration established in accordance with the foreign arbitration law which applies to the conduct of arbitration, either inside or outside the territory of Vietnam.⁸ Arbitration administered by arbitral institutions established under foreign law or under the rules of foreign arbitral institutions (e.g. PCA, SIAC, ICC, LCIA, HKIAC, SCC) is considered foreign arbitration. Notably, the qualification “*inside or outside the territory of Vietnam*” could mean that an arbitration conducted under the rules of foreign arbitral

⁸ Article 3(11), LCA.

institutions, but seated in Vietnam, would still be considered foreign arbitration.

- 3.3 Domestic arbitration, on the other hand, is arbitration established in accordance with the laws of Vietnam. Parties, whether Vietnamese investors, foreign investors, and “*foreign-invested*”⁹ business organisations, could agree to proceed to domestic arbitration in Vietnam. Therefore, “*international*” arbitrations under Article 1(3) of the Model Law, involving parties of different nationalities, may be considered “*domestic*” arbitration under Vietnam law if it is established “*in accordance with the laws of Vietnam.*”
- 3.4 It is important for potential foreign arbitration users to note that distinction; the process and extent of judicial review in the context of petitions for the recognition and enforcement of arbitral awards is different between a domestic arbitration and a foreign arbitration. Domestic arbitral awards have some degree of comfort in their ease of enforcement (with a 1-step procedure directly addressed to the State Enforcement Agency) as opposed to a 2-step procedure for foreign arbitral awards (with petition for recognition to be filed in Vietnamese Courts, before enforcement could be had in the State Enforcement Agency). It can be argued that providing for more onerous provisions for the enforcement of foreign arbitral awards is in contravention with Article VII of the New York Convention, one of its cornerstones being codified as the “favourable right” provision, i.e. where there are more favourable domestic provisions or treaties, these may be chosen over the New York Convention rules for enforcement, but no more onerous provisions can be applied. It can also be argued that the recognition procedure in local courts should not be considered as an additional step or provision required of foreign arbitral awards; the challenge is not so much on this step but on the nature of the procedure itself which could be lengthy, costly and not necessarily straightforward as what one may expect in major hubs for arbitration.

C. Dispute with a foreign element

- 3.5 Another concept that may be unique in Vietnam arbitration is the concept of “*dispute with a foreign element*” set out in Article 2(4), LCA. It means a dispute arising from commercial relations involving, or in some other legal relationships involving, a foreign element as prescribed in the Civil Code.
- 3.6 Under Article 663(2) of the Civil Code, civil relation involving a foreign element means:
- (i) at least one of the participating parties is a foreign individual or legal entity;
 - (ii) the participating parties are Vietnamese citizens or legal entities but the establishment, modification, implementation, or termination of such relations occurred in a foreign country;

⁹ “Foreign-invested” as defined under the relevant laws of Vietnam such but not limited to its equivalent under the Law on Investment.

- (iii) the participating parties are Vietnamese citizens or legal entities, but the subject matter of such civil relations is located in a foreign country.
- 3.7 For disputes with no foreign element, the applicable substantive law or law on the merits shall be Vietnamese law.¹⁰ For disputes that has a foreign element, the applicable substantive law shall be that law agreed upon by the parties and if not so agreed, that which the arbitral tribunal deems appropriate.¹¹
- 3.8 Whether a “*dispute with a foreign element*” could be arbitrated by way of foreign arbitration remains to be an unsettled topic and can be argued either way. Pursuant to Vietnam’s Law on Investment 2021 effective as from 1 January 2021, an “*investor*” is an organisation or individual conducting business investment activities comprising domestic (Vietnamese) investors, foreign investors, and economic organizations with foreign investment capital.¹² A “*foreign investor*” means “*an individual with foreign nationality or an organization established in accordance with foreign law conducting business investment activities in Vietnam*”.¹³
- 3.9 The Law on Investment 2021 made no mention of the concept of “*foreign-invested business organisation*” (which was provided for in the 2014 version of the law) but it can be argued the law may be referring to such an entity when referring to “*economic organisation with foreign investment capital*”.
- 3.10 Under the Law on Investment, disputes over business investments in Vietnam shall be initially settled through negotiation and conciliation.¹⁴ If resolution cannot be reached through negotiation and conciliation, the dispute shall be resolved by arbitration or by the courts.¹⁵ A dispute between:
 - (i) a domestic investor and economic organisation with foreign investment capital; or
 - (ii) a domestic investor or economic organisation with foreign investment capital and a competent State agency relating to business activities in Vietnam,shall be resolved by a) a Vietnamese arbitration agency or b) a Vietnamese court (save for cases that would fall within Article 14(3) of the Law on Investments 2021).¹⁶
- 3.11 Disputes between investors when at least one party is a foreign investor or economic organisation with foreign investment capital prescribed in sub-clauses (a), (b), and (c) of Article 23.1 (which prescribes thresholds of foreign investment capital) of the Law on Investments 2021, shall be resolved by:

¹⁰ Article 14.1, LCA.

¹¹ Article 14.2, LCA.

¹² Article 3(18) read together with Article 14, Law on Investments 2021.

¹³ Article 3(19), Law on Investments 2021.

¹⁴ Article 14(1), Law on Investments 2021.

¹⁵ Article 14(1), Law on Investments 2021.

¹⁶ Article 14(2) and (3), Law on Investments 2021.

- (i) a Vietnamese court;
- (ii) a Vietnamese arbitration body;
- (iii) a foreign arbitration body;
- (iv) an international arbitration body; or
- (v) an arbitral tribunal established in accordance with the agreement of the disputing parties.¹⁷

Resolution of disputes by a foreign arbitration body, by an international arbitration body, or an arbitral tribunal established in accordance with the agreement of the disputing parties is only available if at least one of the disputing investors is a foreign investor falling under the sub-clauses of Article 23.1 of the Law on Investments 2021. If the foreign investment capital is less than the thresholds prescribed in Article 23.1, then the dispute shall be resolved by either a Vietnamese court or by a Vietnamese arbitration body. Seemingly, this may be in conflict with Vietnam's WTO Commitments relating to "*professional services*" whereby Vietnam had undertaken not to limit market access or that Vietnam applies "*national treatment*"¹⁸ in the supply of professional services, including foreign and international arbitration services.

D. Mediation and arbitration by arbitrators

- 3.11 The arbitral tribunal may, at the request of the parties, conduct mediation in order for the parties to reach an agreement to

¹⁷ Article 23.1 (*Implementation of investment activities by economic organisations with foreign investment capital*) reads:

"An economic organization must satisfy the conditions and carry out investment procedures in accordance with regulations applicable to foreign investors upon investment for establishment of another economic organization; investment in the form of capital contribution or purchase of shares or purchase of a capital contribution portion in another economic organization; or investment on the basis of a BCC contract if such economic organization falls into any one of the following cases:

- (a) More than 50% of its charter capital is held by a foreign investor(s), or a partnership has a majority of partners being foreign individuals in the case of an economic organization being a partnership;
- (b) More than 50% of its charter capital is held by an economic organization(s) prescribed in sub-clause (a) above;
- (c) More than 50% of its charter capital is held by a foreign investor(s) and an economic organization(s) prescribed in sub-clause (a) above.

¹⁸ "*National treatment*" is defined as "*members must not accord discriminatory appropriate treatment between imports and like domestic products*", and is one of the central principles under the WTO/ GATT (Article III) agreement. The principle of "*national treatment*" is also enshrined in Article XVII of the General Agreement on Trade in Services (GATS) where "*each member shall accord to services and service suppliers of any other member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.*", which implies the absence of all discriminatory measures that may modify the conditions of competition to the detriment of foreign services or service providers.

resolve their dispute.¹⁹ If the mediation is successful, the arbitration tribunal shall then prepare minutes of successful mediation to be signed by the parties and certified by the arbitrators. The arbitral tribunal shall issue a decision recognising the agreement of the parties, and such decision shall be final and shall have the same validity as an arbitral award.²⁰

- 3.12 This is a procedure that is unique to a few jurisdictions including Vietnam. Some jurisdictions do not allow arbitrators appointed in a matter to conduct mediation. If they do so and the matter is not successfully settled, the matter may no longer proceed to arbitration by the same arbitral tribunal members.

E. Issues of law in arbitration

- 3.13 In arbitration, issues of law that could potentially arise and their determination could be made in accordance with the following:
- (i) the law that governs the capacity of the parties to enter into an arbitration agreement;
 - (ii) the law that governs the arbitration agreement;
 - (iii) the law that governs the procedure of the arbitration and the law of the seat of arbitration;
 - (iv) the law that governs the supportive and enforcement measures;
 - (v) the law that governs the substantive rights of the parties.²¹

1. Law on the capacity of the parties

- 3.14 Questions in relation to the capacity of the parties to enter into an arbitration agreement depend on the personal law of the party. For individuals, the legal age of a person to enter into an arbitration agreement depends on the law of the domicile of the individual. For legal entities that are economic organisations, questions of authority and agency will largely depend on the law of the place of incorporation or the law of the principal place of business.
- 3.15 In Vietnam, an individual can enter into a contract when considered to be an adult, i.e. at least 18 years old,²² and has not lost his or her capacity for civil acts.²³ A limited capacity for civil acts is granted by law to a: (i) person from six to under 18 years of age, provided he or she has the consent of his or her legal representative, to establish and perform civil transactions for the purpose of meeting the needs of daily life appropriate to the age group, and a (ii) person who is from 15 to under 18 years of age and has sufficient property to secure the performance of obligations may establish and perform civil transactions without

¹⁹ Article 9, LCA; Article 29, VIAC Rules 2017.

²⁰ Article 58, LCA.

²¹ Boo, Lawrence and Rivera-Dolera, Earl, *"Halsbury's Laws of Singapore: Arbitration"*, 2021 re-issue, paragraph [20.005] citing Pryles, Michael, *"Choice of Law Issues in International Arbitration,"* 1997 Arbitration Vol 63 No. 3.

²² Article 19, 20, Civil Code of Vietnam.

²³ Article 22, Civil Code of Vietnam.

the consent of his or her legal representative.²⁴ A person under six years of age does not have the capacity for civil acts and any civil transaction entered into by such person must be established and performed by his or her legal representative.²⁵

3.16 Legal entities that are considered “*economic organisations*” in Vietnam include State-owned enterprises, co-operatives, limited liability companies, shareholding companies, enterprises with foreign-owned capital, and other economic organisations satisfying all of the conditions provided in Article 4 of the Civil Code.²⁶ A legal entity acts with civil legal capacity through its legal or authorised representative. A legal representative is usually the head of the entity who shall be named in the decision of an authorised State body establishing the legal entity or its charter.²⁷ An authorised representative is representation established pursuant to a power of attorney between the representative and the principal.²⁸ A party’s (whether an individual or a legal entity) capacity for civil acts including entering into a commercial transaction (and the arbitration agreement contained therein) must be established prior to commencing any arbitration proceedings, otherwise an arbitral award could be made against a party that had no capacity to act at all. Due diligence requires that a party who has capacity for civil acts only commence and carry-on full arbitration proceedings against another party who has capacity for civil acts.

3.17 An arbitral award that could be made against a person that lacks the capacity to act may be set aside in Vietnam pursuant to Article 68.2(a) or 68.2(dd) of the LCA, viz:

“68.2 An arbitral award which falls within any of the following cases shall be set aside:

(a) There was no arbitration agreement or the arbitration agreement is void;

...

(dd) The arbitral award is contrary to the fundamental principles of the laws of Vietnam.”

3.18 The question of lack of legal capacity has been considered in a setting aside application in Singapore.²⁹ The Court of Appeal in Singapore partially set aside an SGD720 million arbitral award made against the respondents in an arbitration. The Court considered that the arbitral award had imposed a joint and several liability for the damages against the respondents based on fraudulent misrepresentations made at the time when the claimant and the respondents entered into a share sale and purchase agreement (**SSPA**). The named respondents included five minors (**Minors**) who were between the ages of three and

²⁴ Article 20, Civil Code of Vietnam.

²⁵ Article 20, Civil Code of Vietnam.

²⁶ Article 103, Civil Code of Vietnam.

²⁷ Article 86 and 91, Civil Code of Vietnam.

²⁸ Article 142, 143, Civil Code of Vietnam.

²⁹ *BAZ v BBA and others*, [2018] SGHC 275 (Singapore).

eight years old when the SSPA was signed and between eight and 12 years old at the time of the arbitration. Their fathers had entered into the SSPA on their behalf. The Court partially set aside the arbitral award to the extent it imposed liability against the Minors upholding the principle of protecting the interests of minors in commercial transactions as part of the public policy in Singapore. In this case, the Minors have been made jointly and severally liable for the fraudulent misrepresentation of their guardian on transactions that the Minors had no knowledge of. This violates the principle of protecting a minor from liability for the procurement of a contract by fraudulent misrepresentation encapsulated under s 35(7) of the Civil Law Act. Further, the Court also said that an arbitral award imposing liability on the Minors in the amount of over SGD720 million “shocks the conscience and violates Singapore’s most basic notion of justice”. The arbitral award was also sought to be enforced at the Delhi High Court. The Delhi High Court³⁰ allowed the enforcement of the award in part but refused enforcement in relation to the Minors noting the tribunal’s decision to impose liability on the Minors was contrary to Indian law in that a minor could not be held to have committed fraud through an agent. The Delhi Court emphasized that the protection of minors was part of the fundamental policy of Indian law and therefore the award was not enforceable against the award debtors who were minors. It is noted that the age of any of the twenty or so respondents did not feature at all in the arbitration proceedings;³¹ the age of the Minors was only put into issue for the first time at the setting aside application in a court in Singapore and at the concurrent enforcement application in a court in India.

- 3.19 In another case against minors, despite Supreme Court rulings affirming the primacy of arbitration agreements over the last decade in the United States,³² one segment of potential plaintiffs remain unaffected with motions to compel arbitration in mandatory arbitrations: minors.³³ Mandatory arbitration clauses (including a waiver of class action) are especially prevalent in consumer contracts in the United States. There is an estimated 826,537,000 consumer arbitration agreements in force in the United States as of 2018 predominantly in the e-commerce industry.³⁴ In California, a minor has a right to enter into a

³⁰ *Daiichi Sankyo Company Limited vs Malvinder Mohan Singh and ors*, O.M.P. (EFA) (Comm.) 6/2016, 31 January 2018.

³¹ The author has been involved in the arbitration of this matter from the commencement of arbitration to issuance of the arbitral award.

³² *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019).

³³ *District Court for the Northern District of California*, see, e.g., *I.B. ex rel. Fife v. Facebook, Inc.*, 905 F.Supp.2d 989, 1000 (N.D. Cal. 2012); *Lopez v. Kmart Corp.*, No. 15-CV-01089-JSC, 2015 WL 2062606, at *5 (N.D. Cal. May 4, 2015); *T. K. v. Adobe Sys. Inc.*, No. 17-CV-04595-LHK, 2018 WL 1812200, at *4 (N.D. Cal. Apr. 17, 2018); *Doe v. Epic Games, Inc.*, No. 19-CV-03629-YGR, 2020 WL 376573, at *4 (N.D. Cal. Jan. 23, 2020).

³⁴ Imre Stephen Szalai, “The Prevalence of Consumer Arbitration Agreements by America’s Top Companies,” 52 UC Davis L. Rev. Online 233 (February 2019), <https://lawreview.law.ucdavis.edu/online/vol52/52-online-Szalai.pdf> (last accessed on 23 February 2021).

contract, subject to the statutory right of disaffirmance,³⁵ which may be made by any act or declaration indicating intent to disaffirm. Disaffirmance by a minor rescinds the entire contract which results in the non-existence of a valid agreement to arbitrate such that the Court must deny a motion to compel arbitration.³⁶

- 3.20 In Vietnam, consumer disputes could be resolved by way of arbitration clauses contained in standard conditions on the supply of such goods and services drafted by the provider of goods or services. In such disputes however, the consumer has the unilateral right to select arbitration or court litigation to resolve disputes with the goods or services provider.³⁷ A goods or services provider shall only have the right to institute arbitration proceedings if the consumer consents to such a dispute resolution mechanism.³⁸
- 3.21 A consumer dispute involving a holiday ownership contract has been the subject matter in a judgment issued by the Supreme People's Court of Vietnam.³⁹ The contract contained a dispute resolution clause providing for arbitration to be administered by the Singapore International Arbitration Centre (**SIAC**) in Singapore. According to the Court, the holiday ownership contract falls within the purview of a pro-forma, pre-drafted standard contract made by the service provider who prescribed the arbitration agreement. It is not a sale and transfer contract relating to real estate but a service contract in the tourism sector and is considered a deposit contract for the possession of holiday or vacation hotel rooms on certain dates. As such, the holiday ownership contract is deemed a consumer contract. Pursuant to Article 17, LCA, the consumer has the unilateral right to select arbitration or court litigation in the event of a dispute with the goods or services provider. Without the consent of the consumer, the goods or services provider cannot commence arbitration proceedings.
- 3.22 In another case, the Supreme Court of Vietnam rejected a petition for recognition and enforcement of a foreign arbitral award on the basis that one of the parties who entered into the contract (containing the arbitration agreement) had no civil legal capacity to act as such. The case involved an American company, the award creditor, who filed a petition for recognition and enforcement of a foreign arbitral award in Vietnam. The Court requested the award creditor to provide its charter to prove that the person who signed the contract (and, therefore, the arbitration agreement) was authorised to do so, but the award creditor failed to provide its charter to the Court. Having failed to provide evidence that the person who signed the disputed contract was the authorised representative of the legal entity, the Court determined that any act or agreement (including arbitration agreements) entered into by such unauthorised person is invalid, as that person did not have

³⁵ Cal. Family Code s 6700.

³⁶ Lopez, 2015 WL 2062606, at 5 and 7.

³⁷ Article 17, LCA.

³⁸ Article 17, LCA.

³⁹ Decision 42/QD-CA dated 12 March 2021 of the Chief Justice of the Supreme People's Court.

the civil legal capacity to act on behalf of the legal entity. On that basis, the petition for recognition and enforcement of the arbitral award was rejected.⁴⁰

- 3.23 Similarly, the Supreme Court of Vietnam rejected a petition for recognition and enforcement of a foreign arbitral award on the basis that whilst the lawyer of a party was authorised to represent that party in the arbitration, the lawyer's authority did not include a right to amend the arbitration agreement.⁴¹ The arbitration agreement had been amended, signed by the lawyer, and the arbitration proceeded on the basis of the amended arbitration agreement. The Court concluded that the lawyer did not have the authority to do so and the arbitral award made pursuant to the amended arbitration agreement was rejected.

2. Law of the arbitration agreement

- 3.24 The law of the arbitration agreement determines the validity and enforceability of the arbitration agreement. The arbitration agreement is the source of the arbitrator's authority and jurisdiction, and the basis by which to determine:

- (i) whether a dispute falls within the scope of the agreement; and
- (ii) whether the agreed qualifications of arbitrators and manner of constitution of the arbitral tribunal have been complied with.

- 3.25 Article 6, LCA provides:

"Court refusal to accept jurisdiction if there is an arbitration agreement.

Where the parties in dispute already have an arbitration agreement but one party institutes court proceedings, the court must refuse to accept jurisdiction unless the arbitration agreement is void or incapable of being performed."

- 3.26 It is thus primordial in any jurisdiction, including Vietnam, that an arbitration agreement is valid and capable of being performed (as also required under the Model Law and the New York Convention), otherwise the arbitrator's jurisdiction could be challenged. If a challenge is successful and the arbitration agreement is determined to be invalid and incapable of being performed, then the parties to that agreement may be compelled to resort to the local courts for resolution of their disputes. This may come as a surprise to the parties who entered into the underlying contract knowing full well that their dispute resolution mechanism was supposed to be arbitration.
- 3.27 In general, the courts in Vietnam will refuse to accept jurisdiction where one party to an arbitration agreement institutes court proceedings in violation of the arbitration agreement.⁴² The court

⁴⁰ Decision No. 01/2014/QĐST - KDTM dated 6 June 2014.

⁴¹ Decision No. 04/2015/QĐPT-KDTM dated 13 January 2015.

⁴² Article 6, LCA.

will however accept jurisdiction if the arbitration agreement is void or incapable of being performed.⁴³

- 3.28 The doctrine of separability is expressly recognised in Vietnam such that an arbitration agreement exists independent of the underlying contract.⁴⁴ Any modification, extension, rescission, invalidity, or unenforceability of the underlying main contract does not result in the invalidity of the arbitration agreement unless the arbitration agreement falls within the purview of void arbitration agreements set out in Article 18, LCA or arbitration agreements that are incapable of being performed as listed in Article 4, Resolution No. 01 as set out below at paragraph 3.37.
- 3.29 For an arbitration agreement to be valid and capable of being performed, it must be: (a) in the form set out in the underlying contract or (b) it may be in the form of a separate agreement.⁴⁵ It must also be made in writing.⁴⁶ Arbitration agreements made orally are not permitted in Vietnam.
- 3.30 In Vietnam, the following scenarios shall be deemed to constitute a written arbitration agreement:⁴⁷
- (i) an agreement established via an exchange between the parties by telegram, fax, telex, email, or other form prescribed by law;
 - (ii) an agreement established via the exchange of written information between the parties;
 - (iii) an agreement prepared in writing by a lawyer, notary, or authorised organisation at the request of the parties;
 - (iv) reference by the parties during the course of a transaction to a document such as a contract, source document, company charter or other similar documents which contain an arbitration agreement;
 - (v) exchange of statements of claim and defence that express the existence of an agreement proposed by one party and not denied by the other party.
- 3.31 It is not common practice however that an arbitration clause would expressly state the law of the arbitration agreement. Model arbitration clauses drafted by major arbitral institutions, including that of the VIAC, do not do so.⁴⁸ This is not surprising upon consideration of the separability doctrine at play. The party autonomy principle in international arbitration suggests that the parties to a contract could choose a law to govern their rights and obligations set out in the main contract and choose another law

⁴³ Article 6, LCA.

⁴⁴ Article 19, LCA.

⁴⁵ Article 16(1), LCA.

⁴⁶ Article 16(3), LCA.

⁴⁷ Article 16(2), LCA.

⁴⁸ See VIAC Model Clause here: <https://www.viac.vn/en/model-clause.html> ; SIAC Model Clause here: <https://www.siac.org.sg/model-clauses> ; ICC Model Clause: <https://iccwbo.org/dispute-resolution-services/arbitration/arbitration-clause/>; HKIAC Model Clause: <https://www.hkiac.org/arbitration/model-clauses>.

to govern the arbitration agreement. In practice, however, parties imply that the governing law of the main contract or the law of the seat of arbitration would be the law applicable to the arbitration agreement.

- 3.32 When the validity and enforceability of the arbitration agreement are in issue, then the law of the arbitration agreement has to be determined in order to resolve whether the arbitration agreement is valid and capable of being performed under that law.
- 3.33 According to international best practices, determination of the law of arbitration agreement follows a three-tiered enquiry:⁴⁹
- (i) whether the parties expressly chose the law of the arbitration agreement;
 - (ii) if no such express choice, whether the parties made an implied choice of the arbitration agreement; and
 - (iii) in the absence of express or implied choice, the system of law with which the arbitration agreement has the “*closest and most real connection*”.

A Supreme Court decision in the United Kingdom⁵⁰ provided a welcome clarity to the above enquiry. The Supreme Court departed from the strong presumption in the case of *Sulamerica* that the parties to a contract have impliedly chosen the law of the seat of arbitration as the law of the arbitration agreement. The Supreme Court said that where the parties have not specified the law applicable to the arbitration agreement, but have chosen the law of the main contract, they will generally be presumed to have intended that law as their implied choice applicable to the arbitration agreement.

- 3.34 The law in Vietnam is more straightforward. While it did not provide for the manner by which to determine the parties' choice of law applicable to the arbitration agreement, Vietnam law sets out an exhaustive list of void arbitration agreements that must be avoided by parties arbitrating in Vietnam. Void arbitration agreements include the following:

- “1. The dispute arises in a sector outside the competence of arbitration prescribed in article 2⁵¹ of [the LCA].
- 2. The person who entered into the arbitration agreement lacked authority as stipulated by law.
- 3. The person who entered into the arbitration agreement lacked civil legal capacity pursuant to the *Civil Code*.

⁴⁹ as set out by the UK Court of Appeal in *Sulamérica Cia Nacional de Seguros SA v. Enesa Engenharia SA (Sulamerica)* [2012] EWCA Civ 638.

⁵⁰ *Enka Insaat ve Sanayi A.S. v OOO Insurance Company Chubb (England and Wales)*, October 2020, [2020] UKSC 38.

⁵¹ Article 2, LCA:

“Competence of arbitration to resolve disputes:

- 1. Disputes between parties arising from commercial activities.
- 2. Disputes arising between parties at least one of whom is engaged in commercial activities.
- 3. Other disputes between parties which the law stipulates shall be resolved by arbitration.”

4. The form of the arbitration agreement does not comply with article 16 of [the LCA].

5. One of the parties was deceived, threatened, or coerced during the process of formulation of the arbitration agreement and requests a declaration that the arbitration agreement is void."⁵²

3.35 The second limb of Article 6, LCA refers to arbitration agreements that are '*incapable of being performed*' but the LCA has not set out an exhaustive list of what may fall within the purview of such arbitration agreements, as compared to void arbitration agreements.

3.36 Resolution No. 01 addressed this gap where the Council of Judges of the Supreme People's Court sets out in Article 4 the arbitration agreements that are '*incapable of being performed*':

"1. The parties have agreed to resolve the dispute at a specific arbitration centre but such centre has ceased operation without any successor arbitration centre, and the parties fail to agree on another arbitration centre to resolve the dispute.

2. The parties have agreed on the choice of a specific arbitrator for an *ad hoc* arbitration, but at the time a dispute arises, that arbitrator is unable to conduct the arbitration because of a *force majeure* event or for any other objective reason, or the arbitration centre or the court cannot find an arbitrator as agreed by the parties, and the parties fail to agree on any alternative arbitrator.

3. The parties have agreed on the choice of a specific arbitrator for an *ad hoc* arbitration but at the time a dispute arises, the arbitrator rejects the appointment or the relevant arbitration centre rejects the appointment of that arbitrator and the parties fail to agree on any alternative arbitrator.

4. The parties have agreed to resolve the dispute at a specific arbitration centre but have also agreed to apply the Rules of Arbitration of another arbitration centre, and the charter of the arbitration centre chosen for dispute resolution does not allow the application of the rules of any other arbitration centre, and; the parties fail to agree on alternative rules of arbitration.

5. The goods and/or services provider and the consumers have an arbitration clause in the standard conditions for the provision of such goods and/or services which were previously drafted by the provider as stipulated in article 17 of the *Law on Commercial Arbitration*, but when a dispute arises, the consumers do not agree to use arbitration to resolve the dispute."

⁵² Article 18, LCA.

- 3.37 In recent decisions, Vietnam courts have dealt with the issue of pathological arbitration clauses, which have been considered as proper grounds for the setting aside of the award.
- 3.38 In Case No. 1768/QD-PQTT,⁵³ the People Court of Ho Chi Minh City set aside an award for 2 reasons. First, the Power of Attorney submitted by the Claimant was not legalised. Legalisation is required under Decree 11/2011/ND-CP. Therefore, according to the Court, there is a violation against the fundamental principles of Vietnamese law which is prescribed in Article 3.2 of the Civil Code 2015. (The issue of authority to bind a party is discussed elsewhere in this guide.) Second, it was unclear whether the parties agreed to an institutional arbitration. The arbitration clause did not provide for the name of an arbitral institution to administer an arbitration between the parties, and there was no attempt to agree to have VIAC administer the arbitration as well.
- 3.39 In Case No. 851/2020/QDST-KDTM,⁵⁴ the People's Court of Ho Chi Minh City set aside an award issued by a tribunal constituted under the auspices of the Ho Chi Minh City Commercial Arbitration Center (**TRACENT**). The TRACENT award was issued after another award was issued by a VIAC tribunal on disputes between the same parties. The respondent commenced arbitration with TRACENT after the VIAC had already issued the VIAC award. The Court considered the relevant arbitration clause and found it did not specify the "*arbitration organisation*." However, the respondent neither requested the setting aside of the VIAC award nor objected to the jurisdiction of VIAC and the VIAC tribunal at the earliest opportunity. Therefore, the respondent was deemed to have accepted jurisdiction of the VIAC tribunal, and the TRACENT tribunal does not have jurisdiction to issue another award over a similar dispute between the same parties that had been finally settled by VIAC.

3. Law of the arbitral procedure and law of the seat of arbitration

- 3.40 The law governing the arbitral procedure may be different from the law of the arbitration agreement or the governing law of the contract. In international best practices, the procedural law applicable to the arbitral proceedings is usually the law of the seat of arbitration, i.e., the system of law under which a court has the supervisory jurisdiction over the arbitration. It is also known as the curial law of the arbitration or *lex arbitri*.
- 3.41 Whilst a commercial contract without a proper governing law cannot exist, an arbitration agreement can exist without specifically stating its governing law. Contracting parties may, in theory, choose a procedural law outside the seat of arbitration but in practice, such a choice may risk a host of practical problems, e.g. which court has supervisory jurisdiction – the court named in the agreed curial law or the court in the seat of arbitration? How

⁵³ Court Decision No. 1768/QD-PQTT issued by the People's Court of Ho Chi Minh City, dated 6 October 2020

⁵⁴ Court Decision No. 851/2020/QDST-KDTM issued by the People's Court of Ho Chi Minh City, dated 25 June 2020

will a court in the agreed curial law exercise jurisdiction over arbitral proceedings held outside of its territorial jurisdiction?

- 3.42 The seat of arbitration is a legal concept that should not be conflated with the place or venue of arbitration. The seat of arbitration is the legal place of the arbitration proceedings. By the parties' act of choosing a seat, the parties *ipso facto* had also chosen the law of that place to govern the arbitration. Although the seat indicates a geographical place, it does not necessarily translate that the hearings will take place in the seat. It may be more convenient and less costly for the parties and arbitral tribunal to hold preliminary meetings, case management conferences, and hearings in other places outside the chosen seat. In other cases, the hearings could be moved to a place outside the seat if the security and safety of the arbitral tribunal or any of the parties, witnesses, and experts are of concern.
- 3.43 The seat of arbitration is a crucial element in arbitration due to its legal implications on, *viz*:
- (i) the law of the seat is the governing law of the arbitration proceedings;
 - (ii) the supervisory jurisdiction of the courts of the seat over the arbitration proceedings;
 - (iii) the setting aside application (and the law and grounds applicable) is made in the seat; and
 - (iv) the enforceability of the award overseas.
- 3.44 Whilst there have been jurisdictions that enforced arbitral awards already set aside at the seat, the general perception remains that the enforcement courts cannot enforce arbitral awards already set aside at the seat.
- 3.45 Upon consideration of the legal implications of the seat, the parties usually choose seats which:
- (i) are widely perceived as having a competent, independent, impartial, efficient, arbitration-friendly judiciary;
 - (ii) are contracting states to the New York Convention; and
 - (iii) have a robust legal framework that is supportive and assistive toward arbitral proceedings.
- 3.46 In Vietnam, the concept of 'venue' in arbitration finds its equivalent in the concept of 'dispute resolution location' which is defined as the location where the arbitral tribunal conducts the dispute resolution as agreed by the parties or as decided by the arbitral tribunal if the parties have not so agreed. If the location is within the Vietnamese territory, the award is regarded as having been issued in Vietnam, regardless of the place in which the arbitral tribunal holds the hearing to issue such award.⁵⁵ The VIAC Rules and the LCA provide that, unless otherwise agreed by the parties, the arbitral tribunal may hold a hearing at a venue it deems appropriate for tribunal deliberations, taking witness statements, consulting experts, or for the evaluation of goods,

⁵⁵ Article 3.8, LCA.

assets or other documents.⁵⁶ It is not clear yet whether the concept of 'seat of arbitration' is defined or recognised under the laws of Vietnam.

- 3.47 The legal concept of 'seat of arbitration', whilst widely accepted in international arbitration practice, is not without its challenges.
- 3.48 An arbitral award was set aside by the People's Court of Hanoi on the basis that the arbitral tribunal had changed the hearing venue from Hanoi to Japan and Singapore, notwithstanding the agreement between the parties to hold the hearing in Hanoi.⁵⁷ The Court said that the arbitration proceedings were held not in accordance with the agreement of the parties.⁵⁸ This case will be discussed further in Part 5, Section E of this treatise.
- 3.49 Two arbitral awards were set aside or refused enforcement by Singapore courts on the basis that the arbitration proceeded under the wrong seat of arbitration. The case of *ST Group Co Ltd and others v Sanum Investments Limited and another appeal*⁵⁹ involved a dispute arising from multiple contracts amongst multiple parties. One of the contracts with the heading, Master Agreement, contained an arbitration agreement that stated "*arbitration in Macau*". Another contract with the heading, Participation Agreement, has "*arbitration in Singapore under the SIAC Rules*" in the arbitration clause. Sanum commenced arbitration with the seat in Singapore before the SIAC. The parties from Laos objected to the arbitration and did not participate any further. The tribunal ruled that it has jurisdiction over the dispute since the Participation Agreement '*amplifie[d] and supplement[ed]*' the arbitration clause in the Master Agreement. Despite not having been pleaded, the tribunal also ruled that the seat of arbitration is Singapore. The Court of Appeal ruled in favour of the parties from Laos stating that the dispute arose solely from the Master Agreement and therefore the seat of arbitration should have been Macau, and not Singapore. The Court of Appeal, therefore, refused recognition and enforcement of the arbitral award in Singapore. Notably, the Court of Appeal held that it is not necessary for a party who is resisting enforcement of any award arising out of a wrongly seated arbitration to demonstrate actual prejudice resulting from the wrong seat. Proceeding with arbitration under the wrong seat, by itself, is sufficient reason for the Court to refuse recognition of the award.
- 3.50 Another award that was set aside in Singapore is the award subject in the case of *BNA v BNB and another*.⁶⁰ The relevant contract contained an arbitration clause providing for disputes to be finally "*submitted to [SIAC] for arbitration in Shanghai*". The High Court and then the Court of Appeal had diverging views on the proper interpretation of the phrase '*in Shanghai*'. The High Court interpreted the phrase as merely a selection of hearing venue, and not arbitral seat. The decision was overturned by the

⁵⁶ Article 11.2, LCA; Article 22.2, VIAC Rules 2017.

⁵⁷ Decision 11/2019/QD-PQTT of the Hanoi People's Court.

⁵⁸ Article 68.2.b, LCA.

⁵⁹ [2019] SGCA 65 (Singapore).

⁶⁰ [2019] SGCA 84.

Court of Appeal saying that on its face, the natural meaning of the phrase, "*arbitration in Shanghai*", was for Shanghai to be the seat of arbitration citing similar interpretation from the courts in England and Wales.

3.51 Matters that normally come within the purview of the curial law or law of the seat of arbitration include, insofar as not otherwise specified in the arbitration agreement:

- (i) the number and default appointing procedure of arbitrators;
- (ii) revocation of mandate of arbitrators and duties of arbitrators;
- (iii) powers of arbitrators;
- (iv) how hearings are to be conducted; and
- (v) judicial review of awards.

3.52 If Vietnam were the seat of the arbitration, then the LCA will be the law of the arbitral procedure and the main law (on arbitration) of the seat of arbitration.

(i) *Number and default appointing procedure of arbitrators*

3.53 In the appointment procedure for arbitrators, the parties' express choice remains paramount in the constitution of the arbitral tribunal. The tribunal may consist of one or more arbitrators, depending on the parties' agreement.⁶¹ If there is no agreement, the default number is three.⁶²

3.54 The LCA distinguishes the default appointment procedure (in the event of parties' failure to nominate or appoint) for institutional arbitration and *ad hoc* arbitrations. In institutional arbitrations, the tribunal members will be appointed by the chairman of the arbitration centre. In *ad hoc* arbitrations, the tribunal members will be appointed by the competent court. The parties may refer to the competent court of their own choosing.⁶³ If the parties could not agree on the competent court, then the competent court is determined as follows:⁶⁴

⁶¹ Article 39(1), LCA.

⁶² Article 39(2), LCA.

⁶³ Article 7, LCA.

⁶⁴ Article 7, LCA.

“Arbitration Activities”	“Competent Court”
(a) appointment of arbitrator to establish an <i>ad hoc</i> tribunal	where the respondent resides (if an individual); where the respondent has its head office (if an organisation);
(b) replacement of arbitrators in an <i>ad hoc</i> tribunal	in the place where the tribunal resolves the dispute;
(c) appeal against the decision of a tribunal that the arbitration agreement was void or incapable of being performed or appeal against the decision on jurisdiction of the tribunal	in the place where the tribunal issued the decision;
(d) application to a court to collect evidence	in the place where such evidence requiring collection exists;
(e) application to a court to grant interim relief	in the place where the relief needs to be applied;
(f) summoning witnesses	in the place where the witnesses reside.

3.55 In Case No. 163/2020/QDST-KDTM,⁶⁵ the People’s Court of Ho Chi Minh City set aside an award on the basis that the tribunal appointment was made in violation of the agreed procedure. According to Article 40.3 of the LCA and Article 12.3 of VIAC Rules, the two party-appointed arbitrators must appoint a presiding arbitrator within 15 days from the appointment of the respondent’s arbitrator. If no presiding arbitrator has been appointed within the 15-day period, the chairman of the VIAC must make the appointment. However, in this case, it was the two party-nominated arbitrators who appointed the presiding arbitrator after the 15-day period. The respondent argued that at a meeting with the claimant, the claimant had expressed its acceptance of the constitution of the tribunal. However, the Court, in setting aside the application, did not consider this as an effective waiver on the part of the claimant. There was no evidence showing the claimant’s awareness of the deviation from the proper appointment procedure, until after the arbitral award was served upon it.

(ii) Revocation of mandate of arbitrators and duties of arbitrators

3.56 The parties have a right to request to replace an arbitrator or the arbitrator must refuse to accept an appointment from a matter in the circumstances set out in Article 42, LCA, *viz*:⁶⁶

- (i) the arbitrator is a relative or representative of a party;
- (ii) the arbitrator has an interest related to the dispute;
- (iii) there are clear grounds demonstrating that the arbitrator is not impartial or objective;

⁶⁵ Court Decision No. 163/2020/QDST-KDTM issued by the People’s Court of Ho Chi Minh City, dated 12 February 2020.

⁶⁶ Article 42, LCA.

- (iv) the arbitrator was a mediator, representative, or lawyer for either of the parties prior to the dispute being brought to arbitration for resolution unless the parties provide written consent.
- 3.57 The above circumstances show a similar inclination of the LCA to adhere to the conflict-of-interest guidelines set out in the International Bar Association (**IBA**) Guidelines on Conflicts of Interests in International Arbitration 2014 (**IBA Guidelines**), a widely used guideline that provides for the relevant criteria for assessing the impartiality and independence of arbitrators. Whilst non-binding, for the most part, the IBA Guidelines continue to be influential in the determination of challenges to arbitrators and challenges to awards on the basis of arbitrator conflicts.⁶⁷ The IBA Guidelines focus on (a) when an arbitrator should disclose potential conflicts, and (b) when an arbitrator should simply not accept the appointment.
- 3.58 Due diligence must be taken however by arbitration users in Vietnam wishing to refer to the IBA Guidelines or the IBA Rules on the Taking of Evidence in International Commercial Arbitration (**IBA Rules**). The People's Court in Hanoi rejected a petition for recognition and enforcement of an arbitral award because the arbitral tribunal had, in the arbitral award, referred to the IBA Rules when it disregarded evidence submitted by a party.⁶⁸ This will be discussed further in Part 5 Section E of this Guide.
- 3.59 Article 42, LCA is further bolstered by Article 18, LCA setting out the obligation of arbitrators to accept or refuse a dispute, to remain independent during the dispute resolution process, and to ensure that the process is impartial, speedy, and prompt.⁶⁹
- 3.60 It bears noting that the laws of Vietnam do not explicitly provide immunity from a civil claim for arbitrators. This seems to be the implication in Article 49.5, LCA which reads:

"[i]f the arbitral tribunal applies a different interim relief or an interim relief which exceeds the scope of request for applying the interim relief of the requester, thereby causing damage to the requester, to the party to which the interim relief is applied, or a third person, then the party incurring the damage shall have the right to initiate litigation procedure for compensation under the civil procedure laws."
- 3.61 In 2019, a VIAC-constituted arbitral tribunal was sued by the arbitration respondent at the High People's Court of Hanoi – the first tribunal to have been sued as such. Claims for compensation was filed on the basis that the tribunal wrongly applied an interim relief pursuant to Article 49.5, LCA. The High People's Court of Hanoi confirmed the judgment of the first-instance court, but as

⁶⁷ A Kluwer Arbitration Blog survey on soft law instruments in 2014 found that the IBA Guidelines are the second most popular soft law instrument with 44.4% of respondents stating they use them regularly. In North America, 71.4% of respondents said they use them always or regularly.

⁶⁸ Decision 11/2019/QĐ-PQTT dated 14 November 2019.

⁶⁹ Article 21, LCA.

the interim relief had not been implemented, there were no damages incurred.

(iii) Powers of arbitrators

3.62 Pursuant to the laws of Vietnam, arbitrators have jurisdiction to determine:

- (i) disputes between parties arising from commercial activities;
- (ii) disputes arising between parties at least one of whom is engaged in commercial activities; and
- (iii) other disputes between parties which the law stipulates shall be resolved by arbitration.⁷⁰

3.63 “*Commercial activities*” means activities for profit-making purposes, comprising the purchase and sale of goods, provision of services, investment, commercial enhancement, and other activities for profit-making purposes.⁷¹ If a labour dispute is brought to arbitration by way of an arbitration agreement and the *lex arbitri* is Vietnamese law, such dispute is considered non-arbitrable and it shall not be accepted by any arbitral institution in Vietnam. If an arbitral tribunal had already been constituted, the arbitrators shall dismiss the claim for lack of jurisdiction. We note, however, that the Supreme People’s Court issued a decision considered as a precedent in Vietnam. One of these precedents is Precedent No. 69/2023/AL that dealt with the question of arbitrability of non-disclosure and non-compete agreements in employer-employee contracts (the **Precedent**), which took effect as from 1 November 2023. The Court considered the non-disclosure agreement (**NDA**) and non-compete agreements as agreements separate from a labour contract, as was the intention of the parties in that case, thus disputes arising therefrom should not be considered as a labour dispute, but rather a separate dispute between the parties with at least one of whom is engaged in commercial activities. According to the Court, the dispute is one capable of settlement by arbitration under Article 2.2. of the LCA.” Prior to this Precedent, there were two opposing views regarding the enforceability of non-compete agreements, and whether violations of non-compete agreements could be submitted to arbitration. The first takes the view that a dispute involving a non-compete agreement is a labour dispute which falls under the jurisdiction of the labour mediator, or through labour arbitration, or the court (pursuant to Article 187 of the Labor Code 2019). This list excludes commercial arbitration from resolving non-compete disputes. Further, Article 10.1 of the Labor Code 2019 provides that “[a]n employee shall have the right to choose his employment, employer in any location that is not prohibited by law.” A non-compete agreement that prohibits an employee from pursuing another employment elsewhere may be considered a violation of this right. The other view relies on Article 2.2 of the LCA that provides: “[d]isputes arising between parties at least one of whom

⁷⁰ Article 2, LCA.

⁷¹ Article 3.1 of Law No. 36/2005/QH11, entitled the Law on Commerce passed by the National Assembly of Vietnam on 14 June 2005 (*Law on Commerce*).

is engaged in commercial activities." On the basis that an agreement (such as a non-compete agreement) has at least one party engaged in commercial activities, disputes arising from such an agreement can be resolved through commercial arbitration. Further, Vietnam law recognises the freedom of parties to contract. Therefore, a non-compete, which was freely entered into between the parties, should be respected under Vietnam law. The Precedent appears to resolve the issue strongly in favour of the second view.

- 3.13 The arbitral tribunal constituted pursuant to the LCA or arbitral institution rules in Vietnam has the powers to make orders or give directions to any party for:
- (i) interim relief;⁷²
 - (ii) for the applicant for interim relief to provide financial security;⁷³
 - (iii) production of documents and evidence;⁷⁴
 - (iv) summoning witnesses to give evidence.⁷⁵
- 3.14 There is no specific law on discovery in Vietnam. In the event that a party required to produce documents and other evidence refuses to produce documents so required by the tribunal, the requesting party could make an application to the competent court for an order for the production of such documents and evidence so requested. It is not certain, however, whether or not the court (or tribunal) will allow such request and how the procedure will be when the production request reaches the court.
- 3.15 We must note that in Case No. 04/2020/QD-PQTT (as discussed in Part 5), among the grounds the Court considered to set aside the award was that the tribunal refused the claimant's request to collect evidence. This was ruled to be violations of Article 46.2., LCA, and Article 19.2., VIAC Rules.
- 3.16 The use of witness statements and cross-examination in hearings are also unclear and is generally subject to the arbitral tribunal's discretion, the parties' agreement, and the procedural orders made by the tribunal on a case-by-case basis. Article 45, LCA provides for the jurisdiction of the arbitral tribunal to "*verify facts*". It shall be made "*during the dispute resolution process, to meet or hold discussions with one party in the presence of the other party, by appropriate methods, in order to clarify issues relevant to the dispute*".⁷⁶ Article 47, LCA provides for the jurisdiction of the arbitral tribunal to summon witnesses where the tribunal could require a witness to attend a dispute resolution session.⁷⁷ It is not clear whether or the witness(es) so summoned could be cross-examined at the dispute resolution session (i.e. hearing).⁷⁸ In

⁷² Article 48, 49, LCA.

⁷³ Article 49(4), LCA.

⁷⁴ Article 46, LCA.

⁷⁵ Article 47, LCA.

⁷⁶ Article 45, LCA.

⁷⁷ Article 47(1), LCA

⁷⁸ Article 20, VIAC Rules 2017.

practice, the use of witness statements and cross-examination largely depends on the discretion of the tribunal.

- 3.17 Vietnamese law is also not clear on the concepts of legal professional privilege or litigation or arbitration privilege. If a matter involves documents and evidence that ought to be protected with privilege and the arbitral tribunal could exercise its power to order their production, the parties to the arbitration might wish to agree at the outset as to the scope of legal privilege and the law applicable to it.

(iv) How hearings are to be conducted

- 3.18 The tribunal fixes the time and location of the hearings unless the parties have agreed otherwise, and it may be held by telephone conference, video conference, or by any other appropriate means if the parties have agreed so.⁷⁹ Hearings shall be conducted in camera unless the parties have agreed otherwise.⁸⁰ Summons to attend a hearing is sent by VIAC to the parties within a period of time no less than 15 days prior to the hearing unless the parties have agreed otherwise.⁸¹
- 3.19 In practice, it could be a different process altogether. It largely depends on the experience and case management skills of the arbitrator. There may be arbitrators who make procedural decisions without giving the opportunity for the parties to attempt to agree at the first instance, which could be perceived as disregard for the party autonomy principle in arbitration. There could also be arbitrators who may allow *ex parte* communications with one party, and subsequently, notifying the other party what transpired in those *ex parte* communications. It may be a precarious situation as the other party will not know the full extent of those *ex parte* communications. Best practices permit the parties to communicate with each other on disputed procedural matters and attempt to agree on the best way to progress the arbitral proceedings; *ex parte* communications with the tribunal members are prohibited which is usually set out in the tribunal's first procedural order.
- 3.20 Arbitration users may wish to consider taking a more pro-active stance and attempt to agree on the procedural steps to be taken in the arbitral proceedings. To avoid any misunderstanding and miscommunication, arbitration users may want to include in a procedural order that the parties should not engage in *ex parte* communications with the tribunal members in the course of the arbitral proceedings.
- 3.21 In Decision 52/2019/QD-PDTT, the People's Court of Ho Chi Minh City set aside a VIAC award because the arbitrator engaged in *ex parte* communication with one party. The Court noted that there were 14 phone calls between the respondent and an arbitrator. It is interesting to note that it was this same party (i.e., the respondent) who requested the setting aside of the VIAC award.

⁷⁹ Article 25, LCA.

⁸⁰ Article 25(3), LCA.

⁸¹ Article 25(2), LCA.

- 3.22 Confidentiality of the arbitration proceedings is not, in precise terms, provided in the LCA. Article 21.5 puts the onus on the arbitrators *“to maintain the confidentiality of the contents of the dispute, unless required to provide information to competent authorities under laws”*.⁸² Confidentiality may have been indirectly referred to in Article 4.4 as one of the principles for dispute resolution by arbitration. Article 4.4 reads: *“Dispute resolution by arbitration shall be conducted in private unless otherwise agreed by the parties.”* It should be noted though that *“private”* does not necessarily translate to *“confidential”*. The arbitration proceedings may be conducted in private, i.e. not accessible to the public. But the proceedings and contents thereof may not be deemed confidential by the parties, counsel, witnesses, experts, and transcribers. The law does not explicitly provide for confidentiality obligations.
- 3.23 It cannot be underestimated that the arbitral proceedings must be conducted in accordance with the parties’ arbitration agreement, especially in view of the principle of equality protected under Vietnamese law. In Case No. 1191/2021/QDST-KDTM,⁸³ the People’s Court of Ho Chi Minh City set aside an award, ruling the use of the English language in the arbitral proceedings violated the principle of equality. The court noted the parties’ agreement to use Vietnamese as the language of the arbitration, the contract was in Vietnamese, and the performance of the obligations was in Vietnam. The respondent objected to the use of English at the time when the arbitrator was appointed and maintained this objection in the course of the arbitral proceedings. This seems to be a proper ground for setting aside, as major hubs for arbitration also consider the use of language not agreed upon as grounds to set aside the arbitral award. The language used in the arbitral proceedings was a clear deviation from the express wording of the arbitration agreement and appeared to be slanted to favour one party, and injurious to the other. It must be noted that the aggrieved party participated in the arbitral proceedings, with a continuing objection as to the use of the English language in the arbitration.

(v) Judicial review of awards

- 3.24 Post-award, the courts of Vietnam have two opportunities to review arbitral awards: 1) by a petition by the award debtor requesting the setting aside of an arbitral award (**Setting Aside Petition**) or 2) by resisting or refusing enforcement of an arbitral award against a petition for recognition and enforcement filed before a competent court. Petitions for recognition and enforcement shall be discussed in Part 5 of this treatise.
- 3.25 Article 68(2), LCA lists the grounds for a Setting Aside Petition as follows:
- (i) there was no arbitration agreement or the arbitration agreement is void;

⁸² Article 21(5), LCA.

⁸³ Court Decision No. 1191/2021/QDST-KDTM issued by the People’s Court of Ho Chi Minh City, dated 1 December 2021.

- (ii) the composition of the arbitration tribunal was [or] the arbitration proceedings were inconsistent with the agreement of the parties or contrary to the provisions of the [LCA];
 - (iii) the dispute was not within the jurisdiction of the arbitration tribunal; where an award contains an item which falls outside the jurisdiction of the arbitration tribunal, such item shall be set aside;
 - (iv) the evidence supplied by the parties on which the arbitration tribunal relied to issue the award was forged; or an arbitrator received money, assets, or some other material benefit from one of the parties in dispute which affected the objectivity and impartiality of the arbitral award;
 - (v) the arbitral award is contrary to the fundamental principles of the laws of Vietnam.
- 3.26 The first three grounds above are consistent with the grounds for setting aside in Article 34(2) of the Model Law. The fourth ground is not found in the Model Law but it provides a stricter approach against errant and egregious behaviour of arbitrators. The LCA also provides forged evidence as one of the grounds for setting aside, which is also not one of the grounds under the Model Law.
- 3.27 In Case No. 1079/2020/QDST-KDTM,⁸⁴ the People's Court of Ho Chi Minh City set aside a domestic award, on the ground that the evidence supplied by the parties in the arbitral proceedings was forged (Article 68.2(d), LCA). In the course of the VIAC proceedings, the respondent requested the claimant to provide originals of the documents and evidence it submitted. The claimant could neither provide the originals nor explain justifiably why they could not do so. Notably, at the setting aside proceedings, the respondent (now petitioner) submitted evidence showing that the claimant's documents submitted in the arbitration did not match the records available to the respondent. The court accepted the respondent's argument and ruled that the evidence submitted during the arbitration was forged. It was not clear whether the respondent in the setting aside proceedings submitted contemporaneous records against which the court may have compared the documents submitted by the claimant in the arbitration.
- 3.28 The fifth ground is a precarious area to anchor a Setting Aside Petition on. That the arbitral award is contrary to the "*fundamental principles of the laws*" of Vietnam could be perceived as too broad a basis for setting aside an arbitral award further inviting the court to delve into the merits of the award and to painstakingly thresh out each issue or decision that is potentially contrary to the fundamental principles of the law of Vietnam. This could be Vietnam's equivalent to the ground of public policy in Article 34(2)(b)(ii) of the Model Law. It is not yet clear, however, what the fundamental principles pertain to.

⁸⁴ Court Decision No. 1079/2020/QDST-KDTM issued by the People's Court of Ho Chi Minh City, dated 23 July 2020.

- 3.29 Resolution No. 1 may provide guidance relating to fundamental principles of the laws of Vietnam. The Supreme People's Court said that for a court to consider a Setting Aside Petition on this basis, the court must determine:
- (i) whether the arbitral award violates one or more fundamental principles of law, and
 - (ii) that such principle(s) is (are) relevant to the dispute resolution by arbitration.
- 3.30 Fundamental principles could be referring to the interests of the government or the legitimate rights and interests of third parties. Resolution No. 1⁸⁵ had set out examples of a violation of fundamental principles, viz:
- (i) If the parties have voluntarily agreed on a dispute resolution clause and the agreement is not contrary to law or social morals but the arbitral tribunal did not acknowledge such agreement in the arbitral award, the award could be deemed as having been made in violation of the principle of free and voluntary commitment in the field of commerce.⁸⁶ The award must be set aside as it is contrary to the fundamental principles of Vietnamese laws as provided in the Commercial Law and the Civil Code.
 - (ii) a disputing party provides evidence showing that the arbitral award was made based on coercion, fraud, threat, or bribery. In such a case, the arbitral award has violated the LCA which mandates that '*the arbitrator must be independent, objective and impartial*'.
- 3.31 A Setting Aside Petition shall be filed with the competent court within thirty (30) days from the date of receipt of such award. Article 71(4), LCA mandates the courts not to review the merits of the dispute which the arbitral tribunal had already resolved and they shall rely solely on the provisions of Article 68(2), LCA as listed above.
- 3.32 In the event that the ground for the Setting Aside Petition is an error that is rectifiable by the arbitral tribunal, the court may adjourn a Setting Aside Petition for a period not exceeding 60 days for the arbitral tribunal to rectify such errors.
- 4. Law governing the supportive and enforcement measures**
- 3.33 Where assistance is sought from the courts of Vietnam to support an arbitration seated overseas by way of a stay of court proceedings, preservation of assets, facilitating the conduct of overseas arbitration (such as the taking of evidence or summoning witnesses in Vietnam), the law applicable would be the law of Vietnam despite the arbitration having its seat elsewhere. The power of the courts in Vietnam to issue these orders has not been widely used yet. It remains uncertain how the Vietnam courts will proceed in determining such applications and issuing the orders requested to support arbitration overseas.

⁸⁵ At commentary in Article 14(2)(dd).

⁸⁶ As provided in Article 11 of the Commercial Law and Article 7 of the Civil Code.

- 3.34 Vietnam courts have jurisdiction in issuing supportive measures for the preservation of assets in the form of interim relief orders for arbitration in Vietnam. Parties can make an application in court for interim relief in support of arbitration after the submission of the request for arbitration. After a tribunal has been constituted, any party could still request the competent court for interim relief in support of the arbitral process. Such provisional relief remains in force in the course of the arbitral proceedings. Prior to issuing such relief, the court will have to confirm with the applicant-party that no similar application has been made to the arbitral tribunal and if one has been made, the arbitral tribunal has not granted the application. The arbitral tribunal has the jurisdiction to grant all types of interim relief that the court could grant; the court could proceed to do so without the arbitral tribunal's consent but only upon the request of one party.
- 3.35 The enforceability of interim measures (or the non-enforceability thereof) comes into issue if the interim relief is issued by an arbitral tribunal in a foreign arbitration. In general, enforcement of the arbitral tribunal's decision on interim reliefs will be implemented in accordance with the law on enforcement of civil judgments.⁸⁷ The interim relief issued by an arbitral tribunal constituted by a foreign arbitration centre will however not be recognised or enforced in Vietnam. The Civil Procedure Code 2015 – as it is currently worded – only allows the recognition and enforcement of a final award that resolves all issues arising from the dispute between the parties.⁸⁸
- 3.36 Petitions for recognition and enforcement of foreign arbitral awards in Vietnam could be granted so long as the award creditor satisfies the statutory requirements⁸⁹ even if there is no connection with Vietnam, the arbitration agreement, or the arbitral process.

5. Law governing the substantive rights of the parties

- 3.37 The law governing the substantive rights and obligations of the parties is usually the governing law of the underlying or main contract. Where the parties have expressly chosen the governing law of the contract, then that is the law governing the substantive rights and obligations of the parties.
- 3.38 Whilst it is not uncommon for a governing law to refer to a law of a national system, a clause that permits the arbitrator to determine the proper law not confined to a national system of law is not considered uncertain and the award made, subject to compliance with statutory requirements, could be enforceable. An example of a commonly used body of law in arbitration outside the national systems of law is the Convention of Contracts for the International Sale of Goods or the CISG.

⁸⁷ Article 50.5, LCA

⁸⁸ Article 424.2, Civil Procedure Code.

⁸⁹ Chapter 36, Civil Procedure Code 2015; Article 432.1, Civil Procedure Code 2015.

4

Recognition and enforcement of arbitral awards in Vietnam



- 4.1 At the outset, it is important to distinguish whether an arbitral award is a result of foreign or domestic arbitration. The laws of Vietnam provide for different enforcement mechanisms between a foreign and domestic arbitral award.
- 4.2 Vietnam law puts the onus on the parties to voluntarily carry out arbitral awards, regardless of the type of award.⁹⁰ To “carry out” may mean for the award debtor to comply with the obligations imposed in the arbitral award rather than to wait for a court judgment compelling the award debtor to pay, or for the award creditor seeking registration, recognition, and enforcement of the arbitral award in the competent court.⁹¹
- 4.3 According to the LCA, a domestic award shall be voluntarily carried out by the award debtor. Upon expiry of the time-limit for carrying out a domestic award without it having been set aside by the competent court nor having it voluntarily carried out by the award debtor, the award creditor may request the State enforcement agency to execute the award. For domestic *ad hoc* awards, the award creditor may have the award registered with the competent court and then proceed to request the civil judgment State enforcement agency to execute the award.
- 4.4 The New York Convention has been ratified by Vietnam and has been incorporated into Vietnamese national law in the Civil Procedure Code. Vietnam, however, has made 3 reservations, viz:
- (i) the award sought to be recognised and enforced is made in the territory of another contracting State;
 - (ii) disputes arising out of a legal relationship, contractual or not, and deemed as “commercial” under Vietnam laws; and
 - (iii) for awards made in non-contracting States, Vietnam will apply the New York Convention to the extent that the non-contracting State does the same on the basis of reciprocity.
- 4.5 According to the New York Convention,⁹² each contracting State shall recognise arbitral awards as binding and enforce them in accordance with the law of such contracting State in a manner similar to how that State enforces domestic awards or civil judgments. Accordingly, a foreign arbitral award, which is recognised and enforced by a court in Vietnam, has the same legal effect as a legally binding decision made by a Vietnamese court.
- 4.6 Recognition and enforcement may, however, be refused on the grounds listed in Article V(1) of the New York Convention.⁹³ It bears noting that similar grounds are set out in Vietnam’s Civil Procedure Code.⁹⁴ Vietnam adopted a revised Civil Procedure Code No. 92/2015/QH13 or the Civil Procedure Code 2015, which entered into force on 1 July 2016 and replaced the former Civil

⁹⁰ Article 65, LCA

⁹¹ Article 62.2, LCA

⁹² Article III, New York Convention.

⁹³ Article V(1), New York Convention.

⁹⁴ Article 459(1), New York Convention.

Procedure Code 2004. The Civil Procedure Code 2015 introduced several positive changes with the purpose of making the recognition and enforcement of foreign arbitral awards in Vietnam become more effective.

4.7 Whilst there are five grounds in the New York Convention, the Civil Procedure Code 2015 expanded these into seven (7) grounds. There is no ground set out in the Civil Procedure Code 2015 that is not found in the New York Convention, but the Civil Procedure Code 2015 divided certain sub-clauses of Article V(1) of the New York Convention into two grounds, e.g. Article V(1)(e), made into Article 459(e) and (g) in the Civil Procedure Code 2015.

4.8 Article 459, Civil Procedure Code 2015, “Cases of non-recognition” reads as follows:

“1. The court does not recognise an award of foreign arbitrators when considering that the evidence supplied by the award debtor to the court in order to object to the petition for recognition is grounded and legal, and the arbitration award falls under any of the following cases:

(a) The parties signing the arbitration award did not have the capacity to sign such agreement in accordance with the law applicable to each party;

(b) The arbitration agreement did not have legal effect in accordance with the law of the country selected by the parties for application, or in accordance with the law of the country where the award was issued if the parties did not select an applicable law for such agreement;

(c) The agency, organisation, or individual against whom the award is to be enforced was not notified in a timely and proper manner of the appointment of arbitrators, of the procedures for resolution of the dispute by foreign arbitration, or cannot exercise their litigation rights due to another legitimate reason;

(d) The award of foreign arbitrators was pronounced on a dispute for which resolution was not requested by the parties, or which exceeds the request of the parties who signed the arbitration agreement. Where it is possible to separate the section of the decision on matters which were requested from the section of the decision on matters which were not requested to be resolved by foreign arbitration, the section of the decision on matters which were requested to be resolved may be recognised and permitted to be enforced in Vietnam;

(dd) The composition of foreign arbitrators or the procedures for dispute resolution of foreign arbitrators did not conform with the arbitration agreement or with the law of the country where the award of foreign arbitrators was pronounced if the arbitration agreement is silent on such issues;

(e) The award of foreign arbitrators is not yet binding on the parties;

(g) The award of foreign arbitrators has been rescinded or suspended from enforcement by a competent agency of the country where the award was pronounced, or of the country of the applicable law.

2. An award of foreign arbitrators shall also not be recognised if a Vietnamese court considers that:

(a) The dispute could not be resolved by arbitration proceedings in accordance with Vietnamese law;

(b) The recognition and permission for enforcement of the award of foreign arbitrators in Vietnam are contrary to the basic principles of the laws of Vietnam.”

- 4.9 The Civil Procedure Code 2015 also clarified that the party opposing the recognition and enforcement of a foreign arbitral award has the obligation to prove the grounds used as basis for the opposition.⁹⁵ This is a key principle because it means that the burden of proof does not lie on the petitioner but on the resisting party. Petitioners only need to submit the originals or certified true copies of the foreign arbitral award and of the relevant arbitration agreements.⁹⁶
- 4.10 The Civil Procedure Code 2015 provides additional clarifications (as compared to the Civil Procedure Code 2004) with respect to the suspension of examining the petition. In the course of the suspension period, the judges are responsible for supervising and speeding up the elimination of all causes and, when the cause for suspension no longer exists, the judges shall issue a decision to continue the examination proceeding.⁹⁷
- 4.11 Finally, a decision to recognise or refuse to recognise an award can now be appealed.⁹⁸ The Civil Procedure Code 2015 also expanded the authority of the appeal panel, which is now entitled to cancel the decision of the first-instance court and to forward the dossiers to such first-instance court for re-examination under the circumstances set out in Article 462.5.⁹⁹
- 4.12 A point of concern, however, arises in Article 459(2)(b), Civil Procedure Code 2015: “*an award of foreign arbitrators shall also not be recognized if a Vietnamese court considers that [to do so] is contrary to the basic principles of the law of Vietnam*”.
- 4.13 This may similarly refer to the reference to “*fundamental principles*” stated in Article 68.2(dd), LCA relating to a Setting Aside Petition. This may also be Vietnam’s equivalent to the public policy ground set out in Article V(2)(b) of the New York Convention. However, despite the development of court decisions on this ground, there is yet no clear definition as to what constitutes “*basic principles of the law*” or “*fundamental principles of the law*” in Vietnam, leaving the courts with more broad discretion to interpret this term and which could potentially give more room for ambiguity. Courts have shown changing

⁹⁵ Article 459.1 of Civil Procedure Code 2015.

⁹⁶ Article 451.1 and Article 453 of Civil Procedure Code 2015.

⁹⁷ Article 457.2 of Civil Procedure Code 2015.

⁹⁸ Article 461.1 of Civil Procedure Code 2015.

⁹⁹ Article 462.5 of Civil Procedure Code 2015.

attitudes in either strictly or loosely interpreting this ground to refuse enforcement or to set aside arbitral awards.

- 4.14 Reference may be made to Article 3 of the Civil Code 2015 with the heading “*basic principles of civil law*”, viz:

“Article 3. *Basic principles of civil law*

- (i) *Equality in civil relations;*
- (ii) *Freedom of civil rights and obligations (freedom of contract);*
- (iii) *Goodwill and honesty (good faith);*
- (iv) *No infringement of national interests, public interests, lawful rights, and interests of other persons;*
- (v) *Personal liability for the performance of one’s civil obligations.”*

- 4.15 It is not clear though whether the “*basic principles of law*” referred to in Article 459(2)(b) of the Civil Procedure Code 2015 and “*fundamental principles*” in Article 68.2(dd) of the LCA refer to Article 3 of the Civil Code 2015.

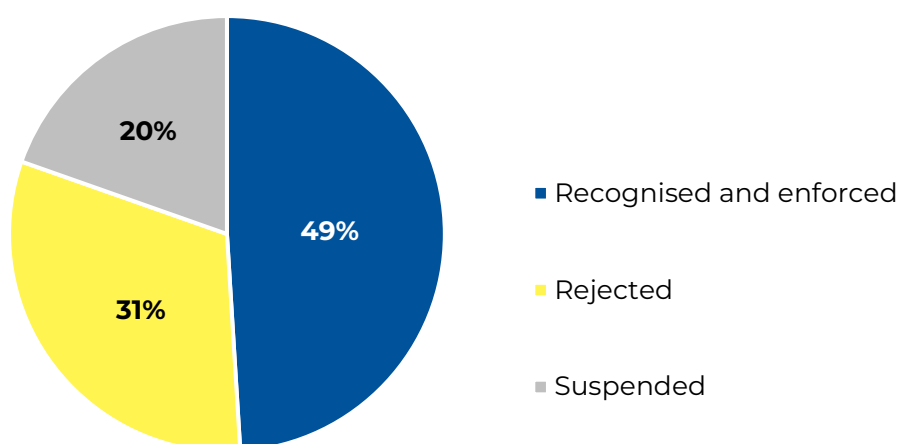


5

Review of rejected
petitions for
recognition and
enforcement of foreign
arbitral awards

- 5.1 From 1 January 2012 to early 2023, there had been 118 arbitration-related judgments published in publicly available sources, out of which 102 judgments pertain to petitions for the recognition and enforcement of foreign arbitral awards, and 16 relate to setting aside petitions of domestic awards. It must be noted that not all foreign arbitral awards seeking to be enforced in Vietnam are published. Of these 102 petitions for recognition and enforcement of foreign arbitral awards:
- 50 petitions were recognised and enforced,
 - 32 were rejected, and
 - 20 petitions were suspended (which may be on the basis of the withdrawal of petition or voluntary compliance by the award debtor).

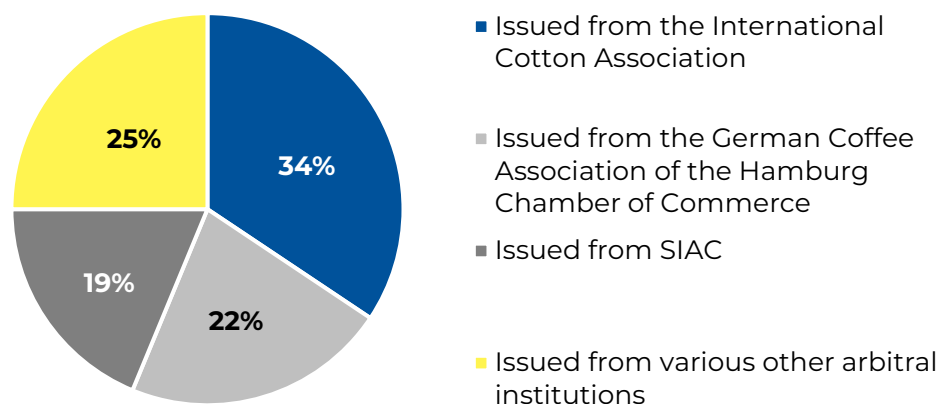
Recognition and Enforcement of Arbitral Awards in Vietnam



- 5.2 Amongst the 32 rejected petitions (i.e. 31% of the total number of petitions relating to foreign arbitral awards):
- eleven (11) were issued by arbitrators from the International Cotton Association (formerly the Liverpool Cotton Association);
 - seven (7) were issued by arbitrators from the German Coffee Association of the Hamburg Chamber of Commerce, Germany;
 - six (6) were issued by arbitrators from SIAC; and
 - the remaining eight (8) from various other arbitral institutions.

The 20 suspended petitions have been issued by tribunals from various arbitral institutions as well.

Institutions issuing foreign arbitral awards that were rejected



- 5.3 At 31%, Vietnam has a high percentage of rejected petitions for recognition and enforcement of foreign arbitral awards. However, it must be noted that this percentage covers the total number of petitions (relating to foreign arbitral awards) filed in the span of 11 years.
- 5.4 The record in the first-instance courts in Vietnam leaves much to be desired as well. From 2014 to 2017 (i.e. four years), the People's Court of Hanoi rejected 33% of these petitions; from 2011 to 2018 (i.e. eight years), the People's Court of Ho Chi Minh City's rate was 31%.
- 5.5 If read on an annual basis, the data shows a different perspective:

	Petition for setting aside ¹⁰⁰ - granted	Petition for enforcement - granted	Petition for enforcement - rejected	Petition for enforcement - suspended	Total petitions each year (published)
2012¹⁰¹	0	10	4	1	15
2013	1	11	10	2	24
2014	0	2	9	2	13
2015	1	2	2	0	5
2016	0	4	2	3	9
2017	0	4	3	1	8
2018	0	5	0	2	7
2019	0	3	0	1	4
2020	6	4	0	4	14
2021	3	2	1	1	7
2022	4	3	0	2	9
2023	1	0	1	1	3
Total cases in 10 years	16	50	32	20	118

¹⁰⁰ These numbers only concern domestic awards. Under Vietnamese law, setting aside petitions are only available against domestic awards.

¹⁰¹ Year of issuance of the court decision for the relevant petition.

The data shows that there could be trend from 2015 onwards for Vietnamese courts becoming more assistive and friendly towards arbitration, most especially in the recognition and enforcement of *foreign* arbitral awards.

- 5.6 In this treatise, we will focus our analysis on the 32 petitions rejected by the Supreme Court of Vietnam, where some of these petitions cited more than 1 ground for such rejection. The most common grounds are as follows:
- (i) improper notice or improper service of notice – mentioned in 28 decisions;
 - (ii) the award is contrary to the basic principles of Vietnam – mentioned in 11 decisions;
 - (iii) lack of authority to enter into the arbitration agreement or the signing formalities had not been complied with – mentioned in six (6) decisions;
 - (iv) the arbitral procedure was not in accordance with the law of the country where the arbitration took place – mentioned in one (1) decision.

A. Improper notice / improper service of notice – what the law requires

- 5.7 Amongst the grounds for rejecting foreign arbitral awards is Article 459(1)(c) of the Civil Procedure Code 2015, which reads:

“1. The court does not recognise an award of foreign arbitrators when considering that the evidence submitted by the award debtor to the court in order to object to the petition for recognition is grounded and legal, and the arbitration award falls under one of the following cases:

...

(c) The agency, organisation, or individual against whom the award is to be enforced was not notified in a timely and proper manner of the appointment of arbitrators, of the procedures for resolution of the dispute by foreign arbitration, or cannot exercise their litigation rights due to another legitimate reason;”

- 5.8 There is no guidance as to the interpretation of the phrase, “*timely and proper manner*” for the service of arbitration documents mentioned in Article 459(1)(c) of the Civil Procedure Code 2015. However, Article 439(3) thereof is instructive as to the timeliness of notices made by a foreign court, viz:

“Article 439 Civil judgments and decisions of foreign courts not recognised or permitted for enforcement in Vietnam

...

The judgment debtor or his or her legal representative was absent at the hearing session of the foreign court

because he or she was not duly summoned, or documents of the foreign court were not served on him or her within a reasonable period in accordance with the law of the country of such foreign court for him or her to exercise the right to self-defend.”

- 5.9 What could be a “*reasonable period*” may vary depending on the national laws of the country of such foreign court. It could mean proper service of notice of an arbitral award within three months from the date a party received the award. Prior service made to an unofficial email address may not be considered proper service in certain jurisdictions such as Vietnam. Proper service of the award and receipt by the proper representative starts the limitation period within which a petition seeking to set aside the award may be lodged in the court of the seat of arbitration.¹⁰²
- 5.10 Article 12 of the LCA sets out that the manner and order for the service of notices in the context of arbitral proceedings. It shall be (i) by the parties’ agreement, or (ii) as stipulated by the procedural rules of the relevant arbitration centre.
- 5.11 Service of notices in the LCA must be read together with service or notification of a legal process to an organisation as provided for in Article 178 (Ch. 10, Issuance, Service and Notification of Legal Process) of the Civil Procedure Code 2015. Service shall be made directly to the (a) legal representative, or (b) person in charge of receipt of documents of such organisation, and the signature of such person for confirmation of receipt shall be required. It is arguable that Article 178 is found in Ch. 10 of the Civil Procedure Code 2015 and refers to the service of court documents, and therefore the same requirements do not apply to the service of arbitration documents. In practice, however, local courts (especially those in remote areas) might take a strict and conservative approach towards the service of foreign arbitration documents and may require these to be served in the same manner as domestic court litigation documents.
- 5.12 Whenever an organisation or legal entity (having been issued, served, or notified of a legal process) has its representative participating in the proceedings, or delegates to its representative the receipt of legal process, the signature of such person shall be required. The date of signing for confirmation of receipt shall be the date of issuance, service, or notification.
- 5.13 The concept of “*legal representative*” has a concrete meaning under the laws of Vietnam. The “*legal representative*” is the person who is registered with the relevant Vietnamese authority as the company’s legal representative. It does not automatically refer to lawyers or counsel representing a party in the arbitration proceedings. One of the main obligations of a legal representative is the capacity to enter into contracts on the company’s behalf.
- 5.14 In a recent appellate decision No. 09/2023/HS-PT issued by the High People’s Court in Hanoi on 17 January 2023 (**Decision No. 09/2023**), the Court refused recognition and enforcement of an

¹⁰² Article 34(3), UNCITRAL Model Law.

SIAC Award as (among other grounds) the arbitral tribunal did not properly inform the respondent's expert witness of the hearing, in order for the expert to adequately prepare and join the hearing. According to the Court's judgment, the tribunal did not send the link and password for the virtual hearing to the respondent's expert witness, which, according to the Court, is against the SIAC Rules and the hearing rules. The High People's Procuracy¹⁰³ in Hanoi issued an opinion and said the expert did eventually receive the link and password. It is not clear, however, whether the expert was able to login and attend the hearing. The Court determined there was a violation on proper notice of hearing and thus the recognition petition was rejected on that basis.

5.15 From the 28 judgments that cited improper notice or improper service of notice as the basis for rejection, the following notices appear to be the oft-cited subject matter:

- (i) Notice summoning a party to arbitration;
- (ii) Notice of arbitrator appointment;
- (iii) Notice of list of arbitrators;
- (iv) Notice of dispute resolution session (or hearing),

and understandably so. These are the notices that will indicate (a) that the party(ies) to the arbitration agreement have had the proper notice of a legal process providing them with the opportunity to be heard in the arbitration, (b) when the statute of limitations and other limitation periods should run, and (c) whether the agreed arbitration procedure has been complied with. As to the notice of list of arbitrators, it is not common that such notice is required in other jurisdictions, and it is also not clear what list (of arbitrators) is being referred to.

B. Service of notice to the improper party; proof of notice and its contents

5.16 In Case No. 8,¹⁰⁴ the notice of arbitrator appointment was served on a person who had no authority to sign and confirm receipt of the notice on behalf of a respondent-company as the person who received the notice was not its legal representative. In rejecting the petition, the Court referred to documents (without stating specifically the nature and content of documents) that were couriered to the respondent-company via FedEx. The Court said the arbitrator did not provide any evidence indicating that the required notices and documents were indeed sent via FedEx to the respondent-company. This case also rejected the petition on the ground that the arbitrator had no jurisdiction as the arbitration agreement specifically mentions 'Commerce and Industry Chamber Geneva, Switzerland', and yet the arbitrator

¹⁰³ People's procuracies are state agencies exercising the power to prosecute and supervise judicial activities of the Socialist Republic of Vietnam.

¹⁰⁴ The case references used in Part 5 is a numerical reference to the Supreme People's Court judgments as published on the Ministry of Justice's website: <https://moj.gov.vn/tt/Pages/dlcn-va-th-tai-Viet-Nam.aspx> (last accessed on 31 July 2021). Cases published elsewhere are referred to by their court reference number.

proceeded under the auspices of the Swiss Chambers' Arbitration Institution.

- 5.17 Case No. 41¹⁰⁵ also referred to service of the relevant notices by FedEx. In this case, there was proof from FedEx in the form of a shipping receipt, but the Court stated such receipt did not identify the contents of the documents served on the respondent-company. It also did not state the specific address but only the country and city. Service of notices by email was permitted under the arbitral institution rules in this matter, but the Court observed that the email address where the notices have been served was not the official email address of the respondent-company. Additionally, the documents provided to the respondent-company did not prove that the arbitration proceedings had been conducted properly, resulting in the respondent-company not having received the arbitral award within the time period to exercise its right to make the necessary application in court.
- 5.18 Case No. 77 had involved notices sent to the email address of an intermediary company, and not to the official email address of the proper party in the dispute. The intermediary company was not the party to the arbitration agreement. Lack of proper notice resulted in denying the relevant party its opportunity to be heard in the arbitration.
- 5.19 Case No. 13 is quite peculiar. The respondent-company, through its lawyer in the arbitration, requested the International Chamber of Commerce in Singapore (**ICC**) court of arbitration for a 'list of arbitrators', which the ICC court did not grant. This is understandable as there is no provision in the ICC Rules for its court of arbitration to provide a 'list of arbitrators' to a requesting party. If at all, the ICC Secretariat has the obligation to notify the parties to the arbitration when arbitrators are appointed by the ICC court, but there is no obligation for the ICC court to provide a 'list of arbitrators' to any party prior to the constitution of the tribunal.
- 5.20 The respondent-company also complained that at the session of the ICC court that appoints arbitrators in arbitration matters, the respondent-company's lawyers were not present to represent the respondent-company, and that there had been no minutes of that session confirming the appointment of arbitrators is in accordance with the ICC Rules then in force. The Hanoi People's Court rejected the petition for recognition of the arbitral award (issued in 2011) on the basis that the arbitrator appointment procedure violated the rights and interests of the respondent-company and it was not in accordance with the procedure set out in Article 8 (Number of Arbitrators) of the ICC Rules then in force.
- 5.21 The reasons behind the Court's rejection are peculiar to the extent that there is no requirement under the ICC Rules for the ICC Court of Arbitration to grant a request for a list of arbitrators, a full detailed minutes of its session(s), including sessions that appoint arbitrators in ICC matters, and/or for lawyers in arbitration matters to be present at the ICC Court's session that

¹⁰⁵ Decision No. 1245/2013/KDTM-St dated 8 October 2013 of the People's Court of Ho Chi Minh City.

appoints arbitrators. Crucially, the confidential nature of the work of the ICC Court has been set out even in the older versions of the ICC Rules. In the ICC Rules 1998 (which might have been the version of the ICC Rules applicable to the arbitration in this case), the confidential character of the ICC Court's works was set out in Appendix II, Article 1.

- 5.22 Case No. 22 is similar to Case No. 13. In Case No. 22, the SIAC arbitral award was issued in 2014, and the arbitration proceedings may have proceeded under the SIAC Rules 2013. It involved complaints of alleged lack of notice of the 'list of arbitrators', that SIAC did not provide such list, that the parties were not consulted in the appointment process of the arbitrator, and thus in violation of Rule 6.1 (Number and Appointment of Arbitrators), SIAC Rules. The arbitrator also proceeded on a documents-only basis without the agreement of the parties in violation of Rule 5.2(c), SIAC Rules that provides unless the parties agree that the pending dispute shall be decided on the basis of documentary evidence only, the tribunal shall hold a hearing for the examination of witnesses and experts as well as for any hearing on the merits.
- 5.23 The Court rejected the petition and relied on the SIAC Rules then in force, except that the SIAC Rules do not require the SIAC to provide a "list of arbitrators" to a requesting party. The number and appointment process of arbitrators must be in accordance with the parties' agreement or, in the absence of any express agreement, in accordance with the applicable rules of arbitration. It is not clear from the available information the agreed number of arbitrators and the procedure applied in the appointment of arbitrators in this matter.
- 5.24 Rule 9, SIAC Rules 2016 (then Rule 6, SIAC Rules 2013), however, provides for two ways that the SIAC's discretion could trump the parties' agreed appointment procedure. First, a party's *nomination* of an arbitrator does not necessarily translate to *appointment* of the arbitrator so nominated. The SIAC president has the sole discretion whether or not to appoint the arbitrator(s) nominated.¹⁰⁶ Second, Rule 9 also provides that, by default, a sole arbitrator shall be appointed, unless the parties have agreed otherwise or it appears to the SIAC registrar that the dispute warrants the appointment of three arbitrators. Despite what the parties might have agreed upon, the SIAC registrar could still trump such agreement if, in the exercise of her discretion, the registrar determines the nature of the dispute necessitates the appointment of three arbitrators. The parties' choice for a SIAC-administered arbitration is also, by implication, a choice to proceed with the SIAC Rules. Therefore, the provisions under the SIAC Rules that could trump the parties' agreed procedure might have been the source of complaint made by the respondent-company in Case No. 22.
- 5.25 The above-mentioned cases highlight the following:
- (i) The required notices in foreign arbitrations must be served on the proper party. If the proper party is a company, then the notices should be served on the "legal

¹⁰⁶ Rule 9.5, SIAC Rules 2016 (Rule 6.5, SIAC Rules 2013).

representative" of the company, and not on the branch, or any employee of the company (e.g. deputy, director, or president of the company) who is not the named "*legal representative*" of the company. The legal representative registered in the official documents of an enterprise is usually the general director, a member of the board, or a member of the top management of the enterprise. In practice, however, it is difficult to serve the arbitration documents to the legal representative of the company by personal service. As is the case in many jurisdictions, it is not usual for top management members to be waiting at the reception desks ready to receive court or arbitration documents;

- (ii) Service of notices could be made by courier or by email. Either way, it must be made on the registered or official physical address or official email address of the proper party and proof of receipt of the notices must be stated in the arbitral award. Crucially, the content of the documents and notices served on the proper party should also be stated in the arbitral award;
- (iii) The arbitrators should decline jurisdiction if they were appointed under the wrong arbitral institution.

C. Basic principles of the law of Vietnam

- 5.26 It is suggested that a key issue that needs to be resolved is the definitive interpretation of "*fundamental principles*" or "*basic principles*" of the laws of Vietnam. It could be perceived as too broad a basis for rejecting petitions for recognition of foreign arbitral awards and is ripe for ambiguous and conflicting interpretation for future users of arbitration. Although there had been guidance from the Supreme Court, such guidance is not (yet) in the form of a precedent that could be relied upon by courts determining similar issues in subsequent proceedings. The application of "*fundamental principles*" or "*basic principles*" of the laws of Vietnam is, to date, subject to the exercise of wide discretion of the enforcement court.
- 5.27 In Decision No. 09/2023, the Court relied on the fundamental principles violation when it refused to recognise and enforce an SIAC award. The Court determined there was such a violation when the tribunal refused to consider the respondent's request to postpone the hearings until after the Supreme Court's review of a lower court's judgment in a related criminal case. The lower court's ruling in the criminal case was relied upon in the arbitration by the claimant's expert which the tribunal then had relied on in the award. The Supreme Court may have issued its judgment on the criminal case after the arbitration hearing but before the petition for recognition was filed in Vietnam; in its judgment, errors were found in the lower courts' decision. Thus, the enforcement Court considered the Supreme Court's judgment – had the arbitration hearings been postponed - could have provided the tribunal a complete background of the arbitration matter. The request for hearing postponement was thus reasonable and should have been granted by the tribunal, denying so was unjust under the circumstances.

- 5.28 According to the submissions made by the Procuracy, the tribunal did adjourn the hearing dates from August 2020 to February 2021. However, there has not been any determination yet from the Supreme Court on the arbitration respondent's request for judicial review of the lower court's judgment in the criminal case. Decision No. 09/2023 was issued and yet the Supreme Court made no decision regarding the judicial review proceedings. Without a judicial review decision overturning the appellate court judgment, the latter remains final and binding.
- 5.29 In the same Decision, the Court also reasoned that the application of Singapore law but not Vietnamese law (in particular, Chapter XX of the Civil Code 2015) to resolve a tort claim relating to a share purchase agreement signed and performed in Vietnam is against the fundamental principles of Vietnamese law without, however, specifying which "*fundamental principle(s) of Vietnamese law*" was being referred to.
- 5.30 Several decisions illustrate the extent of review that some Vietnamese courts may take in relation to arbitral awards, particularly as regards the "*fundamental principles*" ground to set aside or to reject petitions for recognition. Although these decisions are not within the context of recognition and enforcement of foreign arbitral awards in Vietnam, they help to shed some light on the approach of the local courts regarding their interpretation of "*fundamental principles of Vietnamese law*".
- 5.31 In Case No. 04/2020/QD-PQTT,¹⁰⁷ the People's Court of Ha Noi set aside a domestic award on the basis that the tribunal did not order the production of evidence requested by the claimant. The claimant had sent a request to the VIAC tribunal to collect documents and evidence that may be used against the respondent. At issue was whether or not the respondent used the VND61 billion deposit made by the claimant and for what purpose. The Court ruled that the tribunal violated Article 46.2., LCA, and Article 19.2., VIAC Rules when it refused the respondent's request. Further, the Court said that the incomplete evidence violated the mandate of arbitrators to be impartial and objective (Articles 4.2. and 4.3., LCA). The Court also ruled that the award did not comply with Article 61.1(dd), LCA, having been issued without reasons and where the parties had not previously agreed for the tribunal to issue an unreasoned award. This case is notable because it straddles the thin line between the duties of a supervisory seat court to ensure equal opportunity to be heard for both parties and the duty not to encroach and review the award's merits. On the one hand, the tribunal's authority to conduct the proceedings as it sees fit, to be the master of procedure, must be respected. This authority extends to its wide discretion to order (or not to order) in the evidence gathering or collection stage. However, an enforcement / setting aside court should also consider whether or not a tribunal's exercise of its powers resulted in a denial of equal opportunity to be heard or due process.

¹⁰⁷ Court Decision No. 04/2020/QD-PQTT issued by the People's Court of Ha Noi, dated 29 May 2020.

- 5.32 A similar scenario was the subject matter in Case No. 596/2021/QDST-KDTM.¹⁰⁸ The People's Court of Ho Chi Minh City set aside an award that did not consider and review the related documents and appendices to the main contract and therefore the Court deemed the award to have violated the principle of equal treatment under Vietnamese law. It could be argued that tribunals have the duty to review all contracts related to the main contracts between the same parties, and failure to do so may mean that the award failed to consider all the issues and facts of the case and could thus be considered "incorrect". However, Article 68, LCA (listing the grounds for setting aside arbitral awards) does not specifically include the failure of the tribunal to issue a "correct" decision on the merits. This case shows Vietnamese Courts' inclination to review the "correctness" of an award via the lens of the fundamental principles basis.
- 5.33 In Case No. 554/2020/QDST-KDTM,¹⁰⁹ the People's Court of Ho Chi Minh City set aside a domestic award on the basis that the tribunal did not apply the Law on Insurance Business to an insurance contract. Moreover, the tribunal appointed an assessor to determine the cause and extent of the loss but did not accept the conclusion of the assessor. The Court considered this to be contrary to the Law on Insurance Business, and is therefore, contrary to the fundamental principles of Vietnamese law. Although the tribunal may have indeed misapplied the law, it may be argued that the position the Court took is considered a review on the merits, proscribed by Article 71, LCA.
- 5.34 In Decision No. 12/2023/QD-PQTT¹¹⁰, the Court set aside a VIAC award because the authorisation documents (required in order for the authorised representatives of the claimant to properly participate in the arbitral proceedings) were not duly legalised under Vietnamese law (among other grounds). The tribunal held that it had the right to not require the documents to be legalised as the LCA does not require documents in arbitration to be legalised. The tribunal also held that the procedure applicable to Vietnam court proceedings should not apply to arbitration proceedings. However, the Court then held that the Civil Code and the Civil Procedure Code (which require authorisation documents to be legalised) are part of the fundamental laws of Vietnam. In addition, the Court said the claimant had acknowledged that the documents should indeed be legalised as it later submitted legalised documents. The Court also determined the presence of bias on the part of the tribunal when it accepted evidence from the claimant without requiring an expert's examination on the signatures despite the respondent's request. The tribunal thus violated Article 46.3 of the LCA. The Court then set aside the arbitral award being contrary to the basic principles of Vietnamese law.

¹⁰⁸ Court Decision No. 596/2021/QDST-KDTM issued by the People's Court of Ho Chi Minh City, dated 27 April 2021.

¹⁰⁹ Court Decision No. 554/2020/QDST-KDTM dated 12 May 2020 of the People's Court of Ho Chi Minh City.

¹¹⁰ Decision No. 12/2023/QD-PQTT dated 04 July 2023 of the People's Court of Hanoi.

D. Lack of authority

- 5.35 In Case Nos. 9, 10, 46, the relevant notices were served on a “branch” of the respondent-company, and not on the respondent-company itself. Under Vietnamese law, a branch is a separate (but dependent) unit from the main company. A branch cannot be made a respondent in a matter in arbitration or litigation. Therefore, service to a branch meant improper service upon the respondent-company. It follows that the real party to the arbitration was not notified of the relevant arbitral procedure, such as the appointment of the arbitrator and the commencement of the foreign arbitration.
- 5.36 In Case No. 16, the president of the respondent-company did not have the capacity to sign the contract that contained the arbitration agreement as the president was not the registered legal representative of the respondent-company. In Case No. 19, the person who signed the contract (and the arbitration agreement contained therein) was the deputy of a branch of the respondent-company, and again, not the registered legal representative. As such, neither the president nor the deputy has the authority to sign the contract and the arbitration agreement. Additionally, the required notices were sent to the respondent-company’s branch in Ho Chi Minh city when they should have been sent to the registered address of the respondent-company in Hanoi. Case Nos. 38, 39, 40, 42, 43 also served the relevant notices to the director of a company who was not the legal representative of the respondent-company and therefore the authorisation made by the director to the lawyers representing the respondent-company in the arbitration was invalid.
- 5.37 Case No. 75 stated that failure to provide proof of the capacity of a legal representative is contrary to the basic principles of the laws of Vietnam regarding representation as set out in Article 73, Civil Procedure Code. In this case, the person who signed the main contract did not present any document (e.g. the company’s charter) to indicate his capacity and authority to act as a legal representative from the beginning of the arbitration proceedings.
- 5.38 Case No. 76 is unique in its terms. The two disputing parties had already given up their rights and obligations in the main contract such that there was no more obligation for one party to pay the other party any liability. There was thus no more dispute. The Court said that the arbitration was contrary to the basic principles of Vietnamese law, without specifying what area of Vietnamese law was indeed violated.
- 5.39 Case Nos. 77, 79, and 80 dealt with an award debtor who was not the signatory-party that signed the main contract and the arbitration agreement. The Court said that the arbitration agreement was invalid insofar as the award debtor was concerned. There was no clear agreement on the part of the award debtor to be bound by the main contract and the arbitration agreement and therefore the resulting arbitral award was made against the basic principles of Vietnamese law. In Case No. 79, the Court said the unilateral initiation of arbitration by the

award creditor against a non-party is contrary to the basic principles of Vietnamese law.

- 5.40 Vietnam has taken great strides in developing a more robust and arbitration-friendly legal landscape, albeit with some setbacks. The LCA continues to be widely accepted in the arbitration community as an arbitration-friendly legal framework. Certain judgments of the Court, however, that rejected petitions for enforcement of foreign arbitral awards may be perceived as two steps back in its attempts to develop Vietnam as a regional arbitration hub.

E. Improper arbitral procedure

- 5.41 In Decision 11/2019, the Hanoi People's Court set aside a VIAC award on 3 principal grounds, which are all related to the arbitration procedure. First, the tribunal decided to change the hearing venue from Hanoi to Osaka and Singapore. The tribunal's decision was a result of respondent's commencing suit against the tribunal members in their personal capacity, in relation to adverse interim relief order issued by the tribunal. The Court considered the change of hearing venue as a departure from the parties' agreement to hold the hearings in Hanoi. Second, the tribunal excluded the respondent's witnesses' evidence as they did not appear at the hearing. In doing so, the tribunal cited the IBA Rules, although acknowledged that the IBA Rules were merely guidelines and are thus not legally binding. The Court, however, considered the tribunal to have violated Article 56.2, LCA which requires tribunals to proceed with the arbitration on available documents and evidence. The Court said further that the IBA Rules had unfairly infringed the respondent's interests. Third, the tribunal relied solely on the claimant's expert evidence in calculating the damages quantum. The Court considered this to be in violation of Article 46.3, LCA, as the tribunal was to make its own appraisal on quantum aspects. It is not clear whether the Court's decision is a summon on arbitrators to quantify damages on its own, without the assistance of expert report(s) on damages should there be only one (1) side presenting an expert report.
- 5.42 In an appellate decision in 2021,¹¹¹ the Vietnamese court ruled against recognising an award issued by the China Guangzhou Arbitration Commission (**CGAC**) does not comply with the Rules of CGAC. The respondent in the arbitration filed a counterclaim, but it was not accepted and considered by the tribunal. Article 19 of CGAC Rules provides that the counterclaim, if any, shall be considered by the arbitrators. However, the award neither mentioned nor resolved the counterclaim. The court then rejected enforcement of the CGAC award pursuant to Article 459(1)(dd), Civil Procedure Code 2015 (which is similar to Article V(1)(d) of the New York Convention). It is not clear from the Court's judgment the reason behind the non-determination of the counterclaims, e.g. respondent might not have paid the deposits required for such counterclaim to be determined by the tribunal.
- 5.43 In Decision No. 09/2023, the Court held the SIAC tribunal had violated the rules or protocol for online hearings. Under such

¹¹¹ Decision No. 188/2021/QD-PT dated 31 March 2021 of the People's High Court in Hanoi.

rules, the parties were not allowed to use virtual background and the venue or room party may use for the should be seen clearly without any visual obstacle or distraction. The claimant's counsel in this case used curtains in their hearing room despite the opposition from the respondent. The tribunal then carried on with the hearing. The Court rejected the recognition petition on the basis that the hearing proceeded violating the agreed hearing rules.

F. Arbitrability

- 5.44 Decision No. 09/2023 provides a notable example on the approach of Vietnamese courts regarding the arbitrability of a dispute. In this decision, the Court held the enforcement of the SIAC award in Vietnam would lead to enforcement orders to be made against the movable and immovable assets of the award debtors in Vietnam. Under Vietnamese law, disputes relating to immovable assets in Vietnam shall belong to the exclusive jurisdiction of Vietnamese courts. It is worth noting that the arbitration's subject matter is a disputed monetary claim arising from a share purchase agreement, with no connection at all to any dispute involving ownership or possession of immovable assets in Vietnam. This finding of the High Court in Hanoi is arguably risky and may mean that at any time the *enforcement* of a foreign arbitral award may relate to immovable assets in Vietnam (e.g. the need to sell immovable assets to pay for monetary obligations) the award will not be recognised and enforced by Vietnamese Courts.
- 5.45 In an earlier 2016 decision of the High Court in Ho Chi Minh City,¹¹² the High Court also ruled that an SIAC award on a dispute arising from a share purchase agreement could not be resolved by arbitration, as it was related to immovable assets in Vietnam. Prior to the issuance of the SIAC award, there was a judgment made by a Vietnamese Court, which held that the governing law and arbitration clause of the share purchase agreement was invalid, as the dispute arising from such agreement (which relates indirectly to immovable assets) is within the exclusive jurisdiction of Vietnamese Courts.

¹¹² Decision No. 33/2016/QDPT-KDTM of the High Court in Ho Chi Minh City dated 8 August 2016.

6

Case Study: An Analysis of Arbitration-Assistive Judgments



Recognition and Enforcement of Foreign Arbitral Awards in Vietnam:

A Case Analysis of *Sojitz Pla-Net Corporation v Rang Dong Holding Joint Stock Company*¹¹³

A. Introduction

- 6.1 This section examines the recent case of Sojitz Pla-Net Corporation (**SPNC**) v Rang Dong Holding Joint Stock Company (**Rang Dong Holding**), in the context of the recognition and enforcement of a foreign arbitral award in Vietnam (**the Case**).
- 6.2 The Case involved a dispute arising from a share sale and purchase agreement entered into by and among SPNC (as the buyer), Rang Dong Holding (as the seller) and others, in 2017 (**the SPA**). This dispute led to:
- (a) arbitration at the Singapore International Arbitration Centre (**SIAC**) under the SIAC Rules of Arbitration and seated in Singapore; and
 - (b) a subsequent petition for recognition and enforcement in Vietnam of the arbitral award (**the SIAC Arbitral Award**) issued by an arbitral tribunal constituted under the SIAC Rules of Arbitration (**the SIAC Arbitral Tribunal**) and duly verified and formalised by the SIAC.

B. Background

- 6.3 SPNC and Rang Dong Holding (among others) entered into the SPA in 2017. Pursuant to the express provisions of the SPA, SPNC acquired from Rang Dong Holding 20% of the issued and fully paid-up ordinary shares (**the Purchased Shares**) in the charter capital of an existing subsidiary of Rang Dong Holding (namely, Rang Dong Long An Plastic Joint Stock Company (**Rang Dong Long An**), for a purchase price in the amount of VND174,375,000,000 (**the Purchase Price**).
- 6.4 Although the share sale and purchase transaction provided for under the SPA (**the Share Transfer Transaction**) was duly completed in accordance with the express provisions of the SPA and the applicable laws of Vietnam (**SPA Completion**), a dispute (**the Conditions Subsequent Dispute**) arose between SPNC and Rang Dong Holding (**the Parties**) after SPA Completion, in relation to the matter of whether or not Rang Dong Holding had fulfilled, would be able to fulfil, and/or ought to have been required by SPNC to fulfil, the full list of conditions subsequent (**the Conditions Subsequent**) to which the Parties had agreed under the express provisions of the SPA.
- 6.5 The Parties were unable to resolve the Conditions Subsequent Dispute, which resulted in SPNC exercising a right under the express provisions of the SPA to terminate the SPA and demand the immediate repayment by Rang Dong Holding of

¹¹³ This part has been the subject-matter of Frasers Law Company's legal update published on 5 December 2023.

an amount being equivalent to 90% of the Purchase Price (namely, VND156,937,500,000) (**the 90% Repayment Amount**).

- 6.6 Despite Rang Dong Long An having purported to de-register the Purchased Shares from the name of SPNC and re-register the Purchased Shares back into the name of Rang Dong Holding, Rang Dong Holding refused to repay the 90% Repayment Amount upon SPNC's demand and the Parties were unable to resolve the matter by negotiation, which resulted in SPNC commencing arbitration proceedings (**the SIAC Arbitration Proceedings**) against Rang Dong Holding in the SIAC, under the SIAC Rules of Arbitration, located and seated in Singapore, in accordance with the express dispute resolution provisions of the SPA.
- 6.7 Under the SIAC Arbitration Proceedings, SPNC sought to recover from Rang Dong Holding the 90% Repayment Amount, or damages in lieu thereof, in addition to interest, costs, and certain other relief.

C. The SIAC Arbitral Award

- 6.8 The SIAC Arbitral Tribunal under the SIAC Arbitral Award made the following determinations, in relation to the various claims and/or purported counter-claims which the Parties had made against one another during the course of the SIAC Arbitration Proceedings:
- (a) That SPNC succeeded in its claim.
 - (b) That SPNC lawfully terminated the SPA.
 - (c) That Rang Dong Holding breached the SPA by failing to repay the 90% Repayment Amount to SPNC immediately upon termination of the SPA by SPNC (**the Key Contractual Breach**).
 - (d) That Rang Dong Holding must pay to SPNC the amount of VND156,937,500,000 as damages (**the Damages Award**).
 - (e) That Rang Dong Holding Company must pay to SPNC interest at the rate of 10% per annum on the sum of VND156,937,500,000 in respect of the period from 1 April 2020 (the due date for repayment of the 90% Repayment Amount), until the actual date of payment (**the Primary Interest Award**).
 - (f) That SPNC was not liable to Rang Dong Holding for any costs incurred by Rang Dong Holding in relation to its performance of the SPA (**the No Liability Finding**).
 - (g) That Rang Dong Holding must reimburse SPNC for the SIAC Arbitral Tribunal's fees and charges as well as the SIAC's administrative fees and charges, in the amount of SGD371,563.60 (**the Arbitration Costs Award**).
 - (h) That Rang Dong Holding must reimburse SPNC for its legal and other reasonable costs, in the amounts of

USD585,974.35 and SGD7,414.20 (**the Legal Costs Award**).

- (i) That Rang Dong Holding must pay to SPNC interest at the rate of 5.33% per annum on the amounts awarded under the Arbitration Costs Award and the Legal Costs Award, in respect of the period from the date of the SIAC Arbitral Award until the date of actual payment (**the Secondary Interest Award**).
 - (j) That all other requests and claims were rejected.
- 6.9 Significantly, the Damages Award arose directly from the Key Contractual Breach, the substance of which was the breach by Rang Dong Holding of its obligation under the express provisions of the SPA to repay to SPNC the 90% Repayment Amount immediately upon SPNC's termination of the SPA (**the Immediate Termination Repayment Obligation**).
- 6.10 The SIAC Arbitral Tribunal:
 - (a) did not permit Rang Dong Holding to prosecute against SPNC its proposed counter-claim to recover certain alleged costs (**the Alleged Transaction Costs**) arising from its performance of the SPA (**the RDH Counter-claim**), due to the fact that Rang Dong Holding had refused to pay the counter-claim fees required under the provisions of the SIAC Rules of Arbitration (**the Counter-claim Fees**);
 - (b) rejected the assertion of Rang Dong Holding that it had a right to offset the Alleged Transaction Costs against any amount which may be awarded in favour of SPNC (without this assertion constituting a counter-claim) (**the Alleged Offset Right**); and
 - (c) made the No Liability Funding, on the basis of the express provisions of the SPA which specified that each Party would each bear the entirety of its own costs arising from its entry into the SPA and its performance of its obligations under the SPA.
- 6.11 The SIAC Arbitral Award required Rang Dong Holding immediately to pay to SPNC the entirety of the awarded amount, inclusive of interest calculated up to the actual date of payment (**the Awarded Amount**).
- 6.12 Despite SPNC then having demanded immediate payment of the Awarded Amount in accordance with the provisions of the SIAC Arbitral Award, Rang Dong Holding refused to pay to SPNC the whole or any part of the Awarded Amount.

D. Recognition and enforcement – first instance

- 6.13 SPNC proceeded to petition the People's Court of Ho Chi Minh City (***the First Instance Court***) to recognise the SIAC Arbitral Award for enforcement in Vietnam (***the Recognition Petition***).
- 6.14 At the hearing of the Recognition Petition (***the First Instance Hearing***), the Procurator of the People's Procuracy of Ho Chi Minh City, who appeared before the Court in the First Instance Hearing, argued that:
- (a) there were no valid legal grounds upon which the recognition of the SIAC Arbitral Award for enforcement in Vietnam could be refused; and
 - (b) the SIAC Arbitral Award should be recognised by the First Instance Court for enforcement in Vietnam.
- 6.15 Despite the opinion of the Procurator, the First Instance Court refused to recognise the SIAC Arbitral Award for enforcement in Vietnam, on the grounds that, for the purposes of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (***the NY Convention***), a number of elements of the SIAC Arbitral Award were “...*inconsistent with the fundamental principles of Vietnamese law*...”.
- 6.16 In reaching its conclusions, the First Instance Court identified and relied upon two “...*fundamental principles of Vietnamese law*...”, namely:
- (a) the principle of freedom to enter voluntarily into agreements (***the Principle of Freedom to Contract***); and
 - (b) the principle that persons and entities have the right to seek to have their lawful rights and interests protected by courts or arbitral tribunals of competent jurisdiction (***the Principle of Right to Claim***).
- 6.17 The First Instance Court identified a number of respects in which it considered that the SIAC Arbitral Award was inconsistent with the Principle of Freedom to Contract, namely the following:
- 6.18 **Failure to apply the Commercial Law**
- (a) The SPA was governed by the laws of Vietnam.
 - (b) The First Instance Court found that the SIAC Arbitral Tribunal had failed to apply the laws of Vietnam in making the SIAC Arbitral Award, in a number of respects, including by failing to apply the Law on Commerce (2005) of Vietnam (***the Commercial Law***) when interpreting and making determinations in relation to the express provisions of the SPA.
 - (c) The SIAC Arbitral Tribunal had found that it was unnecessary for it to determine whether or not the SPA and the Share Transfer Transaction were regulated by the Commercial Law (as asserted by Rang Dong Holding but denied by SPNC), on the grounds that the Immediate Termination Repayment Obligation could not in any event be said to constitute a “liquidated

damages” provision (contrary to the assertions of Rang Dong Holding). On this basis, the SIAC Arbitral Tribunal declined to make any determination as to the matter of whether or not the SPA and the Share Transfer Transaction were regulated by the Commercial Law (as it was unnecessary for it to do so).

- (d) The First Instance Court found that the SIAC Arbitral Tribunal’s failure to apply the provisions of the Commercial Law in determining the SIAC Arbitral Award was inconsistent with the Principle of Freedom to Contract.
- (e) The First Instance Court reasoned that since the SPA was governed by the laws of Vietnam:
 - (i) the SPA and the Share Transfer Transaction were regulated by the Commercial Law;
 - (ii) the provisions of the Commercial Law should have been applied by the SIAC Arbitral Tribunal in determining the liability of Rang Dong Holding under the SPA (in precedence over the Civil Code, any other laws of Vietnam, and/or the express provisions of the SPA); and
 - (iii) as a result of the failure of the SIAC Arbitral Tribunal to apply the Commercial Law in determining the liability of Rang Dong Holding under the SPA, the SIAC Arbitral Award was inconsistent with the Principle of Freedom to Contract.

6.19 Undue reliance upon the express provisions of the SPA

- (a) The First Instance Court found that in determining the SIAC Arbitral Award, the SIAC Arbitral Tribunal had relied to a significant extent on the express provisions of the SPA, particularly in relation to the meaning and effect of the Immediate Termination Repayment Obligation, and in so doing had failed to cite express provisions of Vietnam legislation to an extent which the First Instance Court considered to be necessary.
- (b) The First Instance Court determined that because the SIAC Arbitral Tribunal, in relation to a number of key matters in dispute between the Parties, interpreted and applied the express provisions of the SPA without also citing express provisions of Vietnam legislation as part of its analysis in determining those matters:
 - (i) the SIAC Arbitration Tribunal failed to apply the agreed governing law of the SPA (namely, the laws of Vietnam) when making its determinations in relation to key matters in dispute between the Parties; and
 - (ii) as a result, the SIAC Arbitral Award was inconsistent with the Principle of Freedom to Contract.

6.20 **Unlawful application of the Singapore Arbitration Law**

- (a) The First Instance Court found that:
 - (i) in making the Secondary Interest Award, the SIAC Arbitral Tribunal had relied on the provisions of the laws of Singapore relating to international, commercial arbitration (**the Singapore Arbitration Law**); and
 - (ii) by applying the Singapore Arbitration Law in making the Secondary Interest Award, the SIAC Arbitral Tribunal failed to uphold and apply the Parties' choice of governing law under the SPA, namely the laws of Vietnam.
- (b) As a result of these findings in relation to the Secondary Interest Award, the First Instance Court determined that the SIAC Arbitral Award was inconsistent with the Principle of Freedom to Contract.

6.21 **Inconsistency with the Principal of Right to Claim**

In addition, the First Instance Court found that as a result of the SIAC Arbitral Tribunal having:

- (a) refused to allow Rang Dong Holding to prosecute the RDH Counter-claim;
- (b) rejected the existence of the Alleged Offset Right in relation to the Alleged Transaction Costs; and
- (c) made the No Liability Finding in relation to the Alleged Transaction Costs, as requested by SPNC,

the SIAC Arbitral Award was inconsistent with the Principle of Right to Claim.

E. Recognition and enforcement – appeal to the High Court in HCMC

6.22 SPNC proceeded to lodge an appeal to the High Court in Ho Chi Minh City (**the Appellate Court**), seeking to overturn the First Instance Decision and to have the Appellate Court recognise the SIAC Arbitral Award for enforcement in Vietnam.

6.23 The People's Procuracy of Ho Chi Minh City also lodged an appeal to the Appellate Court, seeking to overturn the First Instance Decision and to have the Appellate Court recognise the SIAC Arbitral Award for enforcement in Vietnam.

6.24 The key legal grounds upon which SPNC appealed against the First Instance Decision were the following:

- (a) That the First Instance Court acted in contravention of the NY Convention and the Civil Procedure Code, by revisiting the substantive merits of the Award when formulating and handing down the First Instance Decision.
- (b) The SIAC Arbitral Tribunal in fact applied – and correctly applied – the laws of Vietnam in determining the substantive aspects of SPNC's claims against Rang Dong Holding, despite having relied in some instances and where appropriate on the express provisions of the

- SPA without also citing express provisions of Vietnam legislation.
- (c) The SIAC Arbitral Tribunal correctly applied the Singapore Arbitration Law in making the Secondary Interest Award, due to the fact that the Secondary Interest Award was a procedural (as opposed to a substantive) matter and therefore to be determined under the laws of the jurisdiction in which the SIAC Arbitration Proceedings were seated (namely, Singapore).
 - (d) If Rang Dong Holding had wished to prosecute the RDH Counter-claim against SPNC, it should have acted in accordance with the SIAC Rules of Arbitration by paying the necessary Counter-claim Fees.
 - (e) In making the No Liability Finding, the SIAC Arbitral Tribunal merely applied the express provisions of the SPA, and this did not amount to Rang Dong Holding being denied any Vietnam law right to make claims to protect or enforce its rights.
 - (f) No aspect of the SIAC Arbitral Award contravened any “...*fundamental principle of Vietnam law...*”, even if it is accepted that the Principle of Freedom to Contract and the Principle of Right to Claim are indeed “...*fundamental principles of Vietnam law...*” (which SPNC neither admitted nor denied).
- 6.25 The key legal grounds upon which the People’s Procuracy of Ho Chi Minh City relied in formulating its appeal against the First Instance Decision were broadly consistent with those put forward by SPNC, as summarised in Paragraph 5.3 above.
- 6.26 The Appellate Court upheld SPNC’s appeal in full and issued a decision recognising the entirety of the SIAC Arbitral Award for enforcement in Vietnam (**the Appeal Decision**).
- 6.27 The key reasoning set out by the Appellate Court in its Appeal Decision was the following:
- (a) The First Instance Court had no jurisdiction to revisit the substantive merits of the SIAC Arbitral Award and had acted beyond the scope of its lawful powers by so doing.
 - (b) No aspect of the SIAC Arbitral Award was inconsistent with the Principle of Freedom to Contract, including:
 - (i) the SIAC Arbitral Tribunal having found it unnecessary to determine whether or not the SPA or the Share Transfer Transaction were regulated by the Commercial Law;
 - (ii) the SIAC Arbitral Tribunal having in some instances relied on express provisions of the SPA without also citing express provisions of Vietnam legislation, in making its substantive determinations; and

- (iii) the SIAC Arbitral Tribunal having applied the Singapore Arbitration Law to the procedural aspects of the SIAC Arbitration Proceedings, including in making the Secondary Interest Award.
 - (c) The primary reason why Rang Dong Holding had been prevented from prosecuting the RDH Counter-claim was its failure to pay the Counter-claim Fees as required by the SIAC Rules of Arbitration.
 - (d) No part of the SIAC Arbitral Award would operate to prevent Rang Dong Holding from endeavouring to assert in fresh arbitral proceedings its alleged rights in relation to the Alleged Transaction Costs.
 - (e) It was unreasonable for the First Instance Court to have determined that the SIAC Arbitral Tribunal's refusal to allow Rang Dong Holding to prosecute the RDH Counter-claim and/or the SIAC Arbitral Tribunal's making of the No Liability Finding were inconsistent with the Principle of Right to Claim.
 - (f) The No Liability Finding was a contractual matter within the jurisdiction of the SIAC Arbitral Tribunal and thus beyond the jurisdiction of the Courts of Vietnam.
- 6.28 The key legislative provisions upon which the Appellate Court relied in formulating and handing down the Appeal Decision were the following:
- 6.29 **Clause 4 Article 458 of the Civil Procedure Code**
- "When considering the application for the recognition and enforcement of foreign arbitral award, the Tribunal is not allowed to revisit the dispute which has been resolved by foreign arbitration in the award. The court shall only check and compare the foreign arbitral award and the documents enclosed with the application with the regulations in Chapters XXXV and XXXVII of this Code, other relevant regulations of Vietnamese law and international treaties to which the Socialist Republic of Vietnam is a member as the basis for the decision to recognise or not recognise the award."*
- 6.30 **Article 3 of the NY Convention**
- "Each Contracting State shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon."*
- 6.31 **Clause 4 Article 4 of the Civil Code**
- "Where there is any difference between the provisions of this Code and of an international treaty to which the Socialist Republic of Vietnam is a member on the same issue, the provisions of the international treaty shall apply."*
- 6.32 **Clause 3 Article 2 of the Civil Procedure Code**
- "The Civil Procedure Code applies to the settlement of civil cases involving foreign element(s); where the international treaties to which the Socialist Republic of Vietnam is a*

signatory provide otherwise, the provisions of such international treaties shall apply.”

6.33 **Article 5 of the New York Convention, setting out the instances in which recognition and enforcement of an award may be refused**

“1. *Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:*

(a) *The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or*

(b) *The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or*

(c) *The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or*

(d) *The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or*

(e) *The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.*

2. *Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:*

(a) *The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or*

(b) *The recognition or enforcement of the award would be contrary to the public policy of that country.”*

6.34 In conclusion, the Appellate Court determined, on the basis of Article 5 of the NY Convention, that:

- (a) the SIAC Arbitral Award “...does not fall within the circumstances for refusing the recognition and enforcement of the [award]...”; and
- (b) the First Instance Court acted beyond the scope of its lawful jurisdiction in refusing to recognise the SIAC Arbitral Award for enforcement in Vietnam.

F. Conclusion

- 6.35 This Case highlighted the propensity of respondents in Vietnam to seek to avoid the recognition of foreign arbitral awards for enforcement in Vietnam, by relying on the public policy exception under the NY Convention which states that foreign arbitral awards will be recognised for enforcement in Vietnam to the extent that they are not “...inconsistent with the fundamental principles of Vietnam law...”.
- 6.36 This Case further highlighted the difficulties which often arise from the fact that there is no definition under the laws of Vietnam as to what does or does not constitute a “...fundamental principle of Vietnam law...”. In the absence of such a definition, respondents often proceed on the basis that every provision of every legislative instrument in Vietnam constitutes a “...fundamental principle of Vietnam law...”, and on this basis assert that any and all aspects of foreign arbitral awards which are not based entirely upon express provisions of Vietnam law are tantamount to “...inconsistency with the fundamental principles of Vietnam law...”. Assertions of this kind sometimes persuade Vietnamese Courts, notwithstanding that such assertions are of themselves inconsistent with the NY Convention and the Civil Procedure Code.
- 6.37 This Case also illustrated the fact that Courts in Vietnam – when seeking diligently to apply the laws of Vietnam in determining applications for recognition and enforcement of foreign arbitral awards which come before them – may sometimes inadvertently act beyond the scope of the jurisdiction afforded to them by the Civil Procedure Code and the NY Convention, by revisiting the substantive merits of the relevant foreign arbitral award, as opposed to considering and determining the application for recognition and enforcement within the confines of the applicable provisions of the Civil Procedure Code and the NY Convention (as cited by the Appellate Court and reproduced verbatim in Section 5 above).
- 6.38 It would be of immense benefit to all persons and entities residing and/or doing business in Vietnam for specific legislation (and/or official Supreme Court guidance) to be issued, to define in clear and precise terms what is and what is not a “...fundamental principle of Vietnam law...”, for the purposes of the NY Convention and the Civil Procedure Code.
- 6.39 It would also be of immense benefit to all persons and entities residing and/or doing business in Vietnam for the Supreme Court to issue detailed and official guidance to the People’s Courts of all provinces and municipalities in Vietnam, for them to follow when considering and determining applications for

recognition and enforcement of foreign arbitral awards, thereby providing the provincial and municipal People's Courts with clarity as to how to:

- (a) avoid revisiting the substantive merits of foreign arbitral awards; and
- (b) remain within the confines of the applicable provisions of the Civil Procedure Code and the NY Convention (as cited by the Appellate Court and reproduced verbatim in Section 5 above).

6.40 The Appellate Court is to be commended for its clear and correct understanding and application of the key provisions of the NY Convention and the Civil Procedure Code.

Enforcing dispute resolution procedure in FIDIC Contracts¹¹⁴

- 6.41 Engineering, procurement and construction (**EPC**) contracts relating to projects located in Vietnam are mainly governed by the Construction Law¹¹⁵ and the Civil Code 2015¹¹⁶ provisions.
- 6.42 These laws are then implemented and clarified by decrees and circulars, including but not limited to: Decree No. 37/2015/ND-CP amended and supplemented by Decree No. 50/2021/ND-CP, consolidated by Integrated Document No. 02/VBHN-BXD (**Integrated Decree No. 37**),¹¹⁷ and Circular No. 02/2023/TT-BXD.¹¹⁸ Other decrees and circulars, while not specifically referring to construction contracts, may also be applicable.
- 6.43 Not many construction projects, if at all, are governed by contracts drafted and negotiated from scratch. Most experienced global players in the construction industry rely on model contracts from industry associations such as FIDIC, which were drafted on the basis of the industry's experience arising from successful projects around the world. These model contracts provide for tried-and-tested international standards having thoughtfully considered a balanced approach on the allocation and management of risk, and the roles and responsibilities of the various parties in a construction project.
- 6.44 However, while taking a model contract in verbatim breeds efficiency in the negotiations and deal-making process, not

¹¹⁴ This part has been the subject-matter of Frasers Law Company's legal update published on 13 December 2023.

¹¹⁵ Law No. 50/2014/QH13 dated 18 June 2014, as amended and supplemented by the Law No. 62/2020/QH14 dated 17 June 2020, integrated by document No. 02/VBHN-VPQH dated 15 July 2020.

¹¹⁶ Law No. 91/2015/QH13 dated 24 November 2015.

¹¹⁷ Dated 17 May 2021. This Decree applies to construction contracts funded by public investment capital, state capital other than state investment capital, and PPP projects.

¹¹⁸ This Circular expressly applies to organisations and individuals involved in establishing and managing the implementation of construction contracts of construction investment projects using public investment capital, state capital other than public investment and construction contracts between project enterprises and construction contractors implementing bidding packages under investment projects according to the PPP scheme.

having tailored it to a specific project and jurisdiction where the project is located is perilous. It is highly advisable to negotiate and tailor the model contract in order to make it consistent with the national laws applicable to the project. Without such tailoring and consistency-checking may result in certain provisions in the model contract being held unenforceable in the jurisdiction where the project is located.

- 6.45 In Vietnam, model contracts are provided in Circular No. 02/2023/TT-BXD, which refers to “work construction contracts”¹¹⁹ making clear that model contracts are to serve as guide only with no obligation for any contracting party to adopt wholesale the model contract provisions. Contracting parties are enjoined to amend and adapt these model contracts on a case-to-case basis.
- 6.46 FIDIC model contracts provide for a multi-tiered dispute resolution mechanism in the event of disputes arising between and among the contracting parties in large-scale construction projects. The mechanism kickstarts with the constitution of a Dispute Adjudication Board (DAB), then amicable settlement and then finally, arbitration. The DAB may be constituted by one or three members, and once constituted, it is mandatory for parties to complete the DAB process and obtain the DAB’s decision before resorting to arbitration.¹²⁰
- 6.47 We summarise recent salient decisions of Vietnam Courts (the **Court**) on disputes that were referred to DAB (or not referred at all), and subsequently, to arbitration pursuant to FIDIC model contracts.

Decision 09/2019/QĐ-PQTT of the People’s Court of Hanoi City (Decision 09/2019)

- 6.48 The Court rejected a petition for annulment (also known in international arbitration practice as setting aside application) of an arbitral award issued by a Vietnam International Arbitration Centre (**VIAC**) tribunal.
- 6.49 The parties employed the FIDIC Red Book 1999 (the **Red Book**) with a separate set of “special conditions” that excludes the application of Articles 20.2 (appointment of DAB members) and 20.3 (in the event of failure of the DAB procedure) of the Red Book. Also, the VIAC, instead of the International Chamber of Commerce, was selected to be the administering arbitral institution in the event arbitration is commenced.
- 6.50 The VIAC tribunal issued an award granting the claims of the claimant. The award debtor then filed a request to set aside the award with the People’s Court.

¹¹⁹ “Work construction contracts” are defined as “a type of contract for the performance of construction of the works, work items or part of construction work by design” under Decree No. 37/2015/ND-CP.

¹²⁰ The foregoing sections were similarly discussed in our article, “*Contemporary issues in Construction Contracts: Common Sources in Disputes*” of March 2023. See: https://www.frasersvn.com/api/uploads/Contemporary_Issues_in_Construction_Contracts_f9f6b9ccaa.pdf.

- 6.51 According to the award debtor, Article 20.6 of the contract (requiring amicable settlement under Article 20.5 to be completed prior to commencing arbitration) has not been complied with. The Court rejected this argument because of the parties' agreement to exclude Articles 20.2 and 20.3 of the Red Book, including all their related provisions. Consequently, Articles 20.4 and 20.5 (which are considered provisions related to the excluded articles) of the Red Book would have no application. The Court further ruled that since no DAB was constituted, and Articles 20.4. and 20.5 are not applicable, Article 20.8 (expiry of the DAB's appointment) operates to give the parties the right to file arbitration directly without need to undergo amicable settlement.
- 6.52 The Court also rejected the award debtor's argument that the award misapplied the provisions on the payment of retention money, as these are matters related to the merits of the case and therefore, outside the purview of a petition for annulment lodged in local court.
- 6.53 Decision 09/2019 appears, in all respects, to be in accordance with international best practices relating to parties' recourse to Article 20.8 (i.e. directly commencing arbitration) for failure to constitute DAB within the agreed time period. The Court had, and rightfully so, taken a prima facie approach by avoiding determining issues raised that delved into the merits of the case, which is a refreshing approach compared to arbitration-related Court decisions that were published earlier in the year, 2023. See our discussion in Part V of our Arbitration Guide in Vietnam.

Decision 02/2020/QD-PQTT of the People's Court of Hanoi City (Decision 02/2020)

- 6.54 The Court denied a petition to reverse a decision on jurisdiction issued by a VIAC Tribunal.
- 6.55 The contract involved an EPC contract between a consortium of contractors in relation to the exploration and processing of salt mines in Laos where the parties employed the FIDIC Silver Book 1999 (the **Silver Book**) and the VIAC rules.
- 6.56 Disputes arose and the claimants commenced arbitration with the VIAC. The respondent challenged the jurisdiction of the tribunal which was denied.
- 6.57 The respondent applied to the Court to reverse the tribunal's positive jurisdiction ruling and argued that the claimants commenced arbitration without undergoing the Dispute Avoidance / Adjudication Board (**DAAB**) procedure, previously named DAB, and the amicable settlement processes. Reference was made to a meeting between the parties wherein the respondent claims that it did not waive the pre-arbitral requirements at said meeting.
- 6.58 The respondent also argued that the dispute resolution clause did not specifically refer to the VIAC as the administering institution, but merely selected the procedural rules of the VIAC and Vietnam as the place of arbitration. The respondent thus claimed that VIAC had no jurisdiction.

- 6.59 On the other hand, the claimants argued they had no choice but to bypass the DAAB and amicable settlement processes as the respondent unilaterally took measures to recover the provisional payments made by the claimants, causing financial damage to the claimants. Crucially, continual correspondence was exchanged between the parties for 2.5 years attempting to discuss and settle their disputes without resolution. Therefore, the DAAB and amicable settlement processes could only prolong the unresolved disputes to the detriment of the claimants.
- 6.60 The Court rejected the respondent's argument that VIAC has no jurisdiction, and ruled that reference to the VIAC rules was sufficient to show the parties' intention and choice of VIAC as the administering arbitral institution.
- 6.61 The Court then discussed that in a petition for annulment the Court should only consider the question of the existence of an arbitration agreement, and if so, whether or not the arbitration agreement is invalid or inoperative, as provided in Articles 43 and 44 of the Law on Commercial Arbitration (**LCA**).¹²¹ The respondent's argument that the pre-arbitration procedures were not followed does not fall within the legal bases listed in the LCA. In any case, the Court considered the extensive correspondence between the parties for 2.5 years and yet the disputes remained unresolved. The claimants act of commencing arbitration without undergoing the DAAB or amicable settlement steps is not inconsistent with the purport of the agreed dispute resolution mechanism in the EPC contract.

Decision 09/2020/QĐ-PQT of the People's Court of Hanoi City (Dispute 09/2020)

- 6.62 This case refers to similar contract, parties, and arbitration proceedings in Decision 02/2020 discussed above. However, this case concerns the annulment of the arbitral award, and not the tribunal's decision on jurisdiction.
- 6.63 The respondent repeated its objections that the claimants did not comply with the pre-arbitration DAAB and amicable settlement procedures. The Court again rejected these arguments, stating that the matter was already determined in Decision 02/2020.
- 6.64 On a substantive point, the respondent argued that the tribunal failed to consider the evidence presented regarding the currency exchange rate applied in the arbitral award. The Court considered this argument falling within the merits of the dispute, which are not subject to the Court's review.

Comments

- 6.65 Decisions 02/2020 and 09/2020 are of note because they suggest that when seized with the question of compliance with pre-arbitration procedures, a Vietnam Court may take the

¹²¹ It may be noted that the language used in the Law on Commercial Arbitration mirrors the language used in the Model Law and the New York Convention, e.g., "null and void, inoperative, or incapable of being performed."

position that they may be dispensed with if they are no longer effective or if they may simply be employed or if the issue of non-compliance is raised belatedly as a delaying tactic favourable to the award debtor. Although undergoing the DAAB and the amicable settlement processes are mandatory under the FIDIC Suite of Contracts, the Court's decisions take the view to the contrary, and indeed may be a boon to parties who consider these processes as ineffective. Nonetheless, it appears that these instances must be considered as exception rather than the general rule; the DAAB and amicable settlement processes continue to be mandatory (unless otherwise excluded by agreement between the contracting parties). In any case, the DAAB and / or amicable settlement processes have clearly set out timelines, avoiding traps employed by a party that intend to delay such processes indefinitely.

- 6.66 We highlight the Court's refusal to review the merits of the decisions referred to above, aligning with international best practices in major hubs of arbitration pursuant to the provisions of the New York Convention (to which Vietnam is a signatory) and Vietnam's WTO commitments.
- 6.67 Vietnam Courts have issued decisions earlier in 2023 that rejected petitions for recognition of foreign (i.e. disputes with foreign elements) arbitral awards in Vietnam upon a merits review of the arbitral award, sending jitters in the Vietnam foreign investor community who mostly prefer offshore arbitration as the disputes resolution mechanism in their contracts. The Court decisions referred to in this article provide some degree of comfort that not all Vietnam Courts take the approach of reviewing the merits of arbitral awards (as is commonly perceived), and Vietnam Courts do not hesitate to reject jurisdictional arguments made belatedly in the process that seem to be a ploy to further delay the payment of the award debtor's liability ordered in the arbitral award.
- 6.68 We hasten to add the above decisions are not yet considered by the Supreme Court of Vietnam as precedents but it is our hope that more lower courts seized with jurisdiction to determine setting aside application / petition for annulment of domestic awards, and petitions for recognition and enforcement of foreign arbitral award would take an assiduous approach in avoiding review of the merits while also considering the context or background of a matter in determining whether the belatedly raised issue of non-compliance of DAAB and amicable settlement procedures is indeed simply a delaying tactic on the part of the award debtor.
- 6.69 We note that the DAAB and amicable settlement processes and the enforceability of their outcome is a tricky area to tread in Vietnam, with no clear legislation as to the process of its enforcement. Most players, if not all, in the construction industry in Vietnam, could altogether avoid or skip these steps and resort directly to arbitration, where the resulting arbitral award's enforcement procedure is clearly legislated.

- 6.70 These Court decisions are most welcomed in the construction industry in Vietnam where a quick outcome in the dispute resolution process, and enforcement of such outcome is always ideal. Contracting parties embroiled in a prolonged dispute resolution mechanism may emerge drowning (i.e. bankrupt) or simply swimming above the water in order to at least pay its workers in an ongoing construction project pending resolution of disputes.
- 6.71 A construction project – especially with smaller players playing sub-contractor roles - survives by its robust cash flow. Prolonged dispute resolution procedures when cash payment of certain sums are being withheld pending resolution of disputes raised by the contractor, sub-contractors or employer (including but not limited to issues on extension of time, defects, and the like) could spell survival of the fittest, or not.

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This guide is intended to be a general and high-level reference only and is not intended to be a detailed or comprehensive treatment of the legal and practical aspects of conducting disputes or transactions in and/or in connection with Vietnam.

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