THE ALTERNATIVE DISPUTE RESOLUTION (ADR) IN VIETNAM

by

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I. Current situation of arbitral settlement of business disputes in Vietnam

Broadly speaking, in comparison with the court (*i.e.* juridical) settlement of business disputes, dispute settlement through arbitration have certain advantages and strong points such as the right to self-determination of the parties concerned is most secured as seen from various aspects (including initiation of a lawsuit, selection of arbitration body and individual arbitrators, submission of claims, choice of procedures and methods of dispute settlement etc.), single and private handling of the dispute through simplified, flexible and prompt procedures. As a result, commercial confidentiality may be ensured, time consumption is reduced, litigation costs are affordable to the businesspersons. Furthermore, arbitral awards, if respected, will much likely be honoured by the disputing parties. It helps to bring about a high level of practicality and enforceability of the awards. In international trade, the geographical distance and difference in the political regimes, legal systems and customs and so on become a serious obstacle to foreign businessmen. In case where a dispute arises over interests, the parties concerned tend to rely on those modes of dispute settlement that are considered fairer and closer to international standards or capable of offering a better chance of self-determination for the parties. Arbitral procedures can, by themselves, meet these expectations and since arbitral procedural rules in a large majority of countries were developed based on the model arbitral rules of UNCITRAL 1985, arbitral procedures are fundamentally uniform. Thank to these

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overwhelming advantages, arbitration emerged as a popular, internationally recognised and most-sought mode of business dispute settlement.

In sharp contrast to such a trendy preference for arbitration, the aforesaid advantages of arbitration seem to be under-explored in Vietnam. This judgement is given in consideration of the ill convincing creation and operation of the existing arbitration centres in the country. Quantitatively, apart from the Vietnam International Arbitration Centre, only 5 economic arbitration centres have been established in localities so far employing 94 arbitrators[1]. Such a modest presence of arbitration centres fails to blow fresh air into the arbitral settlement of disputes in comparison with other forms of dispute settlement. In line with the economic transition and the pursue of an open-door policy, commercial transactions with foreign elements accompanied by disputes between Vietnamese business entities and foreign organisations and individuals also grew in number and complexity. Although there has been a surge in the number of disputes filed with, referred to and handled by the Vietnam International Arbitration Centre given those recorded under the centrally planned mechanism, it is still far below the level reached by its counterparts in regional countries[2]. In comparison with the Vietnam International Arbitration Centre, locally-based economic arbitration centres were much less active. In this context, in addition to their handling of economic disputes, some centres have to engage in other

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[1] These 5 economic arbitration centres were set up in Hanoi (2 including Hanoi Economic Arbitration Centre and Thang Long Economic Arbitration Centre), Bac Giang province (1), Ho Chi Minh City (1) and Can Tho province (1). Up to now, the Ministry of Justice has issued arbitrator certificates to 94 individuals from 12 provinces. Over the past 2 years, this number remained unchanged as no locality is reported to apply for arbitrator certificates. *Source*: Department of Civil and Economic Laws, Ministry of Justice.

[2] During 1963-1987, the Foreign Trade Arbitration Council and Maritime Arbitration Council handled only 3 cases while in 1988-1992, these two arbitration councils handled 91 cases. Since its establishment (at the end of 1995), the Vietnam International Arbitration Centre received approximately 20 cases/year on the average, a half of which was ended in hearings. In 2000 alone, the Vietnam International Arbitration Centre handled 21 cases (i.e. increased by only one case compared with that in 1999) with disputed values totalling USD 2,639,327. Parties concerned to disputes with foreign element (19 cases) include nationals from South Korea (4 cases), UK (3 cases), Singapore (2 cases), China (2 cases), Panama (1 case), Ucrain (1 case), Thailan (1 case), USA (1 case), Lichtenstein (1 case) and Taiwan (1 case). Vietnamese party was plaitiff in 52% of these cases (10/19 cases). Of the 21 cases mentioned above, the Centre brought into hearing of 9 cases and succesfully conciliated in 2 cases. By 15 October 2001, the Vietnam International Arbitration Centre received 5 claims relating to product quality and payment with a total disputed value of USD 427,769. In all these 5 cases, the plaintiffs were Vietnamese nationals or entities while defendants include Singaporeans (3 cases), Germany (1 case) and Poland (1 case). The Centre has held hearings of 2 cases and brought 2 other cases inton successful conciliation. *Source*: Vietnam International Arbitration Centre.

businesses such as organising seminars or training courses on business laws for enterprises. Many qualified and capable arbitrators found no opportunity to practice after their issuance of arbitrator certificates. Such a worrying situation resulted from the following reasons:

First, Perception and business culture

Despite its 30 years in existence and continuous strengthening and broadening since the start of the country's transition to a market economy, commercial arbitration and its advantages were not widely known among the business community. Some businessperson even misunderstood that commercial arbitration was merely a modified version and was insignificantly different from the previous State Economic Arbitration.

In the daily business practices in Vietnam, when a dispute arises, parties concerned often opt to resolve it through negotiation, conciliation or even suffer losses to keep their commercial confidentiality and reputation. In certain serious cases, the disputing parties may seek intervention from the economic police forces, procuracy offices and State Inspectorate Only when these solutions become fruitless, other modes of dispute settlement such as courts and arbitration could be referred to.

Second, Lack of confidence among the business circle in the effective settlement of enforcement of arbitral awards.

Because of their limited presence and ineffective performance, the existing economic arbitration centres failed to establish reputation and draw proper interests from businesspersons. On the other hand, the reputation and attractiveness of arbitration institutions are also formed by their representing individuals arbitrators. In achieving this objective, individual arbitrators are required to be outstanding specialists with a high level of ethics and professional qualifications in their own areas of expertise, as well as good knowledge of the laws and hearing experience. Nevertheless, due to strict and limping provisions of Decree No. 116/CP of the Government on criteria of arbitrators which overemphasise legal knowledge while underestimate technical expertise, it is hard if not impossible for arbitration centres to

build up a large number of qualified and experienced arbitrators. Apart from the above-mentioned reasons, one of the other key factor that reduces the attractiveness of arbitral settlement of disputes in Vietnam is said to be a lack of efficient mechanism that secures a strict enforcement of arbitral awards or decisions. Though both Decree No. 116/CP and Arbitral Rules of the Vietnam International Arbitration Centre prescribe that the arbitral awards, once rendered by the Centre will be of full force and effect and will not be challenged or appealed before any court of justice or any institution, so far the relevant laws of Vietnam are still silent on a mechanism that ensure the compliance with awards made by domestic arbitration organisations, should such awards are to be enforced in Vietnam[3]. In accordance with Article 31 of Decree No.116/CP, in respect of arbitral awards rendered by economic arbitration centres that are not respected by a disputing party, the other party may be entitled to request a competent people's court to handle subject to procedures for resolution of economic proceedings. By its nature, this step should not be considered as a court support for the enforcement of arbitral awards but otherwise, it provides a legal foundation for the court to dismiss arbitral awards. Pursuant to this provision, the court may receive and hold hearings of first trial to handle the request without the need to verify the properness and validity of the arbitral awards. In reality, many businesses have first referred their disputes to arbitration but has later voluntarily withdrawn their claim once they are aware of such a fundamental limitation.

Third, arbitration organisations are not vested with adequate powers and are in short of support from judiciary bodies in resolving economic disputes.

Under the existing regulations, commercial arbitration in Vietnam may have jurisdiction over a certain number of disputes only: including,

- Disputes over economic contracts;

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[3] Meanwhile, under Decision No. 453/QD-CTN dated 28 July 1995 of rhe President concerning Vietnam's accession to the 1995 New York Convention on recognition and enfocement of foreign arbitral awards, the arbitral awards rendered by Vietnamese arbitration centres in respect of disputes involving foreign elements may be recognised and secured for overseas enforcement. Similarly, foreign arbitral awards or decisions may also be reviewed, recognised and enforced in Vietnam.

- Internal disputes in company and between members of the company during the establishment, operation and dissolution;
- Disputes over acquisition and sales of shares and bonds.

Under Circular No. 02/PLDSKT of the Ministry of Justice dated 3 January 1995 providing guidance on the implementation of Decree No. 116/CP, disputes over economic contracts are defined as those arising between (i) juridical persons, (ii) juridical persons and private enterprises; (iii) juridical persons and individuals having business registration certificates and (iv) private enterprises and individuals having business registration certificates. Such a definition may broadly cover a wide variety of business disputes arising from the conclusion and performance of contracts. However, this provision is not consistent with the Ordinance on Economic Contracts dated 25 September 1989 since, an economically contractual relation requires a participation of at least one juridical person. Furthermore, Circular No. 02 has not yet determined arbitral jurisdiction over contract disputes between juridical persons and scientists, artisans, family-based economic units, individual farming and fishing households as well as disputes between juridical persons and foreign organisations and individuals in Vietnam (Articles 42 and 43 of the Ordinance on Economic Contracts). There is a wide recognition that the effectiveness and scope of activity of arbitration organisations are not only dependent on their jurisdiction over disputes but are also under a strong impacts of the co-operation, support and assistance of the courts. Individual arbitrators handle disputes based on the power delegated by the disputing parties although, arbitrators do not always exercise their vested powers properly. Therefore, disputing parties must be equipped and well prepared to prevent possible abuse of power or breach of procedural rules, unfairness or bias of arbitrators. To this end, the parties concerned must be permitted to request the court to review, cancel, disapprove or have arbitral awards declared unenforceable. On their part, arbitrators also, under various circumstances need the court assistance in ensuring a fair and just settlement of the disputes. For instance, such a judiciary facilitation is indispensable in taking necessary measures at the request of the disputing parties to safeguard evidence or secure the enforceability of the awards after hearings, or in calling for independent examination, or summoning witnesses, since under the existing regulations, arbitrators have no competence to carry out these activities by

their own. Regrettably, a required degree of assistance and intervention by the public authorities in the arbitral dispute settlement is still absent in the laws.

Fourth, though widely seen as a crucial mode of dispute settlement, under the current circumstances of Vietnam, arbitral procedures are exposed to many limitations given the State-run judiciary procedures.

Notably, like in other countries, advantages of arbitral procedures are also disadvantages of judiciary procedures. Despite the complexity of court settlement of disputes or even corruption in the judiciary system, the court performance creates a confidence of the disputing parties that justice is exercised on behalf of the public powers and hence court judgements are much likely enforceable. This is a well established truth for the judiciary system is currently organised nationwide from central government to local authorities in all 61 provinces and hundred districts with powerful human resources consisting of thousands judges, jurymen and supporting staff. Apart from the assistance extended by other State agencies such as judgement enforcement body in securing the enforceability of court judgements, the court strength is also multiplied by internally co-ordinated efforts of the court components. For example, investigation and hearings may be delegated to agencies at various levels.

Another aspect that is often taken into consideration by the disputing parties when referring their dispute to the court is the ability to benefit from the court assistance in case of necessity. In handling of economic disputes before the courts or arbitration, burden of proof is always born by the parties concerned. However, if the gathering and preserving of proofs are carried out through judiciary examiners, the disputing parties may find it difficult to fulfil this obligation since in Vietnam only the law enforcement bodies such as police, procuracy offices and courts have the right to make a direct request for independent examination. It implies that in obtaining an examination report, an individual has no ways other than bringing an action and petitioning the court to request for examination as there is no legal requirement that oblige the courts to consider a disputant's request for examination before the initiation of a lawsuit. Additionally, due to underdevelopment of public service providers, weaknesses of the archives, and especially lack of willingness and "bureaucracy" of

part of the public servants, individual disputants are faced with mounting difficulties in proposing the competent agencies and persons to verify and authenticate the legitimacy of the proofs whole origin were dated back long ago.

Another obvious advantage of the court which can not be found in arbitration is the ability of the local courts to request the Supreme Court for further guidance and instruction on how to handle the case, where there is inadequate legal grounds to resolve the dispute due to the absence, vagueness, insufficiency or inconsistency of relevant provisions. In the context of incompleteness or even inconsistency of the legal system, this brings about a multiplied advantage for the courts.

Finally, court settlement of economic disputes also has an advantage in cost effectiveness. Normally, arbitral settlement of disputes in most countries costs the disputing parties less money than that in judiciary procedures. By the contrary, in Vietnam the arbitration costs are fairly high due firstly to the fact that arbitration fees are statutorily fixed at high rates compared with that of the court fees (for more detail, please refer to the table comparing arbitration fees applicable to domestic disputes by the Vietnam International Arbitration Centre and court fees applicable to economic proceedings under Decree No. 70/CP of the Government dated 12 June 1997). In certain cases, where the disputed values exceed USD 55,000, the arbitration fees of the Vietnam International Arbitration Centre are even much higher than those applied by the Association of American Arbitration[4]. High costs of arbitration in Vietnam is also due to the fact that arbitral award may be appealed by the disputing parties for a court review or cancellation.

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[4] For example, in accordance with the arbitration tariffs of the the Vietnam International Arbitration Centre, if a disputed value is USD 55,000 (or USD 100,000), the arbitration fees will be USD 1,625 and USD 2,750 respectively that are determined using the following formula: (USD 500 + 2.5% of the amount in excess of USD 10,000). However, pursuant to the international arbitration rules of the Association of American Arbitration (AAA) with effect from 1 March 1991, the arbitration fees under the same circumstances are only USD 1,600 and USD 2,050 respectively. Such a difference lies in the fact that AAA arbitration fees are computed to include: (i) USD 300 applicable to all claims upon their submission and other related costs that are equal to USD 1,250 + 1% of the amount in excess of USD 50,000 in case where the disputed values range between USD 55,000 and USD 100,000.

II. Improving laws governing procedures for arbitral settlement of economic disputes

Reconciliation of differences or conflicts of interests in business transactions is considered an important factor in enhancing the stability, linkage, solidity, and attractiveness of an economy. In promoting a market-driven economy and accelerating economic integration process, arbitral settlement of disputes is undeniable for this mode of dispute resolution is initiated by the disputing parties and aimed at heightening their right to self-determination. It does not however, mean that arbitration settlement of disputes may be independent from or free of State supervision and competes with public jurisdiction. On the contrary, arbitral jurisdiction serves as a supplementary form of the public jurisdiction. Its presence demonstrates democracy in economic activities and goes in line with a trendy socialisation of economic dispute settlement. An enhanced role of commercial arbitration will help to ease the trying burden of the court system. Thus ensuring a balance between arbitral jurisdiction and court jurisdiction, international arbitration procedures and domestic arbitration procedures emerges as an internal task of improving arbitration laws. From an external point of view, any effort to improve arbitration law must be aimed at making the arbitral rules in Vietnam closer and more consistent with international standards. On the one hand, it should represent characteristics of the socialist orientation but on the other hand, it should also respect cultural identity of the parties concerned, the independence, honesty, impartiality and non-discrimination between different legal cultures during the dispute settlement.

In the latest draft of the Ordinance on Arbitration, many of the shortcomings and limitations of the arbitration laws as mentioned above have been step-by-step removed. However, there also remain different views on a number of sections of the draft that may be of interest and relevance to our discussions:

1 Scope of disputes subject to arbitral jurisdiction

As mentioned above, provisions relating to jurisdiction over economic contract disputes seem to be contrary to and inconsistent with substantive laws. Although it is necessary to broaden the arbitral jurisdiction over dispute settlement, it

should be carried out in line with efforts to review and amend relevant regulations on economic contracts and commercial disputes. However, a thorough study is required as regard a possible expansion of arbitral jurisdiction not only to business disputes (business is defined in the 1999 Enterprises Law) but also to disputes arising from civil transactions based on principles of equality and self-determination. This is related to the identification of areas that may be or may not be subject to arbitral jurisdiction. Arbitration is usually referred to in resolving trade and investment disputes as a matter of international practice since the definition of "*business*" under Vietnam's Enterprises Law is basically similar to that of "commerce" as stipulated in the UNCITRAL Model Law on Trade Arbitration dated 21 June 1985 (clause 1 of Article 1).

Areas where arbitration is not referable to as a mode of dispute settlement may include disputes over State or public interests, disputes between subjects of State management, disputes arising from personal relations, divorces or adoption etc.

2. Organisational form of arbitration

There is still a hot debate in Vietnam about a possible formation of ad-hoc arbitration to handle business disputes. Though Vietnam has insufficient number of qualified and experienced arbitrators, the law should not prevent the parties if they could find reliable arbitrators and succeeded in establishing an arbitration committee to resolve their disputes. This shows that due to its limited performance in comparison with statutory arbitration, ad-hoc arbitration is not as popular as statutory arbitration. Nevertheless, a public recognition of ad-hoc arbitration also enables the parties concerned to have a wider option of modes of dispute settlement, especially in case of minor or uncomplicated disputes.

3. Recognition and enforcement of arbitral award by the courts

In respect of the enforcement of arbitral award, some argue that if one disputing party refuses to honour the arbitral award but does not request for court intervention to annul the award, the other party may approach the judgement execution body for enforcement of the award but is not necessarily required to file

petition to the court for recognition and enforcement of the arbitral award[5]. Such a possibility, if realised, will speed up the enforcement of arbitral awards but it fails to ensure that the awards are valid and are in compliance with arbitration procedural requirements. The court examination and supervision of arbitration performance are crucial and help to reaffirm the court role as a judiciary body which is entirely different from the role of the judgement execution body (that serves as a component of the executive body).

4. Criteria of arbitrators

Unlike the laws of many other countries, the laws of Vietnam require individual arbitrators to meet certain specific criteria and conditions. Such a requirement is indispensable to secure arbitration efficiency and is therefore beneficial to the disputing parties. On the other hand, through its issuance of arbitrator certificates, the State may better supervise the arbitration practitioners. Similarly, the laws also regulate criteria of judges, prosecutors, lawyers and legal advisors etc. However, such criteria as "good ethics, honesty, objectivity and impartiality", "having economic and legal knowledge and experience" were proven vague conceptions which may be differently understood and interpreted by each person. Truly speaking, there must be a distinction in determining arbitrator criteria between those applicable to arbitration practices and those applicable to individual arbitrators in handling specific disputes. The law may set forth provisions on criteria and conditions to be satisfied for the issuance of arbitrator certificates whereby certain categories of persons will not be eligible to act as arbitrators including individuals with insufficient civil behavioural capacity, serving prisoners whole sentence have not yet been erased from the court' books, persons who are subject to criminal prosecution, judges, prosecutors, owners or managers of businesses which are declared bankrupt not due to objective reasons etc. All persons who do not fall under one of these categories may be eligible to apply for arbitrator certificates. Such a provision may help to prevent the "request-and-give" mechanism in licensing arbitrators. In the meantime, ill defined criteria such as "*good ethics, honesty, objectivity and impartiality*", "*having*

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[5] Vietnam-French House of Law, Seminar on the Draft Arbitration Ordinance, Hanoi, May 2001, p 58.

economic and legal knowledge and experience" will no longer be taken into account in granting arbitrator certificates. Obviously, in establishing their own reputation and attracting clients, arbitration centres must build up a network of respected and qualified arbitrators as well as require their arbitrators to strictly observe the code of conducts. Thus although not prescribed by the laws, any arbitration organisation which is prepared to create its image in the market as a prestigious and leading institution must set its own criteria and conditions for the individual arbitrators. Furthermore, in practice, disputing parties always try their best to select appropriate individual arbitrators who are capable of protecting their interests. Therefore, the law should not require individual arbitrators to be "honest, impartial and objective", but authorises the disputing parties to monitor the behaviour of arbitrators by exercising their right to declining or requesting to replace certain arbitrators once it is well established that these arbitrators are dependent or biased in dealing with the case. In addition, the law may require an impartiality or objectivity of individual arbitrators by obliging the arbitrators not to be closely related to one of the disputing parties based on bloodline, nurturing, marriage, or other ties. For example, an arbitrator will not be able to handle a dispute if one of the disputing parties is a business where his wife is working or the owner of a disputing business has business and property relationship with the arbitrator.