

Chambers

GLOBAL PRACTICE GUIDES

Definitive global law guides offering
comparative analysis from top-ranked lawyers

International Arbitration

Vietnam

Dr Le Net and Le Thanh Hieu
LNT & Partners

chambers.com

2020

Law and Practice

Contributed by:

Dr Le Net and Le Thanh Hieu

LNT & Partners see p.13



Contents

1. General	p.3	7. Procedure	p.7
1.1 Prevalence of Arbitration	p.3	7.1 Governing Rules	p.7
1.2 Trends	p.3	7.2 Procedural Steps	p.7
1.3 Key Industries	p.3	7.3 Powers and Duties of Arbitrators	p.7
1.4 Arbitral Institutions	p.3	7.4 Legal Representatives	p.8
2. Governing Legislation	p.4	8. Evidence	p.8
2.1 Governing Law	p.4	8.1 Collection and Submission of Evidence	p.8
2.2 Changes to National Law	p.4	8.2 Rules of Evidence	p.8
3. The Arbitration Agreement	p.4	8.3 Powers of Compulsion	p.8
3.1 Enforceability	p.4	9. Confidentiality	p.8
3.2 Arbitrability	p.4	9.1 Extent of Confidentiality	p.8
3.3 National Courts' Approach	p.4	10. The Award	p.8
3.4 Validity	p.5	10.1 Legal Requirements	p.8
4. The Arbitral Tribunal	p.5	10.2 Types of Remedies	p.9
4.1 Limits on Selection	p.5	10.3 Recovering Interest and Legal Costs	p.9
4.2 Default Procedures	p.5	11. Review of an Award	p.9
4.3 Court Intervention	p.5	11.1 Grounds for Appeal	p.9
4.4 Challenge and Removal of Arbitrators	p.5	11.2 Excluding/Expanding the Scope of Appeal	p.9
4.5 Arbitrator Requirements	p.5	11.3 Standard of Judicial Review	p.10
5. Jurisdiction	p.5	12. Enforcement of an Award	p.10
5.1 Matters Excluded from Arbitration	p.5	12.1 New York Convention	p.10
5.2 Challenges to Jurisdiction	p.6	12.2 Enforcement Procedure	p.10
5.3 Circumstances for Court Intervention	p.6	12.3 Approach of the Courts	p.10
5.4 Timing of Challenge	p.6	13. Miscellaneous	p.11
5.5 Standard of Judicial Review for Jurisdiction/Admissibility	p.6	13.1 Class-Action or Group Arbitration	p.11
5.6 Breach of Arbitration Agreement	p.6	13.2 Ethical Codes	p.11
5.7 Third Parties	p.6	13.3 Third-Party Funding	p.12
6. Preliminary and Interim Relief	p.6	13.4 Consolidation	p.12
6.1 Types of Relief	p.6	13.5 Third Parties	p.12
6.2 Role of Courts	p.6		
6.3 Security for Costs	p.7		

1. General

1.1 Prevalence of Arbitration

The Prevalence of International Arbitration in Vietnam

International arbitration is an increasingly more popular method of dispute resolution in Vietnam. According to statistics from the biggest and most popular Vietnamese arbitration centre - the Vietnam International Arbitration Centre (VIAC), there has been a steady growth in the number of newly administered cases and overall amount in dispute (VIAC administered 274 new cases in 2019 – a 52.2% from the previous year), with nearly half of them involving international disputes.

Overall, statistics from just Ho Chi Minh City alone reflect that arbitral institutions located there have administered 5,898 cases. In particular, there were 5,777 cases which have rendered an arbitration award (including 170 cases since 2017), 40 cases being solved by commercial arbitration organisations, 250 cases having been successfully settled, and four cases whose arbitral awards were cancelled by the Court.

The caseload is still modest compared to litigation; however, in Vietnam, around 100,000 commercial litigations are brought every year to court.

International Arbitration

In Vietnam, international arbitration is mostly chosen by domestic parties in the contracts as the method of dispute resolution. There is also enforcement of foreign arbitral awards proceedings in Vietnam, but the number of cases is not too high. Generally, it is foreign direct investment enterprises that choose commercial arbitration. As many as 40% of these foreign direct investment (FDI) enterprises choose to use commercial arbitration in cases of disputes.

This is because arbitration is perceived to be fairer, more effective, helping them save time and costs. Arbitrators are also deemed to have more expertise than judges in technical areas of law and international practice. Court proceedings are also perceived to be considerably lengthier.

1.2 Trends

Arbitration in Vietnam 2019-20

In 2019, important initiatives were issued by Vietnamese authorities. Since mid-2019, the Supreme People's Court has circulated the draft Resolution Guiding Certain Provisions of Civil Procedure Code on Recognition and Enforcement of Foreign Arbitral Awards at First-Instance Courts to the public for comments. The latest draft has clarified the procedural, documentary requirements concerning the recognition of foreign arbitral awards.

Most importantly, the draft has now clarified when the court may refuse to recognise foreign awards on grounds of “non-compliance with principles of Vietnamese law” to concern only restrictive circumstances including national safety, public safety, public health, fraud or bribery, etc.

Additionally, on 2 October 2019, the prime minister announced Decision 1268/QĐ-TTg to approve the plan on completing legislation regarding contracts and the resolution of contractual disputes by commercial arbitration and mediation. This has fuelled calls for revisions of the Law on Commercial Arbitration 2010, bringing it even closer to international practice with a potential express adoption of the UNCITRAL Model Law.

The Impact of COVID-19

COVID-19 has certainly impacted on how arbitration is conducted in Vietnam. In particular, during COVID-19, Vietnamese government has temporarily suspended the grant of visa for foreigners' entry into Vietnam. To counter such risk, the Vietnam International Arbitration Centre has expressly recommended the use of hearing through teleconferences, video conference as measures to minimise risks of disruption to case proceedings.

Parties have also been encouraged to send documents through indirect methods such as by parcel. Tribunals have also been increasingly asked to decide on suspension requests submitted by parties.

1.3 Key Industries

According to statistics from the Vietnam International Arbitration Centre, cases involving the real estate sector experienced a dramatic increase in 2019. The presumed cause is increasing foreign investors' interest in Vietnam real estate market, and many projects put on hold were resumed.

1.4 Arbitral Institutions

In Vietnam, the Vietnam International Arbitration Centre (VIAC) is the most widely used international arbitration institution. This is owing to VIAC's reputation as being the first and most reputed arbitration institution in Vietnam (dating back to 1993), with a list of highly sought-after and well-reputed domestic and international arbitrators. VIAC Tribunal awards are also directly enforceable in Vietnam without needing recognition process.

These advantages meant that VIAC strikes a good balance between neutrality, efficiency and specialities which creates favourable impressions for foreign and local parties alike. As set out in **1.1 Prevalence of Arbitration**, VIAC administered 274 new cases in 2019 – a 52.2% increase from the previous year.

2. Governing Legislation

2.1 Governing Law

Legislations Governing International Arbitration

The Law on Commercial Arbitration 2010 is the main legislation governing international arbitration, including when a dispute may be brought to arbitration, the forms of arbitration (institutional or ad hoc), the arbitration process, the arbitration award (including the challenging of arbitral awards). In relation to the recognition and enforcement of foreign arbitral award, the applicable law is the Civil Procedures Code 2015.

Difference and Similarities with UNCITRAL Model Law

The Law on Commercial Arbitration 2010 and the provisions on the recognition and enforcement of foreign award under the Civil Procedures Code 2015 are both generally based on the UNCITRAL Model Law. Indeed, the drafters to the Law on Commercial Arbitration 2010 drew heavy influence from the UNCITRAL Model Law. There are, however, certain key differences.

For example, under the Model Law, all awards, whether domestic or international, would need go through the recognition and enforcement procedures; whereas under Article 66 and 67 of the Law on Commercial Arbitration 2010, the award is directly enforceable like a court judgment unless the award is set aside. Another difference concerns the grounds for setting aside an award – whereas the UNCITRAL Model Law uses the term “public policy”, the Law on Commercial Arbitration uses the term “principles of Vietnamese law” – which has been interpreted more broadly by courts in setting aside proceedings.

2.2 Changes to National Law

In the past year, there have not been any significant changes to the national arbitration law. However as mentioned above, there are initiatives aiming towards revising the current legal framework, which may materialise in substantive changes in the near future.

3. The Arbitration Agreement

3.1 Enforceability

Under the Law on Commercial Arbitration 2010, an arbitration agreement would be enforceable unless it falls under a number of situations where it is deemed void pursuant to Article 18 of the law:

- the person establishing the arbitration agreement lacks authority or legal capacity;
- the arbitration agreement is not made in writing;

- the arbitration agreement was under fault, duress or threat when entering into the arbitration agreement and has requested a declaration that the arbitration agreement be voided; or
- the arbitration agreement violates a legal prohibition.

3.2 Arbitrability

Subject Matters Which May Be Referred to Arbitration

The approach of Vietnamese law is to set out a number of subject matters that may be referred to arbitration. In particular, Article 2 of the Law on Commercial Arbitration 2010 lists out three kinds of disputes which can be resolved by arbitration, including:

- arbitration arising out of commercial activities;
- arbitration arising between parties in which at least one party participates in commercial activities; and
- other disputes which the law specifies may be resolved by arbitration.

Additionally, Article 470.1 of the Civil Procedures Code 2015 provides three types of disputes that are exclusive jurisdiction to Vietnamese courts, and hence may not be resolved through arbitration. These are:

- civil cases relating to rights over immovable property located within the Vietnamese territory.
- divorce proceedings between a Vietnamese citizen and a foreigner or a stateless person if both spouses are long-term residents of Vietnam; and
- civil cases where the parties have the right, under Vietnamese law or an international treaty of Vietnam, to select the jurisdiction of Vietnamese courts and have decided to make such selection.

Determining Whether a Dispute is “Arbitrable”

Vietnamese law has yet to promulgate any binding case law on the general approach on how to determine whether a dispute is “arbitrable”. However, the common understanding under the Law on Commercial Arbitration is that the questions to answer when determining the “arbitrability” of a dispute is whether the arbitration arises out of commercial activity or not, and whether one of the parties to the dispute engages in commercial activities.

3.3 National Courts’ Approach

In general, Vietnamese national courts will uphold the parties’ arbitration agreement and issue a stay of proceedings if one party, despite the existence of an arbitration agreement, brings a claim to court. The only exception is where the arbitration agreement is void or impossible to perform.

3.4 Validity

The rule of separability to arbitration clauses is expressly recognised under the Law on Commercial Arbitration 2010. Accordingly, an invalid (or void or however modified) agreement would not affect the validity of an arbitration agreement.

4. The Arbitral Tribunal

4.1 Limits on Selection

The parties cannot just select anyone to be their arbitrators in Vietnam. There are certain minimum qualifications an arbitrator must possess mandatorily under Article 20 of the Law on Commercial Arbitration 2010 for him to act as an arbitrator:

- full civil legal capacity as provided in the Vietnamese Civil Code;
- a university qualification and at least five years of work experience in the discipline which they studied; and
- in special cases, an expert with highly specialised qualifications and considerable practical experience may still be selected as an arbitrator notwithstanding that they fail to satisfy the requirements above.

Additionally, the following persons may not be selected as arbitrators:

- if they are a judge, prosecutor, investigator, enforcement officer or official of a people's court, of a people's procuracy, of an investigative agency or of a judgment enforcement agency; or
- if they are a person who is currently prosecuted, or a person who is serving a criminal sentence or who has fully served their sentence but their criminal record has not been cleared yet.

4.2 Default Procedures

Procedure Following a Failure to Select an Arbitrator

In Vietnam, there is a distinction between institutional and ad-hoc arbitration. For institutional arbitration, the general rule is that where the parties' chosen method for selecting arbitrators fails (eg, either parties fails to select the arbitrator), then the Chairman of the arbitral institution will make the appointment.

The situation is different for ad-hoc arbitration. Here the Court will have the authority to appoint an Arbitrator for the Parties if the chosen method for selecting arbitrator fails.

Default Procedure for Multi-party Arbitration

Vietnamese law only contains provisions where there are multiple respondents to an arbitration proceeding. Here, the Parties must jointly appoint an arbitrator. If they fail to do so, then it

will be the Chairman of the arbitral institution (upon the expiration of the deadline to appoint) for institutional arbitration, or the Court for ad-hoc arbitration (upon a request by any of the Parties) that will make the appointment.

4.3 Court Intervention

Vietnamese court generally plays little role and cannot intervene in the Parties' selection of arbitrators. The only time when they participate in the selection of arbitrator process is during ad-hoc arbitrations, where the Court, upon a party request, makes a decision to appoint or replace an arbitrator.

4.4 Challenge and Removal of Arbitrators

Under Article 42.1 of Law on Commercial Arbitration 2010, the Parties have the right to request the replacement of arbitrator in a number of circumstances, including cases where:

- the arbitrator is a relative or representative of one party;
- the arbitrator has an interest relating to the dispute;
- there is a clear ground to conclude that the arbitrator is neither impartial nor objective; and
- the arbitrator was a conciliator, representative or lawyer of one party before the dispute is brought to arbitration for settlement, unless this is agreed in writing by the parties.

4.5 Arbitrator Requirements

In Vietnam, under Article 21 of Law on Commercial Arbitration 2010, an arbitrator is under a general duty to stay independent and impartial. They must also disclose all circumstances which may affect their independence and impartiality pursuant to Article 42.2 of the law. The same disclosure requirement is provided under the Rules of Arbitration of the Vietnam International Arbitration Centre.

5. Jurisdiction

5.1 Matters Excluded from Arbitration

Vietnam's approach, as highlighted by Article 2 of the Law on Commercial Arbitration 2010 is to set out a number of subject matters which may or be referred to arbitration. These are commercial disputes, dispute involving a party engaging in commercial activity, other disputes expressly allowed to be referred to arbitration under Vietnamese law.

In addition, there are certain disputes which fall under exclusive jurisdiction of the Vietnamese court, the most important of which is civil disputes concerning asset rights of real estate located in Vietnam.

5.2 Challenges to Jurisdiction

The principle of competence-competence is expressly recognised under the Law on Commercial Arbitration 2010.

5.3 Circumstances for Court Intervention

Under Article 44 of the Law on Commercial Arbitration 2010, the court has the right to address issues of jurisdiction of an arbitral tribunal if within five working days of receiving the Tribunal's decision on jurisdiction, a party requests the court to review the Tribunal's decision. Unfortunately, however, there have yet to be any precedents representing a general approach from the court on this subject. As for negative rulings on jurisdiction by arbitral tribunals, whilst rare, courts have decided that the arbitral tribunal has jurisdiction to determine the dispute despite a ruling to the contrary by the tribunal itself.

5.4 Timing of Challenge

Under Article 44 of the Law on Commercial Arbitration 2010, the parties have the right to go to court to challenge jurisdiction of the arbitral tribunal within five working days of receiving the Tribunal's decision on jurisdiction.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

In Vietnam, there is no express mention of standard of judicial review on this question of admissibility and jurisdiction. However, under Article 44 of the Law on Commercial Arbitration 2010 and Resolution No.01/2014/NQ-HDTP of the Supreme People's Court, the judge will rely on the application for review, supporting documents and evidence attached to determine on the question of jurisdiction/admissibility. It is therefore commonly understood that the court will make its determination de novo, and is not bound to defer to the arbitral tribunal's decision.

5.6 Breach of Arbitration Agreement

Under Article 6 of the Law on Commercial Arbitration 2010, where an arbitration agreement exists and a party commences court proceedings in breach of such agreement, the court must refuse jurisdiction. The only exception is where the court determines that the arbitration agreement is void or impossible to perform.

5.7 Third Parties

Arbitration brought under Vietnamese law is based on the existence of a consensual arbitration agreement between the Parties (Article 5.1 of the Law on Commercial Arbitration 2010). Hence, the general rule is that someone not a party to the arbitration agreement cannot bring the dispute to arbitration pursuant to that arbitration agreement.

There are, however, express exceptions to this rule under Article 5.2 and 5.3 of the Law on Commercial Arbitration 2010, specifically:

- When one of the parties being an individual to an arbitration agreement dies or loses his/her acting capacity, the arbitration agreement remains valid for his/her heir or representative at law, unless otherwise agreed by the parties; and
- When one of the parties being an institution to an arbitration agreement has to terminate its operation, goes bankrupt, or is dissolved, consolidated, merged, divided, split up or reorganised, such arbitration agreement remains valid for an institution that takes over the rights and obligations of the institution to such arbitration agreement, unless otherwise agreed by the parties.

6. Preliminary and Interim Relief

6.1 Types of Relief

An arbitral tribunal in Vietnam is permitted to award interim reliefs or emergency relief according to Article 48.1 of the Law on Commercial Arbitration. Pursuant to Article 49.2 of the same law, the types of relief which can be granted by the arbitral tribunal include:

- prohibiting any changes in the status of assets under dispute;
- prohibiting or forcing any disputing party to commit one or more certain acts to prevent acts which adversely affect the process of arbitral proceedings;
- distraining assets under dispute;
- requesting preservation, storage, sale or disposal of any asset of one disputing party or all disputing parties;
- requesting temporary money payment between the parties; and
- prohibiting transfer of the rights to assets under dispute.

Under Article 50.5 of the Law on Commercial Arbitration 2010 and Article 26 of Decree 63/2011/ND-CP, a decision to grant emergency relief by an arbitral tribunal is directly enforceable as though it is a court decision to grant emergency relief. The enforcement is done through a separate civil judgment enforcement agency.

6.2 Role of Courts

Courts Granting Emergency Relief

Under Article 53 of the Law on Commercial Arbitration 2010, a party may request the competent Court to apply one or more emergency reliefs after submitting its statement of claim. However, if a party has already requested the Arbitral Tribunal to apply one or more emergency reliefs, the Court will refuse a

request for emergency reliefs from that party, unless the emergency reliefs fall beyond the scope of the Tribunal's authority.

Emergency Reliefs

Under Article 12 of Resolution No 01/2014/NQ-HDTP, the type of emergency reliefs which can be granted by the court in Vietnam includes those available to an arbitral tribunal, meaning those emergency reliefs as listed under Article 50.2 of the Law on Commercial Arbitration (See **6.1 Types of Relief**).

However, the court has broader powers to grant interim relief. Under Article 48 of the Law on Commercial Arbitration 2010, the parties may request the court to also grant emergency reliefs in accordance with other relevant laws. This includes the Civil Procedures Code 2015, Article 114 of which sets out a number of further emergency reliefs which can be applied by the courts. Some relevant ones include:

- distraining the disputed properties;
- prohibiting the transfer of property right over the disputed assets;
- prohibiting the change of the current conditions of disputed assets;
- permitting the harvesting, sale of subsidiary food crops or other products, commodities;
- freezing accounts at banks or other credit institutions, State treasury; freezing properties at places of their deposit;
- freezing properties of the obligor;
- prohibiting involved parties from performing or forcing them to perform certain acts;
- prohibiting the obligors from leaving Vietnam; and
- arresting aircrafts or ships to ensure the lawsuit settlement.

Emergency Relief in Aid of Foreign-Seated Arbitrations

Under Vietnamese law, there has yet to be any specific legal mechanism allowing the courts to grant emergency reliefs in aid of foreign-seated arbitrations.

Emergency Arbitrators

There's not yet any legal mechanism for emergency arbitrator under Vietnamese law.

6.3 Security for Costs

Vietnamese law does not yet have a legal mechanism enabling the courts and/or the arbitral tribunal to order security for costs. However, one can achieve the same results as a security for costs by requesting an interim relief constraining the assets of the other party (Article 49.c of the Law on Commercial Arbitration 2010), freezing bank accounts of the other party (by powers of the court under Article 114.10 of the Law on Commercial Arbitration 2010).

7. Procedure

7.1 Governing Rules

Chapter V of the Law on Commercial Arbitration 2010 sets out a number of procedure requirements for arbitration in Vietnam. These concern: form and content requirements for the statement of claim (Article 30), time when the arbitration proceeding is deemed to start (Article 31), notice of the statement of claim (Article 32), statute of limitation for disputes brought to arbitration (Article 33), the arbitration fees (Article 34) the statement of defence (Article 35), the statement of counterclaim (Article 36), the procedure on withdrawal or amendment of statement of claim, statement of counterclaim, statement of defence (Article 37), negotiation during the arbitration process (Article 38).

7.2 Procedural Steps

In Vietnam, it is commonly understood that the following procedural steps are required by the Law on Commercial Arbitration 2010:

- the submission of statement of claim (Article 30 of the law);
- the notification and delivery of the statement of claim to the respondent (Article 32 of the law); and
- the submission of statement of defence (Article 35 of the law).

This structure is often followed verbatim by the rules of Vietnamese arbitral tribunals (eg, VIAC Rule, Articles 7, 8, 9), making the status of further submissions and procedural order (eg, Statement of Reply, Statement of Rejoinder) unclear. In practice, however, the Tribunal are willing to issue the order and allow the making of further submissions with the consent of the Parties.

7.3 Powers and Duties of Arbitrators

Under Article 21 of the Law on Commercial Arbitration 2010, the following powers and duties are imposed upon arbitrators:

- to accept or refuse to settle disputes;
- to be independent in dispute settlement;
- to refuse to provide dispute-related information;
- to enjoy remuneration;
- to keep secret the circumstances of disputes they settle, unless they have to provide information to competent state agencies under law;
- to ensure impartial, fast and prompt settlement of disputes; and
- to adhere to the rules of professional ethics.

7.4 Legal Representatives

There are no particular qualifications or requirements for legal representatives appearing in arbitration proceeding in Vietnam. It is sufficient that the legal representative is able to show that they are a representative, either by virtue of them holding the position of legal representative of a legal entity, or being empowered by a power of attorney.

8. Evidence

8.1 Collection and Submission of Evidence

Under Article 30, 35 and 46 of the Law on Commercial Arbitration 2010, parties have the right and obligation to submit evidence to prove their case and in support of their statements of claim and statements of defence.

Additionally, as a general rule, pursuant to Article 46 of the Law on Commercial Arbitration, a party can request the arbitral tribunal to order the production of documents and evidence from the other party. In the event that the documents and evidence could not be acquired even though the tribunal or a party have employed necessary methods, then such party may request the Court to order the production of documents/evidence. There's nothing to be sure that a court or tribunal will allow the request for production of document, however.

The similar applies to witness and witness statements. Under Article 47 of the Law on Commercial Arbitration, a party can request the tribunal to order the attendance of witness to attend the hearing. If appropriate methods have been carried out by the tribunal but the witness still do not attend, then the Tribunal will apply to the Court to make an order for attendance. In practice, such process of discovery, disclosure, use of witness statements, cross examination is applied with nuance and, generally, is subject to parties' agreement and the tribunal's direction on a case-by-case basis.

As for privilege, Vietnamese law does not contain express provisions on such matter, and depending on the parties' agreement, or the rules of the arbitral institutions, then the privilege rule may be applied.

8.2 Rules of Evidence

There are no rules of evidence applying particular to arbitration seated in Vietnam (eg, a rule of evidence similar to the IBA Rules on the Taking of Evidence in International Commercial Arbitration). There's only the general rule that Parties have the duty to provide and Tribunals have the power to request the provision of evidence to prove events relating to such dispute (Article 46 of the Law on Commercial Arbitration). It is also commonly understood that parties may submit evidence at any

time prior to the final hearing (Article 25 of the VIAC Rule which applies to VIAC arbitrations, or through power to amend the statements of submissions under Article 37 of the Law on Commercial Arbitration 2010).

8.3 Powers of Compulsion

The Tribunal or the parties may request the competent Court to order the production of documents relating to the dispute. Similarly, the Tribunal may request the Court to require the attendance of witness. In both cases, within seven working days from the day the Court receives the order to request document production/witness attendance, the Chief Judge of the competent court will appoint a judge to consider the request. Within five working days from his appointment, the judge shall make the decision to order document production/witness attendance accordingly.

9. Confidentiality

9.1 Extent of Confidentiality

Article 21 of the Law on Commercial Arbitration 2010 imposes general duty on arbitrators to maintain confidentiality regarding the arbitral proceedings on the parties and the arbitrator. Specifically, the arbitrators shall "keep secret the circumstances of disputes they settle, unless they have to provide information to competent state agencies under law".

As for the parties, there's no express confidentiality requirement, only a default rule that "dispute settlement by arbitration shall be conducted in private, unless otherwise agreed by the parties". The position is unclear in Vietnam, but from the wording it is arguable that the parties are not prevented from disclosing the documents and award of arbitral proceeding in another subsequent proceeding.

10. The Award

10.1 Legal Requirements

Article 61.1 of the Law on Commercial Arbitration 2010 provides a list of requirements which an arbitral award must comply with. Specifically, an award must contain:

- Date and place of issuance;
- Names and addresses of the plaintiff and defendant;
- Name and address of the arbitrator;
- Summary of the circumstances of the petition and matters under dispute;
- Grounds for issuing the award, unless the parties agree that it is unnecessary to indicate these grounds;
- Results of the dispute settlement;

- Time limit for enforcement of the award;
- Allocation of arbitration and other relevant expenses; and
- The arbitrator's signature.

Under Article 61.3 of the Law on Commercial Arbitration 2010, the time limit for an arbitral award to be issued is within 30 days after the end of the final hearing. This requirement may cause difficulty in complex cases where lengthy awards are rendered. Thus, a popular method employed by Tribunals is to substantially complete the award beforehand after completing the main substantive hearing, then render a short final hearing for the purpose of complying with this requirement.

10.2 Types of Remedies

Vietnamese law does not provide any express limitations on the types of remedies that an arbitral tribunal may award. Instead, the tribunal would have to follow the principles of remedies under the substantive law pursuant to their duty to comply with law (Article 4.2 of the Law on Commercial Arbitration 2010).

As for measures under Vietnamese law, for commercial remedies, Article 292 of Law on Commerce lists seven types, including:

- specific performance;
- penalties;
- compensation;
- suspension of performance;
- termination of contract; and
- rescission of contract.

10.3 Recovering Interest and Legal Costs

Legal Costs

Vietnamese law does not make express provisions on the allocation of legal costs, only arbitration fees. Under Article 34 of the Law on Commercial Arbitration 2010, the general principle is that the losing party will be responsible for arbitration fees.

However, under the rules of arbitration of the Vietnam International Arbitration Centre, Article 36, the arbitral tribunal shall have the power to decide that one party shall bear all or part of the legal costs or other reasonable expenses incurred by the other party. It is also a common practice in Vietnam for the Tribunal to order the losing Party to be subject to part or the entire costs.

Interests

It is common practice for parties to arbitration in Vietnam to request the award of interests. In our practice, there has yet to be any Vietnamese law governing arbitration where the Parties do not request the payment of late interest. Such claim is possible pursuant to the parties' right to interest for late payment

under Article 306 of the Law on Commerce and Article 307 of the Civil Code 2015.

11. Review of an Award

11.1 Grounds for Appeal

According to Article 4.5 of the Law on Commercial Arbitration, arbitral awards are final and binding, and may not be appealed in Vietnam.

However, parties are entitled to challenge an arbitral award made in Vietnam on limited number of grounds. Under Article 69 of the Law on Commercial Arbitration, a party may request the competent court to set aside an arbitral award within 30 days from the date of receipt of such award. The request must be accompanied by evidence proving that such application has sufficient grounds and is lawful.

Article 68 of the Law on Commercial Arbitration sets out the grounds for setting aside the arbitral awards as follow:

- there is no arbitration agreement or the arbitration agreement is invalid;
- the arbitration tribunal composition or procedures of arbitral proceedings is/acts incompliant with the parties' agreement or this Law;
- the dispute falls beyond the arbitration tribunal's jurisdiction: when an arbitral award contains the details falling out of the arbitration tribunal's jurisdiction, such details shall be cancelled;
- the evidence provided by the parties on which the arbitration tribunal bases to issue the award is counterfeit: an arbitrator receives money, assets or other material benefits from one disputing party, thus affecting the objectivity and impartiality of the award; and
- the award contravenes the fundamental principles of Vietnamese law.

These grounds roughly follow the grounds set out under Article 36 of the UNCITRAL Model Law, with a number of differences, the most important one being the use of the wording "fundamental principles of Vietnamese law".

11.2 Excluding/Expanding the Scope of Appeal

The parties are not allowed to extend the scope of challenge. As provided under Article 15.2 of Resolution No 01/2014/NQ-HDTP, during a hearing petition to set aside an arbitral award, the court can only consider whether the award falls under one of the grounds in Article 68.2 of the Law on Commercial Arbitration (see **11.1 Grounds for Appeal**). If it does not, then the Court may not set aside the arbitral award.

11.3 Standard of Judicial Review

As mentioned, the court is not allowed to review the merits of the case.

12. Enforcement of an Award

12.1 New York Convention

Vietnam has been a member of the New York Convention since 1995. Vietnam's ratification of the Convention came with four reservations:

- the New York Convention applies only to contracting states;
- for non-contracting state, then the New York Convention will only apply on reciprocity basis;
- the New York Convention will only apply to disputes arising out of commercial relationships as determined under the laws of Vietnam; and
- the interpretation of the New York Convention before Vietnamese courts or competent authorities must be in accordance with the Constitution and the law of Vietnam.

12.2 Enforcement Procedure

Enforcing Awards in Vietnam

In Vietnam, there's a distinction between domestic and foreign arbitral awards. In particular, domestic awards are fully enforceable (subject to set aside), and an applicant may request the civil judgment enforcement authority to enforce the award as though it is a court judgment.

Foreign arbitral awards, meanwhile, are required to go through the recognition procedure first. Under Article 451 of the Civil Procedure Code 2015, the party seeking to enforce a foreign arbitral award in Vietnam must first file a petition with the Ministry of Justice, who will subsequently transfer the document to the competent court within five days upon receipt pursuant to Article 453 of the Civil Procedure Code. Within five working days upon receipt, the Court shall consider to admit the case for review and notify to relevant parties, the procuracy and the Ministry of Justice. Then, within two months, the court will either issue a decision to:

- suspend the consideration of application;
- terminate the consideration of application; or
- open a hearing to consider the application.

If the court finds that the award can be recognised, then it will be enforced.

It should be noted however, that the decision of the Court on the recognition of foreign arbitral award can be appealed within

15 days of issuance, and can be subject to cassation proceeding, which usually take a long time (one to two years).

Enforcement of Awards that Have Been Set Aside

An award being set aside by the courts in the seat of arbitration is one of the grounds where the Court of Vietnam will refuse enforcement of such award. This is provided under Article 459.7 of the Civil Proceeding Code 2015.

Defence of Sovereign Immunity at the Enforcement Stage

Sovereign immunity is not one of the grounds for refusing enforcement of award under Article 459 of the Civil Procedures Code 2015. However, it is noted that the Civil Procedure Code 2015 also expressly recognise an overarching principle that those entitled to diplomatic privileges and immunities or under Vietnamese laws, international treaties to which the Socialist Republic of Vietnam is a signatory, the civil cases related to such individuals, agencies and/or organisations shall be settled through the diplomatic channel.

It is noted that Vietnam has yet to sign the UN Convention on Jurisdictional Immunities of States and their Property. However, if this changes in the future, then it is likely that the above provision of the Civil Procedure Code 2015 will be interpreted to include a defence of sovereign immunity at enforcement and recognition stage.

12.3 Approach of the Courts

Recognition and Enforcement of Arbitration Awards

When it comes to the recognition and enforcement of arbitral awards, Vietnamese courts consistently apply the principle that the Court will not retrial the proceeding already decided on by the arbitral tribunal, only to determine whether the award falls under the grounds for refusal of recognition (Article 457.2 of the Civil Procedure Code 2015). The situations where the courts can refuse to enforce foreign arbitral awards are stipulated under Article 459 of the Civil Procedure Code 2015, and includes:

- The parties of the arbitration agreement do not have the capacity to conclude such agreement according to law applicable to each party.
- The arbitration agreement is not legally effective according to the applicable law or according to the law of where the award is made in case the parties did not choose applicable law.
- The judgment debtors being agencies, organisations and individuals were not promptly and conformably notified of the appointment of the arbitrator and of procedures for resolving the disputes in foreign arbitration; or due to other plausible reasons, such agencies, organisations and individuals cannot exercise their procedure rights.

- The foreign arbitrator's award over a dispute is does not fall under the scope of issues to be resolved by any parties or exceeds the scope of the parties' arbitration agreement. If it is able to separate the parts of the decision on the matter which are requested and not requested to be settled at foreign arbitrator, the decision on the matter requested to be settled may be recognised and enforced in Vietnam.
- Compositions of foreign arbitrator and/or procedures for settlement of disputes conducted by foreign arbitrator is not conformable to the arbitration agreement or to the law of the country where the foreign arbitrator's award has been made, in case the arbitration agreement does not provide for such matters.
- The foreign arbitrator's award has not taken compulsory legal effect on parties.
- The enforcement of the foreign arbitrator's award has been set aside or annulled by a competent agency of the country where such award is made or the home country of the law that is applied.
- According to Vietnam's law, the dispute was not settled according to arbitral procedures.
- The recognition and enforcement in Vietnam of foreign arbitrator's award are contrary to basic principles of law of the Socialist Republic of Vietnam.

However, these standards are very open-ended, giving rise to various interpretations from different courts and a relatively low enforcement ratio. According to statistics, from 2015 to 2019, the percentage of foreign awards enforced in Vietnam was only 47.8%, with 21.7% of the case being refused enforcement. The most usual grounds for non-recognition under Vietnamese law are improper notice, lack of competency to enter into the arbitration agreement and contrary to basic principles of Vietnamese law.

Refusal to Award Foreign Arbitral Awards

Instead of "public policy", Article 459 of the Civil Procedure Codes 2015 uses the test of "basic principles of Vietnamese law". On this concept, Article 14.2 of Resolution 01/2014/NQ-HDTP (which applies to proceeding for annulment of domestic arbitral award) explains that Vietnamese court reviewing the application must consider two questions:

- whether the principle that is alleged to have been breached is one of the "basic principles on conduct, of which effects are most overriding in respect of the development and implementation of Vietnamese legal system"; and
- whether the award "violates the interests of the government, and the legitimate rights and interests of third party(ies)".

Yet there remains significant room for interpretation, and Vietnamese court have on occasion explained this principle very

broadly. For example, in a decision to annul a domestic arbitral award in 2019, the court found that a different interpretation of a substantive question of law by the arbitral tribunal which is inconsistent with the court's view had evidenced the Tribunal impartiality. In particular, the court alleged that the arbitral tribunal had discriminated against the losing party; hence the award has breached fundamental principles of Vietnamese law.

In another, very broadly cited case – *Toepler v Sao Mai*, the court found that the winning party's failure to mitigate its loss was contrary to the principle of good will under the Vietnamese Civil Code. In addition, the granting of liquidated damages is in conflict Vietnamese law on damages (requiring damages to be actual and direct).

In general, whilst the court generally recognise that it was bound to not to retrial the case, there has been occasion where this was the de facto results as the court considered that awards wrongly applying Vietnamese law would be "inconsistent with the principles of Vietnam law". It is hoped that once the Resolution Guiding Certain Provisions of Civil Procedure Code on Recognition and Enforcement of Foreign Arbitral Awards at First-Instance Courts comes into effect, this would narrow down the scope of interpretation for what is meant as "principles of Vietnam law".

13. Miscellaneous

13.1 Class-Action or Group Arbitration

Vietnamese law is silent with regard to class action arbitration or group arbitration. However, it is understood that these types of derivative claims would not be arbitrable, as under Articles 50, 72, 161 of the Law on Enterprise 2014, a member or shareholder of the company when bringing a derivative action on behalf of the company must "comply with legal provisions on civil procedures". It is understood that this refers to the Civil Procedures Code 2015, and indeed Article 30.4 of the Civil Procedures code 2015 provides that disputes between a company and its members/shareholders shall falls under the jurisdiction of the court. Accordingly, we understand that these types of derivative actions must be brought to court, not arbitration.

13.2 Ethical Codes

Under Article 21 of the Law on Commercial Arbitration 2010, the arbitrator has a duty to adhere to the rules of professional ethics. Whilst there's no overarching code on professional ethics in Vietnamese law (except for certain obligations of the tribunal under Article 21 and 42 of the Law on Commercial Arbitration 2010), various arbitral institutions have their own rule of ethics. For example, the Vietnam International Arbitration Centre has its own Rule of Ethics of Arbitrator published in 2015.

As for counsel, there are no specific codes or professional standards applicable to them in arbitration (eg, the IBA Guidelines on Party Representation). Instead counsels are bound by the ethical rules of the relevant bar association. For example, Vietnamese lawyers are subjected to the Ethical Rules and Professional Conducts of Vietnamese lawyers pursuant to Article 5 of the Law on Lawyers.

13.3 Third-Party Funding

There has not been any legal framework or restrictions on third party funders under Vietnamese law. Depending on the structure of the funding however, if it is a loan with a foreign funder, then the funded party will need to register such funding as a foreign loan with the State Bank of Vietnam.

13.4 Consolidation

There's no express recognition for consolidation of arbitration under Vietnamese law, however Article 15 of the VIAC Rules expressly recognise that, with the parties' agreement, the arbitral tribunal may consolidate claims made in separate, but pending, arbitrations into a single arbitration at the earliest commencement date.

13.5 Third Parties

Third Parties Bound by Arbitration Agreements/Awards

Vietnamese law is silent on whether third parties can be bound by an arbitration agreement or award. However, (and this is untested), if the contract is made in favour of a third party, then that party may be entitled to rely on the arbitration agreement to bring dispute against a party, as under Article 415 of the Civil Code 2015, a third party in this case has the power to directly demand the obliged party to perform his obligation.

National Court of Vietnam and Foreign Third Parties

Vietnamese law is silent on the question of whether the national court of Vietnam can bind a foreign third party.

VIETNAM LAW AND PRACTICE

Contributed by: Dr Le Net and Le Thanh Hieu, LNT & Partners

LNT & Partners has an arbitration team with strong expertise in commercial and construction arbitrations and is consistently ranked top-tier by major legal directories. The team has represented a wide variety of clients ranging from state-owned entities to foreign investors in international, domestic arbitrations as well as arbitration-related court proceedings. The firm has extensive experience in most arbitral fora in Vietnam, including the International Chamber of Commerce (ICC), the Singapore International Arbitration Centre (SIAC) and the Vietnam International Arbitration Centre (VIAC). LNT also

has a presence in Singapore, with a representative office, with aims to better assist clients with SIAC and Singapore-seated arbitrations. Recent representations include a government body in a construction dispute concerning a big tunnel and highway project in Southern Vietnam (ICC Rule) valued at USD600 million; a state-owned enterprise employer in an EPC Contract dispute concerning a polyester plant (ICC Rule), valued at USD100 million; and a state-owned enterprise in a multimillion US dollar dispute concerning the construction of the Noi Bai – Lao Cai highway (ICC Rule).

Authors



Dr Le Net is the partner in charge of LNT's international arbitration practice groups, widely renowned for their capacity to tackle complex assignments. Dr Net has acted as counsel or arbitrated in over 70 arbitration proceedings. These include some of the largest and most complex

disputes in Vietnam, such as a dispute regarding a titan mine, valued at over USD100 million, and the dispute regarding the tallest building in Vietnam, valued at nearly USD200 million. His recent experience includes acting as lead counsel for multimillion-dollar dispute concerning the Long Thanh – Dau Giay and the Hanoi – Hai Phong expressways, and a USD100 million EPC dispute.



Le Thanh Hieu is an associate in LNT's International Arbitration practice group. He has diverse international arbitration experience, including actively working on several multimillion US dollar EPC Contract disputes under the ICC and VIAC Rules. Prior to joining LNT &

Partners, Mr Hieu worked as an intern with the secretariat of the Vietnam International Arbitration Centre (VIAC).

LNT & Partners

Level 12 Pacific Palace Building
83B Ly Thuong Kiet Street
Hoan Kiem District
Hanoi
Vietnam

Tel: +84 24 3824 8522
Fax: +84 24 3824 8580
Email: Net.le@lntpartners.com
Web: www.lntpartners.com

