

Part One Overview of the Dispute Resolution Mechanism in Vietnam V. Procedures for Recognising and Enforcing Foreign Arbitral Awards in Vietnam

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V. PROCEDURES FOR RECOGNISING AND ENFORCING FOREIGN ARBITRAL AWARDS IN VIETNAM

1. 1958 New York Convention and Vietnam's accession

One of the fundamental principles of dispute resolution through arbitration is a respect to self-determination of the parties concerned as regard the choice of arbitration and governing laws. It is such a special feature that determine the finality and conclusiveness of an arbitral award.

However, in fact, arbitral awards are not always enforced by all parties. Normally, when an arbitral award is not strictly observed by the obligor, the obligee may request a local court to render a decision to recognise and enforce the award. In respect of foreign arbitral awards, a competent court of the host country is not obliged to recognise these awards, if that country has not been a participant or a signatory of a multilateral or bilateral international treaty on this matter. Before 1958, it was not uncommon for foreign arbitral awards not to be recognised and enforced in other countries. Such a non-recognition and poor enforceability of foreign arbitral awards have hampered the internationalisation of civil and commercial transactions and provided golden opportunities to obligors to avoid their implementation of foreign arbitral awards.

In remedying the problems and rectifying shortcomings of the 1923 Geneva Agreement on Arbitral Clauses and 1927 Geneva Convention on the enforcement of foreign arbitral awards, the United Nations adopted 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards as a multilateral international treaty that set out provisions on conditions and procedures for recognising and enforcing foreign arbitral awards subject to the principle of reciprocity.

The 1958 New York Convention also laid out an underlying principle of non-discrimination between domestic and foreign arbitral awards as regard conditions for recognition and related fees (Article 3).

Under the Convention, a foreign arbitral award will be recognised and enforced if:

- it is based on a written agreement between the parties concerned and signatories to such an agreement should have a legal capacity as determined under the governing law.
- the party requesting for the recognition and enforcement of the award must comply with legal procedures as provided for by the procedural law of the territory where such an award is to be enforced.

Article V of the Convention also indicates a number of circumstances under which a foreign arbitral award may not be recognised nor enforced, namely:

- The arbitration agreement is concluded by parties having no legal capacity to enter into as determined under the governing law or such an agreement is null and void under the referred law.
- The party that is obliged to implement an arbitral award is not properly notified of the appointment of arbitrator(s) or his performance or can not present the case due to a certain reason.
- The award is rendered in respect of a dispute that is not anticipated in the terms of reference of an arbitration or go beyond these terms; or the award covers those matters that are outside the terms of reference of the arbitration. However, if it is possible to separate parts of the ruling that fall within the terms of reference from those that fall outside the terms of reference, these parts may be recognised and enforced.
- Arbitrators or arbitration procedures are not suitable to the parties' arbitration agreement or in the absence of such an agreement, the law of the country where the arbitration is held.
- The award has not yet become effective or has been suspended by a competent body in the country or subject to the laws of the country where the award is rendered.

Furthermore, a recognition and enforcement of a foreign arbitral award may be denied if in the view of a competent body in the country where such a recognition or enforcement are requested:

- the subject matter of the dispute can not be handled through arbitration under the laws of that country; and
- the recognition and enforcement of the award is contrary to the public order and the law of that country.

Since 1987, after the adoption of the Law on Foreign Investment in Vietnam, it became possible for Vietnamese and foreign investors to choose a domestic or foreign non-governmental arbitration to settle their disputes in an effort to attract more foreign investment. Subsequently, a series of legislation have been enacted including the Maritime Code, Law on Civil Aviation, Law on Petroleum, BOT regulation, EPZ regulations etc of which recognise such a choice of dispute settlement body. On the other hand, bilateral agreements concluded between Vietnam and other countries to govern investment, trade, maritime and so on also consist of the same arbitration clause. However, the problem is pursuant to international practices, in the absence of national commitments on mutual recognition and enforcement of arbitral decisions in each country, the arbitration rulings are in many cases useless. From the experience of the Vietnam International Arbitration Centre, some 4 decisions which were made by the

Centre but were not recognised nor enforced in foreign countries that adversely affect the legitimate interests of the winning party.

In response to the growing demands of the economic expansion, in the context of international integration which requires to protect the legitimate rights and interests of both domestic and overseas businesses and in improving the legal framework in Vietnam, on 28 July 1995, the President of the Socialist Republic of Vietnam issued Decision No. 453/QĐ-CTN on Vietnam's accession to the 1958 New York Convention on recognition and enforcement of foreign arbitral awards.⁷

In conformity with clause 3 of Article I of the Convention, in acceding to the Convention, the State of Vietnam has made three reservations. In particular:

- This Convention is only applied to the recognition and enforcement in Vietnam of foreign arbitral awards that are rendered in the countries being members of the Convention. In respect of foreign arbitral awards rendered in countries which are not a signatory or participant of the Convention, the convention may be applied on a reciprocity basis.
- This Convention will only be applied to disputes arising from trade relations.
- All matters relating to the interpretation of the Convention should comply with the laws of Vietnam.

With its accession to the 1958 New York Convention, Vietnam has reaffirmed great efforts in integrating into the regional and global economies. However, the second reservation also raises concerns among foreign investors and relevant countries as the concept of “trade” is still understood in its narrow meaning under the legal system of Vietnam (see clause 2 of Article 5 of the Commercial Law). Furthermore, arbitration jurisdiction in Vietnam, especially the jurisdiction of the Vietnam International Arbitration Centre covers economic relations that have a broader parameter than the trade relations as determined under the Commercial Law. Therefore, if the scope of trade relations in the context of foreign arbitral awards is narrower than that in the context of domestic arbitration, there may be a misunderstanding of discrimination against foreign arbitral awards. Consequently, it may produce negative impacts on the relation between Vietnam and other countries in judiciary area.⁸

2. Procedures for recognising and enforcing foreign arbitral awards

2.1. Foreign arbitral awards

The following foreign arbitral decisions may be considered by the courts of Vietnam for recognition and enforcement:

⁷ Ha Hung Cuong, Economic dispute settlement and the accession to the 1958 New York Convention, seminar paper, Ministry of Justice, 1996, p 12-13.

⁸ Collected documents prepared within the framework of the VIE/94/003 project, Vol. IV, Part II, Chapter II, p.73.

- Arbitral decisions rendered outside Vietnam by an arbitration body that is mutually chosen by the parties concerned to resolve their disputes from trade relations.
- Arbitral decisions that are rendered in Vietnam but not by a Vietnamese arbitration body.

In principle, a foreign arbitral decision may only be enforced in Vietnam after it is recognised and accepted for enforcement by the court of Vietnam. The enforcement of such a decision should be in compliance with the Ordinance on Recognition and Enforcement of Foreign Arbitral Decisions and other regulations concerning the enforcement of civil judgements.

2.2. Procedures for recognition and enforcement

2.2.1. Acceptance and registration of the application

The applicant should file a petition to the Ministry of Justice of Vietnam accompanying with other necessary documents as prescribed under international treaties to which Vietnam is a signatory or a participant or documents stipulated in the Ordinance on Recognition and Enforcement of Foreign Arbitral Decisions.

Within 7 days from the date of full receipt of the required documents, the Ministry of Justice will forward these documents to the provincial court of the locality where the obligor is headquartered or where his/her place of residence or work is located, or where the property subject to the enforcement is situated.

Within 2 months from the date of its registration, the competent court is expected to issue one of the following decisions:

- Temporarily suspending its consideration of the application upon its receipt of a notice from the Ministry of Justice whereby the arbitral award in question is being considered for abolition or suspension of enforcement by a competent body in a foreign country.
- Suspending its consideration of the application if the obligee withdraws his/her application or the obligor has voluntarily implemented the award.
- Suspending its consideration of the application upon its receipt of a notice from the Ministry of Justice whereby the arbitral award in question has been abolished or suspended from enforcement by a competent body in a foreign country.
- Suspending its consideration of the application or returning the application and accompanied documents to the Ministry of Justice if the obligor has no head office or place of residence in Vietnam or it becomes impossible to determine the place where the related property is situated.
- Opening a court session to adjudicate the application.

2.2.2. Adjudication of the application

Such a hearing session will be conducted by a panel of 3 judges including a presiding judge. Additionally, a prosecutor from the procuracy office of the same level, the obligor (losing party) or his/her legal representative will also attend the session.

The hearing session may also be held if the obligor, institutional or individual or his/her legal representative insists that the hearing be held in their absentia or the obligor is still in absence unreasonably after two subpoenas have been serviced.

In principle, during its consideration of the application, the hearing panel will not retry the dispute which has been resolved by a foreign arbitration but only examine and verify the arbitral award and the supporting documents against the laws of Vietnam or international treaties to which Vietnam is a signatory or a participant.

The hearing panel will make its decision on whether to recognise and enforce the foreign arbitral award in Vietnam by a majority voting.

All court decisions relating to the recognition and enforcement of foreign arbitral awards in Vietnam may be appealed by the parties concerned or their legal representatives or protested by the people's procuracy office.

Within one month from the date of its receipt of the protest, the People's Supreme Court will consider and resolve the protest. The hearing panel that has jurisdiction over the appeal and/or protest against a relevant decision of the people's provincial court may preserve, modify part or the whole decision; or temporarily suspend, or suspend its consideration of the appeal or protest if the party concerned withdraws its appeal or the people's procuracy office withdraws its protest.

2.2.3. Enforcement of foreign arbitral awards

Within 15 days from the date when the decision to recognise and enforce foreign arbitral awards in Vietnam takes effect, the competent court will forward a duplicate copy of that decision and a copy of the foreign arbitral award to the judgement enforcement agency re prescribed by the laws of Vietnam.

Foreign arbitral awards will be enforced subject to the laws of Vietnam governing the enforcement of civil judgements.

Upon its receipt of a notice from the Ministry of Justice whereby an arbitral award that has been recognised for enforcement in Vietnam is being considered for abolition or suspension of enforcement by a competent body in a foreign country, the head of the civil judgement enforcement agency will issue a decision to temporarily suspend the enforcement of such an award and forward a copy of such a decision to the competent court which has made a decision to recognise and enforce the foreign arbitral award in Vietnam.

Immediately after its receipt of a notice from the Ministry of Justice whereby an arbitral award that has been recognised for enforcement in Vietnam has been abolished

or suspended from enforcement by a competent body in a foreign country, the Vietnamese court which has made a decision to recognise and enforce the foreign arbitral award in Vietnam should make a decision to cancel its previous decision and send a copy to the civil judgement enforcement body based on which the head of this body will issue a decision to suspend the enforcement of the foreign arbitral award.

2.2.4. Non-recognition of foreign arbitral awards in Vietnam

In line with a general principle laid out in the 1958 New York Convention and in accordance with Article 16 of the Ordinance, a foreign arbitral award will not be recognised and enforced in Vietnam if it is well established by the obligor that:

- Under the applicable law, parties to the arbitration agreement are of insufficient capacity or the arbitration agreement is found null and void;
- The obligor is not duly and promptly notified of the appointment of arbitrators, dispute settlement procedures or other legitimate reasons that made him/her unable to exercise his/her procedural rights.
- The foreign arbitral award exceeds the arbitration jurisdiction or relates to a dispute that is not requested by the parties concerned for settlement.
- Composition of arbitrators and the arbitration procedures are not in compliance with the arbitration agreement or the laws of the country where the arbitral award is rendered.
- The arbitral award has been yet to take effect or have a binding effect on the parties concerned.
- The foreign arbitral award is abolished or suspended by a competent body in the respective foreign country.

In addition, a foreign arbitral award may not also be recognised or enforced in Vietnam if under the laws of Vietnam, such a dispute should not be resolved through arbitration or the recognition of enforcement of which is contrary to fundamental principles of Vietnamese laws.

Finally, in light of the principle of reciprocity, the courts of Vietnam may take relevant actions to restrict their consideration of application for recognition and enforcement of foreign arbitral awards in Vietnam if the applications submitted by Vietnamese organisations or individuals for recognition and enforcement of Vietnamese arbitral awards in a respectively country is not properly considered by a competent body of that country due to discrimination.