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# FRASERS VIETNAM ARBITRATION GUIDE 2021

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Prior to joining Frasers, Earl has worked for a leading chambers of international arbitration practitioners based in Singapore for 9 years.

Earl has extensively published in the area of international arbitration most notable of which is her being a co-author of the Halsbury's Laws of Singapore: Arbitration (2017 and 2020 series). She is also an active advocate in the promotion of international arbitration and speaks on this area in various events and conferences in Japan, Cambodia, Thailand, Philippines, California (USA), Taiwan among others, and a regular judge in mooting competitions in Asia, Europe and the US.

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# PART I

# 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 has 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 Unbeknownst to everyone, the year 2020 – with the Covid-19 pandemic – was to disrupt every economy. It has disrupted cross-border trade, international supply chains, and most especially the aviation, shipping and tourism sectors. Vietnam is no exception. In the first quarter of 2020, its GDP growth fell to 3.8% compared to 6.8% for the same period in 2019. Approximately 35,000 businesses went bankrupt. Several automobile businesses in Vietnam such as Honda and Toyota suspended their operations. Thousands of companies had laid off staff. Strict measures such as closing its borders, suspending tourist visas and travel to Vietnam, lockdown and quarantine had been imposed.
- 1.3 Despite the unwelcome (but expected) effects of the pandemic, Vietnam forged on and had 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. The European Commission has made a forecast that the EU's GDP will increase by US\$29.5 billion by 2035.
- 1.4 Vietnam's resilience and its Government's capacity to contain the pandemic were instrumental in buoying up its economy. It is no wonder then that despite the pandemic creating an upheaval in certain sectors, it somehow provided an avenue for growth in other sectors. Dispute resolution by way of arbitration is no exception.
- 1.5 This Frasers Arbitration Guide 2021 (**Guide**) focuses on commercial arbitration, domestic or international (or 'foreign' under Vietnam laws) and is intended to provide guidelines 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 this Guide 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 Guide or any part of it does not constitute legal advice. For any queries related to arbitration and dispute resolution, please contact your Frasers' legal adviser.
- 1.6 The structure of this Guide is as follows:
- (i) Part 1: Introduction
  - (ii) Part 2: Overview of arbitration in Vietnam
  - (iii) Part 3: Legal framework for arbitration in Vietnam
  - (iv) Part 4: Recognition and enforcement of arbitral awards in Vietnam
  - (v) Part 5: Review of rejected petitions for recognition and enforcement of foreign arbitral awards in Vietnam.

## **PART II**

# **OVERVIEW OF 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 robust dispute resolution regime alternative to court litigation. Vietnam's rapidly developing 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. As such, foreign parties look for alternative avenues for dispute resolution to be included in the contracts they enter into for transactions in Vietnam. This necessitated legal reforms for Vietnam to address that requirement.
- 2.3 One major step that Vietnam has taken to address the need for legal reform 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 168 contracting States<sup>1</sup> 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 found it confusing.
- 2.5 On 11 January 2007, Vietnam joined the World Trade Organization as a fully-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.<sup>2</sup> One such policy that had been rigorously questioned prior to Vietnam's membership was the procedure for the resolution of commercial disputes by arbitration.<sup>3</sup>
- 2.6 Vietnam enacted the Law on Commercial Arbitration (**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 regulates the conduct of commercial arbitrations in Vietnam.<sup>4</sup> Whilst Vietnam has not fully adopted the UNCITRAL Model Law on International Commercial Arbitration (1985) (amended 2006) (**Model Law**),<sup>5</sup> the LCA was 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. The Vietnam International Arbitration Centre (**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:<sup>6</sup>
- 2.8.1 it has 274 new matters filed, a 52.3% increase from 2018's 179, and a long way from 1993's 6 matters. 40% of the new matters filed in 2019 had a

<sup>1</sup> See [https://uncitral.un.org/en/texts/arbitration/conventions/foreign\\_arbitral\\_awards/status2](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 31 July 2021).

<sup>2</sup> Report of the Working Party on the Accession of Viet Nam dated 27 October 2006, paragraphs 110 to 135.

<sup>3</sup> *ibid.*

<sup>4</sup> Article 1, Law 54 on Commercial Arbitration (17 June 2010).

<sup>5</sup> See [https://uncitral.un.org/en/texts/arbitration/modellaw/commercial\\_arbitration/status](https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status) for the current list of States that had adopted the Model Law (last accessed on 31 July 2021).

<sup>6</sup> See <https://www.viac.vn/en/statistics/2020-statistics-s37.html> (last accessed on 31 July 2021).

foreign element, and cases arising from the real estate sector witnessed the most exponential growth;

- 2.8.2 The numbers have gone down a bit in the year 2020, 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.
- 2.8.3 From 1993 to 2020, VIAC had administered a total of 2,051 cases spanning both domestic and international commercial arbitrations.



## **PART III**

# **LEGAL FRAMEWORK FOR ARBITRATION IN VIETNAM**

## **A. Vietnam laws applicable to arbitration**

- 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. 91/2015/QH13, entitled Civil Code of Vietnam, passed by the National Assembly of Vietnam on 24 November 2015 (***the Civil Code***);
  - (iv) 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;
  - (v) 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;
  - (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 foreign arbitration law which the parties agree to select to conduct dispute resolution, either inside or outside the territory of Vietnam.<sup>7</sup> Arbitration administered by arbitral institutions established under a foreign law or under the rules of foreign arbitral institutions (e.g. SIAC, ICC, LCIA, HKIAC) is 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 business organisations, could agree to proceed to domestic arbitration in Vietnam.

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<sup>7</sup> Article 3(11), LCA.

- 3.4 It is important for potential foreign arbitration users to note that distinction, as 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.

### 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 relation occurred in a foreign country;
- (iii) the participating parties are Vietnamese citizens or legal entities, but the subject matter of such civil relation is located in a foreign country.

- 3.7 For disputes that do not involve any foreign element, the applicable substantive law shall be Vietnamese law.<sup>8</sup> For disputes that had a foreign element, the applicable substantive law shall be that agreed upon by the parties and if not so agreed, that which the arbitral tribunal deems appropriate.<sup>9</sup>

- 3.8 Whether a “*dispute with a foreign element*” could be arbitrated by way of foreign arbitration remains to be an unsettled topic. 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.<sup>10</sup> A “*foreign investor*” means “*an individual with foreign nationality or an organization established in accordance with foreign law conducting business investment activities in Vietnam*”.<sup>11</sup> The Law on Investment 2021 had made no mention of the concept of “*foreign-invested business organisation*” (which was provided for in the 2014 version of the law) but the law may be referring to it when referring to “*economic organisation with foreign investment capital*”.

- 3.9 Disputes over business investments in Vietnam shall be initially settled through negotiation and conciliation.<sup>12</sup> If dispute resolution cannot be reached through negotiation and conciliation, the dispute shall be resolved by arbitration or by the courts.<sup>13</sup> 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) by a Vietnamese court (save for cases that would fall within Article 14(3) of the Law on Investments 2021).<sup>14</sup>

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<sup>8</sup> Article 14.1, LCA.

<sup>9</sup> Article 14.2, LCA.

<sup>10</sup> Article 3(18) read together with Article 14, Law on Investments 2021.

<sup>11</sup> Article 3(19), Law on Investments 2021.

<sup>12</sup> Article 14(1), Law on Investments 2021.

<sup>13</sup> Article 14(1), Law on Investments 2021.

3.10 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 of the Law on Investments 2021, shall be resolved by:

- (i) a Vietnamese court,
- (ii) a Vietnamese arbitration body,
- (iii) a foreign arbitration body,
- (iv) an international arbitration body,
- (v) an arbitral tribunal established in accordance with the agreement of the disputing parties.<sup>15</sup>

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*"<sup>16</sup> in the supply of professional services, including foreign and international arbitration services.

#### **D. Mediation and arbitration by arbitrators**

3.11 The arbitration tribunal may, at the request of the parties, conduct mediation in order for the parties to reach an agreement on the resolution of their dispute.<sup>17</sup> If the mediation is successful, the arbitration tribunal shall prepare minutes of successful mediation to be signed by the parties and certified by the arbitrators. The arbitration tribunal shall issue a decision

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<sup>14</sup> Article 14(2) and (3), Law on Investments 2021.

<sup>15</sup> Article 14(3), Law on Investments 2021.

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.

<sup>16</sup> "*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.

<sup>17</sup> Article 9, LCA; Article 29, VIAC Rules 2017

recognising the agreement of the parties, and such decision shall be final and shall have the same validity as an arbitral award.<sup>18</sup>

- 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.<sup>19</sup>

##### *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 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,<sup>20</sup> and has not lost his or her capacity for civil acts.<sup>21</sup> A limited capacity for civil acts is granted by law to a: i) person from six (6) to under eighteen (18) years of age but he or she must have 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 fifteen (15) to under eighteen (18) years of age and has sufficient property to secure the performance of obligations may establish and perform civil transactions without the consent of his or her legal representative.<sup>22</sup> 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.<sup>23</sup>

- 3.16 Legal entities that are 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

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<sup>18</sup> Article 58, LCA.

<sup>19</sup> 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.

<sup>20</sup> Article 19, 20, Civil Code of Vietnam.

<sup>21</sup> Article 22, Civil Code of Vietnam.

<sup>22</sup> Article 20, Civil Code of Vietnam.

<sup>23</sup> Article 20, Civil Code of Vietnam.

Article 4 of the Civil Code.<sup>24</sup> A legal entity acts with civil legal capacity through its legal or authorized 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.<sup>25</sup> An authorised representative is representation established pursuant to a power of attorney between the representative and the principal.<sup>26</sup>

3.17 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 lest an arbitral award could be made against a party that has no capacity to act at all. Due diligence requires that a party who has capacity for civil acts could only commence and carry on full arbitration proceedings against another party who has capacity for civil acts.

3.18 An arbitral award that could be made against a person that lacks 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.”

3.19 The question of lack of legal capacity has been considered in a setting aside application in Singapore.<sup>27</sup> The Court of Appeal in Singapore had partially set aside a 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 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 Court<sup>28</sup> 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 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

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<sup>24</sup> Article 103, Civil Code of Vietnam.

<sup>25</sup> Article 86 and 91, Civil Code of Vietnam.

<sup>26</sup> Article 142, 143, Civil Code of Vietnam.

<sup>27</sup> *BAZ v BBA and others*, [2018] SGHC 275 (Singapore).

<sup>28</sup> *Daiichi Sankyo Company Limited vs Malvinder Mohan Singh and ors*, O.M.P. (EFA) (Comm.) 6/2016, 31 January 2018.

respondents did not feature at all in the arbitration proceedings;<sup>29</sup> 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.

- 3.20 In another case against minors, despite Supreme Court rulings affirming the primacy of arbitration agreements over the last decade in the United States,<sup>30</sup> one segment of potential plaintiffs remain unaffected with motions to compel arbitration in mandatory arbitrations: minors.<sup>31</sup> 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 at 2018 predominantly in the e-commerce industry.<sup>32</sup> In California, a minor has a right to enter into a contract, subject to the statutory right of disaffirmance,<sup>33</sup> 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.<sup>34</sup>
- 3.21 In Vietnam, consumer disputes could be resolved by way of arbitration clauses contained in standard conditions on 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.<sup>35</sup> A goods or services provider shall only have the right to institute arbitration proceedings if the consumer consents to such a dispute resolution mechanism.<sup>36</sup>
- 3.22 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.<sup>37</sup> 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 essentially considered a deposit contract to be in 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.
- 3.23 The Supreme Court of Vietnam had 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

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<sup>29</sup> The author has been involved in the arbitration of this matter from commencement of arbitration to issuance of the arbitral award.

<sup>30</sup> *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019)

<sup>31</sup> *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)

<sup>32</sup> 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).

<sup>33</sup> Cal. Family Code s 6700.

<sup>34</sup> *Lopez*, 2015 WL 2062606, at 5 and 7.

<sup>35</sup> Article 17, LCA.

<sup>36</sup> Article 17, LCA.

<sup>37</sup> Decision 42/QD-CA dated 12 March 2021 of the Chief Justice of the Supreme People's Court.

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 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.<sup>38</sup>

- 3.24 Similarly, the Supreme Court of Vietnam has 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 proceedings, the scope of the authority did not expand to include a right to amend the arbitration agreement.<sup>39</sup> 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*

- 3.25 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.

- 3.26 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.”*

- 3.27 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.

- 3.28 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.<sup>40</sup>

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<sup>38</sup> Decision No. 01/2014/QĐST - KDTM dated 6 June 2014.

<sup>39</sup> Decision No. 04/2015/QĐPT-KDTM dated 13 January 2015.

<sup>40</sup> Article 6, LCA.



The court will however accept jurisdiction if the arbitration agreement is void or incapable of being performed.<sup>41</sup>

- 3.29 The doctrine of separability is expressly recognised in Vietnam such that an arbitration agreement exists independent of the underlying contract.<sup>42</sup> 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.
- 3.30 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.<sup>43</sup> It must also be made in writing.<sup>44</sup> Arbitration agreements made orally are not permitted in Vietnam.
- 3.31 In Vietnam, the following scenarios shall be deemed to constitute a written arbitration agreement:<sup>45</sup>
- (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 which express the existence of an agreement proposed by one party and not denied by the other party.
- 3.32 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.<sup>46</sup> 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 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.
- 3.33 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.

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<sup>41</sup> Article 6, LCA.

<sup>42</sup> Article 19, LCA.

<sup>43</sup> Article 16(1), LCA.

<sup>44</sup> Article 16(3), LCA.

<sup>45</sup> Article 16(2), LCA.

<sup>46</sup> 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>.

3.34 According to international best practices, determination of the law of arbitration agreement follows a three-tiered enquiry:<sup>47</sup>

- (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 Kingdom<sup>48</sup> provided a welcome clarity to the above enquiry. The Supreme Court departed from the Sulamerica’s strong presumption 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.

3.35 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 2<sup>49</sup> 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*.

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.”<sup>50</sup>

3.36 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.

3.37 Resolution No. 01 addressed this gap where the Council of Judges of the Supreme People’s Court sets out at 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.

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<sup>47</sup> as set out by the UK Court of Appeal in *Sulamérica Cia Nacional de Seguros SA v. Enesa Engenharia SA (Sulamérica)* [2012] EWCA Civ 638.

<sup>48</sup> *Enka Insaat ve Sanayi A.S. v OOO Insurance Company Chubb (England and Wales)*, October 2020, [2020] UKSC 38.

<sup>49</sup> 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.”

<sup>50</sup> Article 18, LCA.

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 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.”

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

3.38 The law governing the arbitral procedure may be different from the law of the arbitration agreement or the governing law of the contract. In practice, 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*.

3.39 Whilst a commercial contract without a proper governing law cannot exist, an arbitration agreement can exist without specifically stating its procedural law. 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 will a court in the agreed curial law exercise jurisdiction over arbitral proceedings held outside of its territorial jurisdiction?

3.40 The seat of arbitration is a legal concept that should not be conflated with the place or venue of arbitration. Seat of arbitration is the legal place of the arbitration proceedings and by the parties' act of choosing a seat, the parties *ipso facto* choose the law of that place to govern the arbitration proceedings. Although the seat indicates a geographical place, it does not necessarily translate that the hearings will take place in the seat. It is sometimes the case that 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 will 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 in peril at the seat.

3.41 Seat of arbitration is a crucial element in arbitration due to its legal implications, *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) are made in the seat; and

- (iv) enforceability of the award overseas.
- 3.42 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.
- 3.43 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 toward arbitral proceedings.
- 3.44 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 must be regarded as having been issued in Vietnam regardless of the place in which the arbitral tribunal holds the hearing to issue such award.<sup>51</sup> 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, assets or other documents.<sup>52</sup> It is not clear yet whether the concept of ‘seat of arbitration’ is defined in the laws of Vietnam.
- 3.45 The legal concept of ‘seat of arbitration’, whilst widely accepted in international arbitration practice, is not without its challenges.
- 3.46 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.<sup>53</sup> The Court said that the arbitration proceedings were held not in accordance with the agreement of the parties.<sup>54</sup> This case will be discussed further in Part 5 of this Guide.
- 3.47 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*<sup>55</sup> had 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 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

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<sup>51</sup> Article 3.8, LCA.

<sup>52</sup> Article 11.2, LCA; Article 22.2, VIAC Rules 2017.

<sup>53</sup> Decision 11/2019/QĐ-PQTT of the Hanoi People’s Court.

<sup>54</sup> Article 68.2.b, LCA.

<sup>55</sup> [2019] SGCA 65 (Singapore).

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.

3.48 Another award that was set aside in Singapore is the award subject in the case of *BNA v BNB and another*.<sup>56</sup> 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 being a selection of the venue for hearings, and not the seat of arbitration. The decision was overturned by the Court of Appeal saying that on its face, the natural meaning of the phrase was ‘arbitration in Shanghai’ was that Shanghai was to be the seat of arbitration citing similar interpretation from the courts in England and Wales.

3.49 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.

3.50 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*

3.51 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 agreement of the parties.<sup>57</sup> If there is no agreement on the number of arbitrators, the default number is three arbitrators.<sup>58</sup>

3.52 The LCA distinguishes the default appointment procedure (in the event of failure to nominate or appoint by the parties) for institutional arbitration and *ad hoc* arbitrations. In arbitrations administered by an arbitral institution such as the VIAC, 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.<sup>59</sup> If the parties could not agree on the competent court, then the competent court is determined as follows:<sup>60</sup>

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<sup>56</sup> [2019] SGCA 84.

<sup>57</sup> Article 39(1), LCA.

<sup>58</sup> Article 39(2), LCA.

<sup>59</sup> Article 7, LCA.

<sup>60</sup> Article 7, LCA.

<i>“Arbitration Activities”</i>	<i>“Competent court”</i>
(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 about 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

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

3.53 The parties have a right to request to replace an arbitrator or the arbitrator must refuse to accept appointment from a matter in the circumstances set out in Article 42, LCA, viz.<sup>61</sup>

- (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;
- (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.

3.54 The above circumstances show similar inclination of the LCA to adhere to the conflict of interests 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 a challenged arbitrator in arbitral proceedings worldwide. Whilst non-binding, for the most part, the IBA Guidelines continue to be influential in increasing challenges to arbitrators and challenges to awards on the basis of arbitrator conflicts.<sup>62</sup> The IBA Guidelines focus on a) when an arbitrator should disclose potential conflicts and b) when an arbitrator should simply not accept appointment.

3.55 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*) for that matter. The People’s Court in Hanoi had 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.<sup>63</sup> This will be discussed further in Part 5 of this Guide.

<sup>61</sup> Article 42, LCA.

<sup>62</sup> A Kluwer Arbitration Blog survey on soft law instruments in 2014 found that the IBA Guidelines is 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.

<sup>63</sup> Decision 11/2019/QĐ-PQTT dated 14 November 2019.

3.56 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 and to ensure that resolution of a dispute is impartial, speedy and prompt.<sup>64</sup>

3.57 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.*

3.58 In 2019, a VIAC-constituted arbitral tribunal has been sued by the respondent in the arbitration at the High People’s Court of Hanoi – the first tribunal to have been sued as such – for compensation for wrong application of an interim relief pursuant to Article 49.5, LCA. The High People’s Court of Hanoi confirmed the judgment of the first-instance court that the arbitral tribunal had wrongly applied the interim relief, but as the interim relief had not been implemented, there were no damages incurred.

(iii) Powers of arbitrators

3.59 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.<sup>65</sup>

3.60 “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.<sup>66</sup> 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.

3.61 The arbitral tribunal constituted pursuant to the LCA or arbitral institution rules in Vietnam have the powers to make orders or give directions to any party for:

- (i) interim relief;<sup>67</sup>
- (ii) for the applicant for interim relief to provide financial security;<sup>68</sup>
- (iii) production of documents and evidence;<sup>69</sup>
- (iv) summoning witnesses to give evidence;<sup>70</sup>

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<sup>64</sup> Article 21, LCA.

<sup>65</sup> Article 2, LCA.

<sup>66</sup> Article 3.1 of the Law No. 36/2005/QH11, entitled on the Law on Commerce passed by the National Assembly of Vietnam on 14 June 2005 (the Law on Commerce);

<sup>67</sup> Article 48, 49, LCA.

<sup>68</sup> Article 49(4), LCA.

<sup>69</sup> Article 46, LCA.

- 3.62 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 the court (or tribunal) will allow such request and what the procedure will be when the production request reaches the court.
- 3.63 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'.<sup>71</sup> 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.<sup>72</sup> It is not clear whether the witness(es) so summoned could be cross-examined at the dispute resolution session (i.e. a hearing).<sup>73</sup>
- 3.64 Vietnamese law is also not clear on the concepts of legal professional privilege or litigation or arbitration privilege. If a matter might involve documents and evidence that ought to be protected with privilege and the arbitral tribunal might 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*

- 3.65 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.<sup>74</sup> Hearings shall be conducted in camera unless the parties have agreed otherwise.<sup>75</sup> 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.<sup>76</sup>
- 3.66 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 on the procedural steps, 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 content 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 is frowned upon and such prohibition is usually set out in the first procedural order issued by the tribunal.

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<sup>70</sup> Article 47, LCA.

<sup>71</sup> Article 45, LCA.

<sup>72</sup> Article 47(1), LCA

<sup>73</sup> Article 20, VIAC Rules 2017.

<sup>74</sup> Article 25, LCA.

<sup>75</sup> Article 25(3), LCA.

<sup>76</sup> Article 25(2), LCA.



3.67 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.

3.68 Confidentiality of the arbitration proceedings is not, in precise terms, regulated in the LCA. Article 21.5 puts the onus on the arbitrators '*to maintain confidentiality of the contents of the dispute, unless required to provide information to competent authorities under laws*'.<sup>77</sup> 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, and who may not have the obligation to maintain confidentiality of the arbitration proceedings.

(v) *Judicial review of awards*

3.69 Post-award, the courts of Vietnam have two opportunities to review arbitral awards: 1) by a petition by the award debtor requesting 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 Guide.

3.70 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;
- (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.

3.71 The first three grounds above are consistent with the grounds for setting aside at 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.

3.72 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

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<sup>77</sup> Article 21(5). LCA.

too broad a basis for setting aside an arbitral award further inviting the court to delve into the merits of the award to painstakingly thresh out each issue or decision that potentially is 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.

3.73 Resolution No. 01 may have provided some guidance relating to '*fundamental principles*'. The Supreme People's Court said that for a court to consider a Setting Aside Petition based on this ground, 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.

3.74 Fundamental principles could be referring to the interests of the Government or the legitimate rights and interests of third party or parties. Resolution No. 1<sup>78</sup> had set out examples of a violation of fundamental principles, *viz*:

- (i) if the parties have voluntarily agreed on a dispute resolution and the agreement is not contrary to law or social morality but the arbitral tribunal did not acknowledge such agreement between the parties in the arbitral award, the award therefore violates the principle of free and voluntary commitment in the field of commerce.<sup>79</sup> 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*'.

3.75 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 shall rely solely on the provisions of Article 68(2), LCA as listed above.

3.76 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 sixty (60) days for the arbitral tribunal to rectify such errors.

#### 4. *Law governing the supportive and enforcement measures*

3.77 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, facilitate 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 issuing the orders requested to support arbitration overseas.

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<sup>78</sup> At commentary in Article 14(2)(dd)

<sup>79</sup> As provided in Article 11 of the Commercial Law and Article 7 of the Civil Code.

- 3.78 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 to the arbitration can make an application in court for interim relief in support of arbitration after 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.
- 3.79 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 the enforcement of civil judgments.<sup>80</sup> The interim relief issued by an arbitral tribunal constituted by a foreign arbitration centre will however not be recognised or enforced in Vietnam. The CPC – 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.<sup>81</sup>
- 3.80 Petitions for recognition and enforcement of foreign arbitral awards in Vietnam could be granted so long as the award creditor satisfies the statutory requirements<sup>82</sup> even if there is no prior connection between Vietnam, the arbitration agreement or the arbitral process.

##### 5. *Law governing the substantive rights of the parties*

- 3.81 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 will be the law governing the substantive rights and obligations of the parties.
- 3.82 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.

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<sup>80</sup> Article 50.5, LCA

<sup>81</sup> Article 424.2, Civil Procedure Code.

<sup>82</sup> Chapter 36, Civil Procedure Code 2015; Article 432.1, Civil Procedure Code 2015.

## **PART IV**

# **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 a 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.<sup>83</sup> 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, as the case may be.<sup>84</sup>
- 4.3 According to the LCA, an arbitral award issued from a domestically administered arbitration shall be voluntarily carried out by the award debtor. Upon expiry of the time-limit for carrying out a domestically administered arbitral award without it having been set aside by the competent court nor voluntarily carried out by the award debtor, the award creditor may request the enforcement agency to execute the arbitral award. For domestic *ad hoc* arbitral awards, the award creditor may have the arbitral award registered with the competent court and then request the competent civil judgment enforcement agency to execute the arbitral award.
- 4.4 The New York Convention has been ratified by Vietnam and has been incorporated into Vietnamese national law accordingly, in the Civil Procedures Code, relating to recognition and enforcement of foreign arbitral awards. 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 arbitral 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,<sup>85</sup> 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 set out in Article V(1) of the New York Convention.<sup>86</sup> It bears noting that similar grounds are set out in Vietnam’s Civil Procedures Code.<sup>87</sup> 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 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.

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<sup>83</sup> Article 65, LCA

<sup>84</sup> Article 62.2, LCA

<sup>85</sup> Article III, New York Convention.

<sup>86</sup> Article V(1), New York Convention.

<sup>87</sup> Article 459(1), New York Convention.

4.7 Whilst there are five (5) 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) into 2 grounds, e.g. Article V(1)(e), New York Convention 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” read as follows:

“1. The court does not recognise an award of foreign arbitrators when considering that the evidence supplied by the enforcee 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 is contrary to the basic principles of the laws of Vietnam.”

- 4.9 The Civil Procedure Code 2015 had also clarified that the party opposing the recognition and enforcement of a foreign arbitral award has an obligation to prove the grounds for refusal.<sup>88</sup> This is a key principle, because it means that the burden of proof for obtaining the recognition does not lie on the petitioner. Petitioners only need to submit the originals or certified true copies of the foreign arbitral award and of the relevant arbitration agreements.<sup>89</sup>
- 4.10 In comparison with the Civil Procedure Code 2004, the Civil Procedure Code 2015 provides additional clarifications with respect to the suspension of examination of the petition. In particular, during the suspension period, the judges are responsible for supervising and speeding up of the elimination of all suspension causes and, when the cause for suspension no longer exists, the judges shall issue a decision to continue the examination proceeding.<sup>90</sup>
- 4.11 Finally, a decision to recognise or refuse to recognise an arbitral award can now be appealed.<sup>91</sup> 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 limited to the circumstances set out in Article 462.5, Civil Procedure Code 2015.<sup>92</sup>
- 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 ‘*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, there is yet no clear definition on 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 could potentially give more room for ambiguity.
- 4.14 Reference may be made to Article 3 of the Civil Code 2015 with 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 ‘*basic principles of law*’ referred to in Article 459(2)(b) of the Civil Procedures Code 2015 and ‘*fundamental principles*’ in Article 68.2(dd) of the LCA refer to Article 3 of the Civil Code 2015.

<sup>88</sup> Article 459.1 of Civil Procedure Code 2015.

<sup>89</sup> Article 451.1 and Article 453 of Civil Procedure Code 2015.

<sup>90</sup> Article 457.2 of Civil Procedure Code 2015.

<sup>91</sup> Article 461.1 of Civil Procedure Code 2015.

<sup>92</sup> Article 462.5 of Civil Procedure Code 2015.

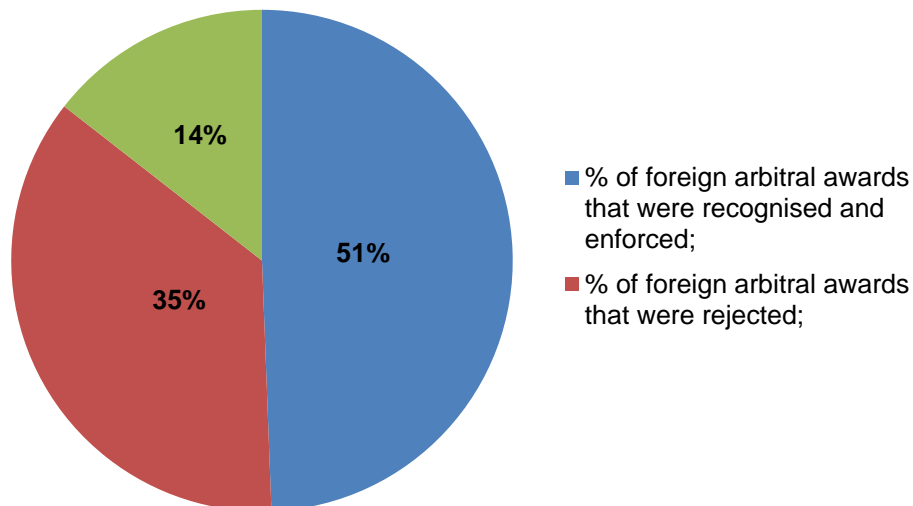
## **PART V**

# **REVIEW OF REJECTED PETITIONS FOR RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS**



5.1 From 1 January 2012 to end of 2020, there had been 85 foreign arbitral awards seeking recognition and enforcement before the Supreme People’s Court in Vietnam as published in publicly available portals. Of these 85 petitions:

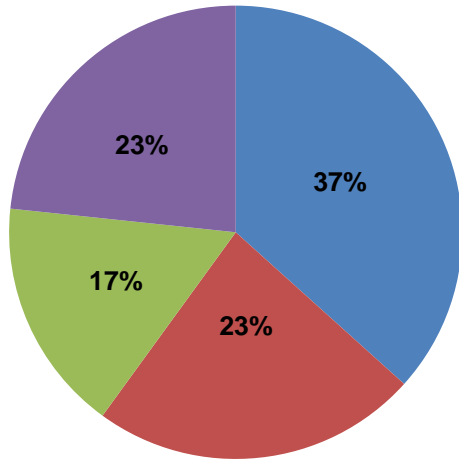
- (i) 43 petitions were recognised and enforced,
- (ii) 30 had been rejected, and
- (iii) 12 petitions were suspended perhaps due to withdrawal of petition or voluntary compliance by the award debtor.



5.2 Amongst the 30 rejected petitions (i.e. 35% of the total number of petitions):

- (i) 11 were issued by arbitrators from the International Cotton Association (formerly the Liverpool Cotton Association);
- (ii) 7 were issued by arbitrators from the German Coffee Association of the Hamburg Chamber of Commerce, Germany;
- (iii) 5 were issued by arbitrators from SIAC; and
- (iv) the remaining 7 from various other arbitral institutions.

The 12 suspended petitions have been issued by tribunals from various arbitral institutions as well.



- % of foreign arbitral awards issued by arbitrators from the International Cotton Association
- % of foreign arbitral awards issued by arbitrators from the German Coffee Association of the Hamburg Chamber of Commerce, Germany
- % of foreign arbitral awards issued by arbitrators from SIAC
- % of foreign arbitral awards issued by arbitrators from various other arbitral institutions.

5.3 At 35%, Vietnam is one of the jurisdictions with a high percentage of rejected petitions or applications. The data however covers the total number of petitions filed in 9 years. The record in the first-instance courts in Vietnam leave much to be desired as well. From 2014 to 2017 (i.e. 4 years), the People’s Court of Hanoi rejected 33% of these petitions; from 2011 to 2018 (i.e. 8 years), the People’s Court of Ho Chi Minh City’s rate was at 31%.

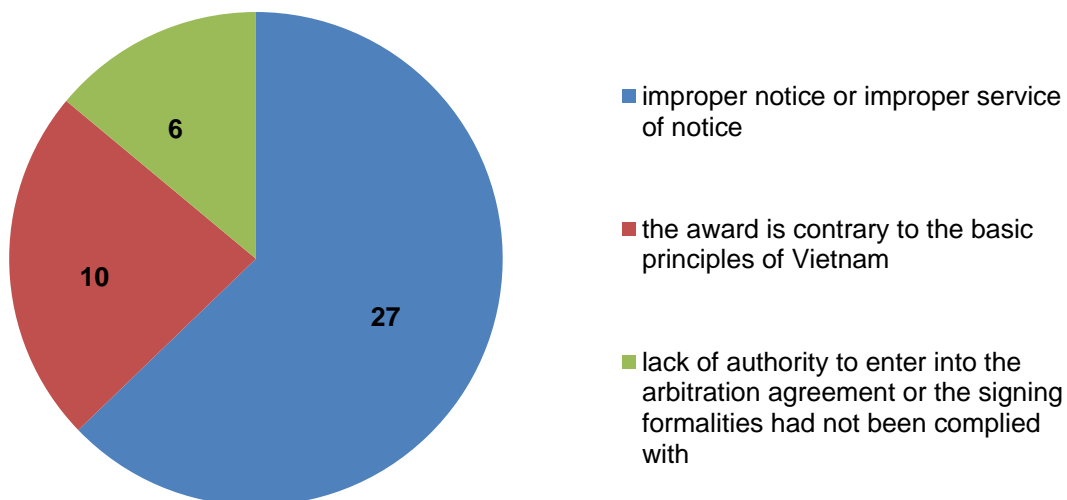
5.4 If read on an annual basis, the data shows a different perspective:

	Petition for setting aside - granted	Petition for enforcement - granted	Petition for enforcement - rejected	TOTAL CASES EACH YEAR
2012		10	4	14
2013	1	11	9	21
2014		2	9	11
2015	1	2	1	4
2016		4	2	6
2017		4	3	7
2018		5		5
2019		4		3
2020		1		
<b>Total cases in 9 years</b>	<b>2</b>	<b>43</b>	<b>28</b>	<b>73</b>

The data shows that there could be an increasing 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.

5.5 In this Guide, we will focus our analysis on the 30 petitions rejected by the Supreme Court of Vietnam. The most common grounds for rejecting these petitions are as follows:

- (i) improper notice or improper service of notice – mentioned in 27 judgments;
- (ii) the award is contrary to the basic principles of Vietnam – mentioned in 10 judgments;
- (iii) lack of authority to enter into the arbitration agreement or the signing formalities had not been complied with – mentioned in 6 judgments.



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

5.6 One of the grounds for non-recognition of foreign arbitral awards is Article 459(1)(c) of the CPC 2015, which reads:

*“1. The court does not recognise an award of foreign arbitrators when considering that the evidence supplied by the enforcer 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;*

5.7 Article 439(3), CPC 2015 is instructive as to the timeliness of notices made by a foreign court, a foreign arbitration centre or a foreign tribunal, *viz*:

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

...

*The enforcer 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 was 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.”*

5.8 What could be a ‘*reasonable period*’ may vary depending on the national laws of the country of such foreign court. A ‘*reasonable period*’ could mean proper service of notice of an arbitral award within three months from the date when a party had received the award. Prior service could have been made to an unofficial email address which may not be considered as proper service in certain jurisdictions such as Vietnam. Proper service of the arbitral award and receipt by the proper representative starts the clock of the limitation period within which a party seeking to set aside the arbitral award could lodge such petition in the court of the seat of arbitration.<sup>93</sup>

<sup>93</sup> Article 34(3), UNCITRAL Model Law.

- 5.9 Article 12, LCA sets out the manner for the service of notices and order for service of notices in the context of arbitral proceedings as follows:
- (i) by the parties' agreement or
  - (i) by the manner stipulated by the procedural rules of the relevant arbitration centre.
- 5.10 Service of notices in the LCA must be read together with service or notification of a legal process to an organisation as regulated in Article 178 (Ch. 10, Issuance, Service and Notification of Legal Process), Civil Procedure Code 2015. Service shall be delivered 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.
- 5.11 Where an organisation or legal entity is issued, served or notified of a legal process has its representative participating in the proceedings or delegates its representative to receive legal process, the signature of such person for confirmation of receipt of the legal process shall be required. Date of signing for confirmation of receipt shall be the date of issuance, service or notification.
- 5.12 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.
- 5.13 Whilst '*timely and proper manner*' of service of notices is regulated under the laws of Vietnam, it not clear yet how the application of such law(s) ought to be made so that any petition for recognition and enforcement for arbitral awards arising from such foreign arbitral proceedings may not be rejected by the courts.
- 5.14 From those 27 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.

**B. Service of notice to the improper party; Proof of notice and its contents – rejected petitions**

- 5.15 In Case No. 8,<sup>94</sup> the notice of arbitrator appointment was served on a person who has 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 the 'legal representative' of the respondent-company. In rejecting the petition, the Court also referred to the arbitral award that had mentioned that 'documents' (without stating specifically the nature and content of documents) were couriered to the respondent-company via Fedex. The SPC said that the arbitrator did not provide any evidence indicating that the required notices and documents were indeed sent via Fedex to

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<sup>94</sup> Case reference in this part of the Guide is numerical reference to the Supreme People's Court judgments as published in the Ministry of Justice's website: <https://moj.gov.vn/tttp/Pages/dlcn-va-th-tai-Viet-Nam.aspx> (last accessed on 31 July 2021).

the respondent-company. This case had also rejected the petition on the ground that arbitrator has no jurisdiction as the arbitration agreement specifically mentions 'Commerce and Industry Chamber Geneva, Switzerland' and the arbitrator proceeded under the auspices of the Swiss Chambers' Arbitration Institution.

- 5.16 Case No. 41<sup>95</sup> 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 it 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 relevant 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 it could exercise its right to make the necessary application in court.
- 5.17 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 is not the party to the arbitration agreement and lack of proper notice to the proper party resulted in the proper party not being able to have its opportunity to be heard in the arbitration.
- 5.18 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 to a matter, but there is no obligation for the ICC court to provide a 'list of arbitrators' to any party prior to constitution of the tribunal.
- 5.19 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 that confirmed that the appointment of arbitrators in this case 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 had violated the rights and interests of the respondent-company and was not in accordance with the procedure set out in Article 8 (Number of Arbitrators) of the ICC Rules then in force.
- 5.20 The reasons behind the Court's rejection of the petition 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 current ICC matters, and/or for lawyers in arbitration matters to be present at the ICC Court's session that 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.
- 5.21 Case No. 22 was not at all at wide variance with the Court's pronouncements in Case No. 13. The SIAC arbitral award in this case was issued in 2014, and the arbitration proceedings may have proceeded under the SIAC Rules 2013. Case No. 22 also involved complaints of alleged lack of notice of the 'list of arbitrators', that SIAC did not provide such list, that the parties have not been consulted in the appointment process of the arbitrator and was thus in violation of Rule 6.1 (Number and Appointment of Arbitrators), SIAC Rules, and that the arbitrator proceeded on a documents-only basis without the agreement of the parties in violation of Rule 5.2(c), SIAC Rules. Rule 5.2(c) provides that unless the parties agree that the pending

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<sup>95</sup> Decision No. 1245/2013/KDTM-St dated 8 October 2013 of the People's Court of Ho Chi Minh City.

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.

- 5.22 The Court's legal basis in rejecting the petition in this case was in accordance with the SIAC Rules then in force, save for the alleged lack of notice of the 'list of arbitrators' as there is no such obligation from SIAC to do so under the SIAC Rules. The number and appointment process of arbitrators must be in accordance with the parties' agreement or in the absence of any express agreement; the process must be in accordance with the rules of arbitration applicable to the arbitral proceedings. It is not clear from the available information that we have as to the agreed number of arbitrators and the procedure applied in the appointment of arbitrators in this matter.
- 5.23 Rule 6, SIAC Rules however provides for two ways that the exercise of discretion by SIAC could trump the parties' agreed appointment procedure. First, it is clear from Rule 6 that a party *nomination* of an arbitrator does not necessarily translate to *appointment* of the arbitrator so nominated. The SIAC president has the sole discretion whether to appoint or not the arbitrator(s) nominated.<sup>96</sup> Second, Rule 6 also provides for the default appointment of a sole arbitrator unless the parties have agreed otherwise or unless 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, she determines that 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 as well, and 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.
- 5.24 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 representative*' of the company, and not on the branch, or any employee of the company (e.g. deputy, director, president of the company) who is not the named '*legal representative*' of the company;
  - (ii) Service of notices could be made by courier or by email. Either way, it must be made on the registered or official 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 as opposed to the arbitral institution agreed by the parties in the arbitration agreement.

C. Basic principles of the law of Vietnam

- 5.25 The Supreme Court of Vietnam has considered the following scenarios as non-compliance to the basic principles of the laws of Vietnam:
- (i) lack of authority on the part of the person signing the main contract;<sup>97</sup>
  - (ii) lack of proper notice (of the arbitrator appointment and the notice of hearing) to the award debtor resulting in the award debtor not having duly participated in the arbitration proceedings and protect its rights;

D. Lack of authority

- 5.26 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. A branch of a respondent-company is not the respondent-company and service to a branch is not proper service made to a proper

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<sup>96</sup> Rule 6.5, SIAC Rules 2013

<sup>97</sup> Case No. 8

party to the arbitration. Under Vietnamese law, a branch is a separate (but dependent) company on the main company. A branch cannot be made a respondent in a matter in arbitration or litigation. Service therefore to a branch meant that service was not properly made to the proper respondent-company in the cases referred. It follows that the proper party to the arbitration was not promptly and properly notified of the relevant notices such as the appointment of the arbitrator and the procedure for resolving the dispute in foreign arbitration.

- 5.27 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 when it should have been sent to the registered address of the respondent-company in Hanoi. Case Nos. 38, 39, 40, 42, 43 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.
- 5.28 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 of the Civil Procedure Code. In this case, the person who signed the main contract did not present any document (i.e. the company's charter) to indicate his capacity to act as a 'legal representative' from the beginning of the arbitration proceedings.
- 5.29 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. There was thus no more dispute. The Court said that proceeding with arbitration in this case was contrary to the basic principles of Vietnamese law. It is noted however that there was no specific information as to what Vietnamese law was violated in this case.
- 5.30 Case Nos. 77, 79, and 80 dealt with an award debtor who was not the 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 is contrary to the basic principles of Vietnamese law.
- 5.31 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 a step backward in developing Vietnam as a regional arbitration hub. Resolution No. 01 has provided a useful guidance in the use and interpretation of the LCA.
- 5.32 It is suggested that one issue that would need to be resolved is the 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 enforcement and is ripe for ambiguous and conflicting interpretation for future users of arbitration.

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