



Contemporary Issues in Construction Contracts: Dispute Adjudication Boards

Enforcing dispute resolution procedures in FIDIC Contracts

December 2023

1. Engineering, procurement and construction (**EPC**) contracts relating to projects located in Vietnam are mainly governed by the Construction Law¹ and the Civil Code 2015² provisions.
2. 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**),³ and Circular No. 02/2023/TT-BXD.⁴ Other decrees and circulars, while not specifically referring to construction contracts, may also be applicable.
3. 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.
4. However, while taking a model contract in verbatim breeds efficiency in the negotiations and deal-making process, not 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.
5. In Vietnam, model contracts are provided in Circular No. 02/2023/TT-BXD, which refers to "work construction contracts"⁵ 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. 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.⁶
7. In this article, 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.

¹ 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.

² Law No. 91/2015/QH13 dated 24 November 2015.

³ 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.

⁴ 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.

⁵ "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.

⁶ The foregoing sections were similarly discussed in our article, "*Contemporary issues in Construction Contracts: Common Sources in Disputes*" of March 2023.

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

8. 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.
9. 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.
10. 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.
11. 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.
12. 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.

13. 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 Vietnam⁷.

Decision 02/2020/QĐ-PQTT of the People’s Court of Hanoi City (Decision 02/2020)

14. The Court denied a petition to reverse a decision on jurisdiction issued by a VIAC Tribunal.
15. 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.
16. Disputes arose and the claimants commenced arbitration with the VIAC. The respondent challenged the jurisdiction of the tribunal which was denied.
17. 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.
18. The respondent also argued that the dispute resolution clause did not specifically refer to the VIAC as the

⁷ Frasers Vietnam Arbitration Guide, 2023

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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.

19. 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.
20. 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.
21. 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).⁸ 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-PQTT of the People's Court of Hanoi City (Dispute 09/2020)

22. 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.

23. 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.
24. 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

25. 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 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.
26. 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

⁸ 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."
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- pursuant to the provisions of the New York Convention (to which Vietnam is a signatory) and Vietnam's WTO commitments.
27. 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.
28. 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.
29. 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.
30. 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.
31. 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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