

Part One Overview of the Dispute Resolution Mechanism in Vietnam III. Current Practices of Arbitral Resolution of Bussiness Disputes in Vietnam

著者	National Centre for Social Sciences and Humanities Vietnam
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III. CURRENT PRACTICES OF ARBITRAL RESOLUTION OF BUSINESS DISPUTES IN VIETNAM

1. Resolution of business disputes through the Vietnam International Arbitration Centre (VIAC)

The VIAC was established under Decision No. 204-TTg dated 28 April 1993 of the Prime Minister on the basis of a merger between the Foreign Trade Arbitration Council and the Maritime Arbitration Council that were in existence as an affiliate to the Vietnam Chamber of Commerce and Industry (VCCI) for 30 years. Subject to Decision No. 204-TTg, the Board of Management of the VCCI has issued Procedural Rules of the VIAC and a table of arbitration fees.

On 16 February 1996, the Prime Minister promulgated Decision No. 114-TTg on expanding the jurisdiction of the VIAC based on which the Board of Management has issued a Domestic Arbitration Proceeding Statute, a table of arbitration fees and costs payable by domestic disputing parties.

1.1. Jurisdiction of the VIAC

The jurisdiction of the VIAC is stipulated in Article 2 of the VIAC Charter issued in conjunction with Decision No. 204/TTg dated 28 April 1993 of the Prime Minister whereby, “the VIAC shall have jurisdiction over economic disputes arising from international economic relations, such as foreign trade contracts, and contracts relating to investment, tourism, international transport and insurance, licensing, international credit and payment”.

Pursuant to this provision, the VIAC has jurisdiction over disputes in cases where the two following conditions are met:

- *First*, at least one of the parties concerned is a foreign individual or a foreign legal person.
- *Second*, before and after the occurrence of a dispute, the parties concerned agree to refer their disputes to the VIAC or an international treaty requires such a dispute to be referred to the VIAC.

It is noteworthy that from 16 February 1996, under Decision No.114/TTg of the Prime Minister, the VIAC’s jurisdiction has been expanded to cover the settlement of economic disputes arising from domestic economic relations, if it is agreed upon by the parties concerned (Article 1). From that point of time, the VIAC is no longer known as a specialised arbitration organisation whose jurisdiction is limited to international economic disputes only. The problem is, however, whether the VIAC is also subject to Decree No.116/CP dated 5 September 1994 that generally governs economic arbitration in Vietnam. Practices over the past years indicate that the VIAC still continue its

existence and operations within a separate legal framework that is independent from a more general economic arbitration legislation. Obviously, the current laws have created two different legal frameworks for the organisation and operations of arbitration centres, especially as regard the arbitral jurisdiction. This is viewed as the most serious weakness and shortcoming of arbitration law in Vietnam at present.

1.2. Selection of arbitrator(s)

According to Article 4 of the VIAC Charter, arbitrators of the VIAC will be individuals with a profound knowledge and experience in various areas of law, foreign trade, investment, finance, banking, transport and insurance etc. who are selected by the standing secretariat of the VCCI for a 4-year term. Foreign experts may also be invited to act as individual arbitrators of the VIAC.

In consultation with the UNCITRAL Arbitral Rules (adopted by the UNCITRAL on 28 April 1976 and by the UN General Assembly on 15 December 1976), the procedures for selecting arbitrators by the parties concerned after their submission of the disputes to the VIAC are provided as follows:

- Each of the parties concerned is entitled to choose or request the President of the VIAC choose its own arbitrators from the pre-determined list of VIAC arbitrators.
- The two arbitrators so chosen will jointly select a third arbitrator from the list of VIAC arbitrators. The three arbitrators so chosen will constitute an arbitration committee to handle the dispute. The third arbitrator will act as the chairperson of the arbitration committee.
- In case where the two arbitrators fail to reach an agreement on a third arbitrator, the president of the VIAC will appoint a third arbitrator from the pre-determined list of VIAC arbitrators.

1.3. Procedures for dispute settlement

Procedures at the VIAC are to be initiated by a claim [or petition] lodged with the Centre by the plaintiff. In accordance with the procedural rules of the VIAC, such a claim should be made in Vietnamese or another foreign language that is popular in international transactions such as English, French or Russian and must specify the following details and particulars:

- Full names and addresses of the plaintiff and the defendant;
- Requests of the plaintiff, explanation of facts and supporting evidence;
- Legal grounds based on which the plaintiff brings such an action.
- Value of the case;
- Full name of the arbitrator who is chosen by the plaintiff from the list of the VIAC arbitrators or plaintiff's proposal for the President of the VIAC to appoint an arbitrator to represent his interests.

Immediately after his/her registration of the claim, the secretary of the Centre will notify the defendant of the claim enclosed by a copy of the claim and relevant documents and the list of arbitrators of the Centre. During that time, the parties concerned should choose or request the Centre to choose on their behalf arbitrators in conformity with the Centre procedural rules. Noticeably, a plaintiff may face with a counter-claim before the hearing of the arbitration committee. The counter-claim will be considered at the same time with the original claim.

After their appointment or selection, arbitrators are expected to work on the files and conduct investigations by all appropriate means to understand the facts and nature of the case.

After the completion of preparatory works, the arbitration committee or the sole arbitrator will hold hearing sessions in Hanoi or another location they deem to be necessary or at the request of the parties concerned.

During the hearing sessions, arbitrators must base their findings and rulings on the governing laws that are applicable to the dispute, relevant international treaties, trade and international practices. On the other hand, arbitrators are supposed to give objective and honest assessment of facts. The arbitration committee will make all decisions by a majority vote. The minority's opinions will be recorded in a minutes.

At all stages of the settlement procedures, arbitrators are obliged to adhere to the Code of Conducts of the VIAC arbitrators issued in conjunction with Decision No. 252-PTM/TT dated 1 August 1996 of the Chairman of the VCCI. These ethical requirements include:

- Impartiality and integrity
- Independence
- Confidentiality
- Due diligence
- Transparency

1.4. Arbitral awards

The process of dispute settlement may result to an arbitral award or a conciliation agreement which is valid as an award. An arbitral award must contain the following detail and particulars:

- Name of the VIAC;
- Date on which and place where the award is rendered;
- Full names of the arbitrators (or the single owner) who resolved the dispute;
- Names of the disputing parties and relevant individuals;
- Subject matter of the dispute and a brief summary of facts;
- Decision on the case, arbitration fees and other costs;
- Bases on which arbitral decisions are made; and
- Signatures of arbitrators (or the single arbitrator) and the secretary of the session.

The award rendered by an arbitration committee may be made public immediately after the end of the final hearing session or at a later time. Arbitral awards

are final and conclusive that can not be appealed before any courts or institutions. Once rendered, the parties concerned are obliged to implement the award within the time limit prescribed therein.

Such a provision is entirely suitable to the international practices whereby an agreement to choose arbitral resolution of dispute should be interpreted as a commitment to enforce the arbitral award unconditionally and a waiver of challenging the arbitral award by all means.

2. Resolution of business disputes through economic centres established under Decree No. 116/CP dated 5 September 1994 of the Government.

2.1. Jurisdiction

In accordance with Article 1 of Decree No. 116/CP dated 5 September 1994 and Circular No. 02-PLDSKT dated 3 January 1995 of the Ministry of Justice, economic arbitration centres have jurisdiction over the following types of disputes:

- Disputes over economic contracts between legal persons, between legal persons and private enterprises; between private enterprises; and between private enterprises and individual businesspersons;
- Disputes between a company and its members; disputes between members of the companies over the establishment, operation and dissolution of the company such as withdrawing capital, distribution of loss and profit, merger, separation and dissolution of a company; disputes over rights and obligations of the company members.
- Disputes over sales and purchases of shares and bonds.

Each economic arbitration centre may determine its own scope of activities depending on the professional capacity of its arbitrators. Such a scope of activities should be stated in the centre's charter.

The above-described provisions suggest that the jurisdiction of economic arbitration centres are not determined on a territorial basis but on a case-by-case basis that allows parties concerned to choose any economic arbitration centre to handle their disputes. On the other hand, it is such a factor that requires these centres to enhance their competitiveness through lowering arbitration fees, shortening resolution process and improving hearing quality.

As regard the competence of economic arbitration centres as prescribed in Decree No.116/CP, there are two points that need to take into consideration, namely:

- The concept of economic contracts as interpreted by economic arbitration centres is broader than that recognised by the courts.

- The jurisdiction of economic arbitration centres is much narrower than that of the VIAC that evidently results to an unfair competition between these arbitration institutions. This helps to explain why the adoption of Decree No.116/CP is not well received and strongly supported by the business community.

2.2. Selection of arbitrators

As a permanent arbitration, each economic arbitration centre has its own charter and a list of arbitrators. In general, the procedures for selection of arbitrators of the economic arbitration centres are also similar to that of the VIAC. In particular:

- In case where the dispute is to be handled by an arbitration committee, each party concerned will choose its own arbitrator. The two arbitrators so chosen will select a third arbitrator who will serve as a chairperson of the arbitration committee.

Within 10 days from the date on which the second arbitrator is chosen, if the two arbitrators fail to reach an agreement on the third arbitrator, the President of the economic arbitration centre in question will appoint the third arbitrator to chair the committee.

- In case where a dispute is to be handled by a single arbitrator as mutually agreed by the disputing parties but the parties concerned fail to jointly select that arbitrator, within 7 days from the date on which he is informed by the parties concerned of their failure to choose an arbitrator, the President of the economic arbitration centre will appoint an arbitrator to resolve the dispute.

2.3. Procedures

Procedures at economic arbitration centres are started with the submission of a written claim (or petition) by the plaintiff. Such a claim will not be accepted nor registered by an economic arbitration centre unless the plaintiff has filed a complete set of the following documents:

- A written claim containing the following detail and particulars:
 - + Date, month and year when the claim is made;
 - + Names and addresses of the relevant parties;
 - + Name of the economic arbitration centre which is requested to resolve the dispute;
 - + A brief summary of the dispute and the request for resolution;
- Any measures of negotiation or conciliation which have been take unsuccessfully;
- Full name(s) of the arbitrator(s) selected by the claimant from the list of arbitrators available in the economic arbitration centre.

- A written agreement of the parties whereby the disputes will be referred to that economic arbitration centre for resolution.
- All necessary documents and evidence that support his/her claim.
- Receipt of advanced payment of the arbitration fees.

Within 7 days from the date of receipt of the claim, the secretary of the economic arbitration centre in question will forward a copy of the claim lodged by the plaintiff and the list of arbitrators of the centre to the defendant. Within the time limit fixed by the economic arbitration centre, the defendant must respond in writing to the center and the plaintiff enclosed with supporting documents.

After their being duly chosen or appointed, arbitrators will review the file and take necessary steps to resolve the dispute including listening opinions and views of the parties concerned, and summoning witnesses in the presence of the parties after having them notified of this step, requesting the parties concerned to provide additional evidence and relevant documents, calling for an independent examination...

Place and timing of the hearing session will be agreed by the disputing parties. In case such an agreement is absent, the chairperson of the arbitration committee or the sole arbitrator will fix a place or time for the hearing provided that a subpoena should be serviced to the parties concerned at least 15 days before the opening of the hearing session (Article 21 of Decree No.116/CP dated 5 September 1994).

Unlike the economic arbitration legislation in other countries, Article 25 of Decree No.116/CP provides that during the settlement of a dispute, an economic arbitration centre will only base its findings on clauses of the disputed contract and the existing laws and regulations. In other words, the applicable laws in Vietnam do not recognise the choice of governing law by the parties concerned.

In practice, the disputing parties may themselves or through their legal attorneys participate in the dispute settlement process. In addition, the parties may also seek defence of their legitimate interests from lawyers.

It is noteworthy that any unjustified absence of at least one party may result to an adjournment or suspension of the dispute settlement (Article 23 of Decree No. 116/CP).

During the resolution of a dispute, if the parties reach an agreement by means of negotiation, the arbitration tribunal shall terminate the proceedings. The parties may request the President of the economic arbitration centre to confirm such an agreement in writing. Such a document shall be of equal validity to an arbitral award.

2.4. Arbitral decision

The resolution of a business dispute through arbitration will be ended by one or more arbitral awards. According to Article 28 of Decree No. 116/CP, the arbitration tribunal or the sole arbitrator may make a decision on a partial settlement of the dispute as it deems appropriate.

An arbitral award must contain the following detail and particulars:

- Name of the arbitration centre;
- Date on which and place where the award is rendered;
- Full names of the arbitrators who resolved the dispute;
- Names and addresses of the parties concerned;
- A summary of the dispute;
- Bases and terms of the awards; and
- Amount of arbitration fees to be borne by the parties.

An arbitral award must be signed by all arbitrators and immediately notified to the parties concerned after the end of the hearing session or at a later time but within 5 days from the end of the hearing session. Copies of the arbitral award must be delivered to the parties within 3 days from the date on which the award is rendered.

After an arbitral award is made public, the arbitral tribunal or the sole arbitrator should not correct or revise except where there are obvious miscalculations or grammar mistakes. In such events, any correction or revision of the award must be notified to the parties concerned.

In principle, the losing party will bear the arbitration fees unless otherwise agreed upon. The tariff of arbitration fees will be fixed by each economic arbitration centre subject to the tariff jointly prescribed by the Ministry of Justice and Ministry of Finance.