

CHAPTER 24 JUDICIAL AND ARBITRAL RECOURSE

OVERVIEW

In May 2023, the Vietnamese government gave the long-awaited green light to Power Development Plan 8 (PDP 8). This landmark legislation sets out a roadmap for Vietnam's future power development over the course of the next decade. The Ministry of Industry and Trade (MOIT) estimates that the implementation of PDP 8 will require between US\$113 and 135 billion of investment.¹

To attract investors, Vietnam will need to ensure a neutral and predictable legal framework. Indeed, one of investors' primary concerns will be the existence of an efficient and transparent justice system to ensure that business commitments will be performed as agreed and that proper recourse will be available in the event of any breach or dispute.

We have noted some positive developments in recent years (as highlighted in this chapter). However, our members continue to report serious obstacles in trying to ensure their rights in Vietnam. We would like to respectfully highlight some of these outstanding issues with respect to the following topics: Vietnamese courts, arbitration in Vietnam, and the recognition and enforcement of foreign arbitral awards in Vietnam.

I. COURTS AND THE COMPETITION AUTHORITY

Relevant authorities: Ministry of Justice (MOJ), Supreme People's Court, Supreme People's Procuracy, National Assembly (Judicial/Economic Committees), Ministry of Industry and Trade (MOIT)

Issue description

In the 2022 edition of the Bertelsmann Stiftung's Transformation Index (BTI)², Vietnam ranked 106th out of 137 participating developing countries in the "political transformation" category (which includes, among other things: judicial independence, prosecution of office abuse, stability of democratic institutions).

One of the reasons that may explain this perception of the Vietnamese judiciary is the need for substantial improvement in transparency. Vietnamese courts have only recently started to publish judgments.³ Our members are following this process with great interest. We hope that, as a result, there will be a well-established and reliable body of precedents and case-law that could provide guidance and predictability on the likeliness of an outcome for individual disputes.

Our members also face this issue in implementing the Law on Competition⁴ because the decisions of the relevant authorities are not public. The Law on Competition stipulates that the National Competition Commission (VCC) is an advisory agency to assist the Minister of Industry and Trade in performing the function of state management of competition on the basis of merging the competition authority and the Competition Council in accordance with the provisions of the Competition Law 2004. On February 10, 2023, the Government promulgates Decree 03⁵ regulating the functions, powers and organizational structure of VCC, which stipulates that VCC is an agency

¹ "Vietnam needs \$135B to develop power projects by 2030", VnExpress, 2023. Available at: <<https://e.vnexpress.net/news/business/economy/vietnam-needs-135b-to-develop-power-projects-by-2030-4631326.html>>, last accessed on 31 October 2023.

² BTI, 'BTI 2022 Country Report: Vietnam', Bertelsmann Stiftung, 2022. Available at: <<https://bti-project.org/en/reports/country-report/VNM>>, last accessed on 18 July 2023.

³ The Supreme Court has launched two websites in accordance with Resolution 03/2017/NQ-HĐTP (Resolution 03) dated 16 March 2017 of the Judicial Council of the Supreme People's Court on the publication of judicial judgments and decisions and the Supreme Court's Official Letter 144/TANDTC-PC dated 4 July 2017 on the implementation of Resolution 03. Available at: <<https://congboanan.toaan.gov.vn/>>, and <<https://anle.toaan.gov.vn/webcenter/portal/anle/home.>>, last accessed on 10 Jul 2023.

⁴ Law 23/2018/QH14 dated 12 June 2018 of the National Assembly on Competition (Law on Competition).

⁵ Decree 03/2023/ND-CP dated 10 February 2023 of the Government defining the functions, tasks, powers, and organizational structure of Vietnam Competition Commission (Decree 03).

under the Ministry of Industry and Trade, with the function of conducting competition proceedings, merger control, deciding on exemptions from prohibited competition restriction agreements, settle complaints against decisions to handle competition cases in accordance with the provisions of law; advise the Minister of Industry and Trade in performing the state management of competition, protecting the interests of consumers and managing business activities in a multi-level manner.

Competition policies are implemented in order to create and maintain a healthy, fair, equal and transparent competitive environment, ensuring the right to freedom of competition in business of enterprises in accordance with the provisions of law. The Law on Competition also provides for the VCC to publicly announce decisions on exemption from prohibited competition restriction agreements, decisions on merger control, decisions on handling competition cases, decisions on suspension of settlement of competition cases, decisions to settle complaints, decisions to handle competition cases in accordance with the provisions of competition law and other relevant laws.

Once the VCC and its supporting entities are operational, we expect to see more enforcement activity by competition regulators, not only in the area of merger control, but also in the enforcement of regulations on anti-competitive agreements and abuse of market dominance.

Furthermore, the permitted scope of legal services for foreign law firms remains uncertain, particularly since the adoption of Decree 123⁶ and Decree 137.⁷ Meanwhile, the Law on Lawyers still prevents a fully qualified Vietnamese lawyer from representing clients before Vietnamese courts if he or she is working for a foreign law firm.⁸

Potential gains/concerns for Vietnam

EuroCham Legal Sector Committee is following with great interest the current process of publishing judgements of Vietnamese courts, including recognition of precedents as one of the sources of law in accordance with the Civil Code.⁹ Every year, the two websites managed by the Supreme People's Court report an increased number of published judgments.¹⁰

When planning to invest abroad, the availability of an efficient and transparent judicial system is one of the key factors that foreign investors consider. Legal Sector Committee members, therefore, believe that further judicial reform in Vietnam will lead to increased confidence among investors which will, in turn, boost Vietnam's economy.

In the same vein, allowing Vietnamese-qualified lawyers working for foreign law firms to represent clients before courts would increase foreign investors' confidence in the judicial system of Vietnam.

Recommendations

- Maintain the predictability and stability of the current system to ensure an enabling regulatory framework;
- Continue to publish the judgments of courts at all levels;
- Publish all decisions of the competition authorities; and
- Amend the Law on Lawyers to allow fully qualified Vietnamese lawyers to represent clients before Vietnamese courts, even if she or he is working for a foreign law firm.

6 Decree 123/2013/ND-CP dated 14 October 2013 of the Government on guiding the Law 65/2006/QH11 dated 29 June 2006 of the National Assembly on Lawyers (Decree 123).

7 Decree 137/2018/ND-CP dated 8 October 2018 of the Government amending and supplementing Decree 123/2013/ND-CP (Decree 137).

8 Law 65/2006/QH11 dated 29 June 2006 of the National Assembly on Lawyers (Law on Lawyers).

9 Article 6, the Civil Code 91/2015/QH13 dated 24 November 2015 of the National Assembly (Civil Code).

10 Total Number of Judgements and Decisions Published: 1.201.442. Available at: <<https://congbobanan.toaan.gov.vn/>>, last accessed on 23 August 2023.

II. ARBITRATION IN VIETNAM

Relevant authorities: Ministry of Justice (MOJ), Supreme People's Court, Supreme People's Procuracy, National Assembly (Economic Committee)

Issue description

Given the real or perceived disadvantages of other dispute settlement mechanisms in Vietnam, such as the Vietnamese courts (see Section I above) and international arbitration (see Section III below), investors may seek recourse through arbitration in Vietnam.

While the Vietnam International Arbitration Centre (VIAC) confirmed a resumption of growth in the total value of disputes of VIAC arbitration cases since the end of the pandemic¹¹, our members continue to report a number of serious issues in VIAC-managed arbitration.

The main concern remains the intervention of the Vietnamese courts not only before a final award is issued, which may result in the lack of jurisdiction of the VIAC tribunal and the termination of the arbitration proceedings, but also by setting aside the final award once it has been issued by a VIAC tribunal.

For example, we are aware of cases where the respondents in VIAC proceedings raised unfounded objections to the jurisdiction of the VIAC tribunal. When the tribunal subsequently issued a decision to confirm its jurisdiction, the respondent successfully applied to a Vietnamese court to have the decision overturned. Since the decision of the Vietnamese court on this issue is final and binding, the court decision resulted in the termination of the VIAC proceedings.

Our members have also reported cases where Vietnamese courts reconsider the merits of the case in order to set aside a final award issued by the VIAC tribunal and rely on a breach of the 'fundamental principles of Vietnamese law' to justify this decision to set aside the award.

The absence of a right to appeal a decision to set aside an arbitral award continues to be a major obstacle for foreign investors who are seeking a fair and transparent resolution of their claims in Vietnam.

Our members report that the objective of avoiding interventions from Vietnamese courts is regularly invoked by VIAC representatives to justify the restrictive management of arbitration proceedings. For example, our members have reported that the rules applied to witnesses at hearings are extremely rigid compared to usual standards in international arbitration centers. This is justified by the fear of a court's intervention at a later stage. At the same time, VIAC tribunals routinely allow a large number of "authorised representatives" of a party (this would include any employees of such party) to attend the hearing and testify or give new evidence during the hearing without prior disclosure to the other party.

Other examples include: a refusal to direct that the submissions/correspondence be exchanged by email as well as hard copy by courier, even when the pandemic caused courier services to be suspended – resulting in months of delay; a refusal to direct that some hearings could be held with some participants joining by video-link; and a refusal to direct that voluminous documents could be submitted via excel files instead of by hard copy documents. All these examples stand in sharp contrast with the usual practice of international arbitration centers.

Another problem is that, unlike other legislations which provide immunity for arbitrators except in cases of gross negligence or fraud, Vietnamese law does not provide immunity for arbitrators. As a result, parties may sue arbitrators in the course of arbitration, particularly when the arbitrator grants interim relief, under the general principles of contract law and civil liability. The arbitration procedure then takes longer, and arbitrators sometimes withdraw.

These elements may explain the difference in the percentage of international cases between VIAC¹² (60% in 2022)

11 "Annual report 2022", Vietnam International Arbitration Centre, 2022. Available at: <www.viac.vn/en/annual-report.html> last accessed on 23 August 2023.

12 "Annual report 2022", Vietnam International Arbitration Centre, 2022. Available at: <www.viac.vn/en/annual-report.html> last accessed on 23 August 2023.

and other Southeast Asian arbitration centers (88% for SIAC¹³ and 83% for HKIAC¹⁴ in 2022).

Our members have noted with interest the establishment of representative offices of two internationally well-known arbitration institutions in Vietnam in recent years. We hope that this will help to increase awareness of international arbitration standards in Vietnam.¹⁵

Potential gains/concerns for Vietnam

An efficient and reliable legal framework for arbitration is a key asset for the development of a favourable environment for investment. In particular, the absence of a right to appeal a decision to set aside an arbitral award would contribute to making dispute settlement through arbitration in Vietnam more transparent and independent and, therefore, more popular on its own merits.

Recommendations

- The Supreme People's Court and the Chief Justice could provide more and stricter instructions to lower-level courts to consistently limit court interventions during arbitration proceedings;
- A right of appeal should be introduced against first-instance court decisions on jurisdiction or on the validity of an arbitral award.

III. RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Relevant authorities: Ministry of Justice (MOJ), Supreme People's Court, Supreme People's Procuracy, National Assembly's Economic Committee

Issue description

Foreign investors generally choose dispute resolution by international arbitration where the value of the contract is substantial. Although international arbitration is often costly and time-consuming, an international arbitral award is generally enforceable in most jurisdictions around the world under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards¹⁶ (NYC), to which Vietnam is a party.

However, our members have found that it is extremely difficult, in practice, to achieve the recognition and enforcement of foreign arbitral awards through the Vietnamese courts. Unfortunately, we have not seen real improvement since the previous editions of this chapter.

One of the main difficulties encountered is the reversal of the burden of proof. Under the provisions of the NYC, if the award debtor raises any objection to the enforcement of a foreign arbitral award, then the award debtor is required to provide evidence to prove its objection. However, in practice, the Vietnamese courts reverse the burden of proof and require the award creditor to prove that any objections raised by the award debtor are invalid or not applicable. This practice encourages award debtors to raise as many objections as possible, sometimes frivolously, which the award creditor is required to disprove. This imposes a significant cost and time burden on the award creditor and obstructs the award creditor in enforcing its legitimate rights. The Civil Procedure Code¹⁷ contains a specific provision on the burden of proof which makes clear that the award debtor shall bear this burden. Unfortunately, it appears that this practice has not substantially evolved with the entry into force of the Civil Procedure Code in 2016, as suggested by the MOJ's figures mentioned below.

13 "Annual report 2022", Singapore International Arbitration Centre, 2022. Available at: <<https://siac.org.sg/annual-reports>> last accessed on 23 August 2023.

14 "Annual report 2022", Hong Kong International Arbitration Centre, 2022. Available at: <<https://www.hkiac.org/about-us/annual-report>> last accessed on 24 July 2023.

15 <https://icc-vietnam.org/> and <https://docs.pca-cpa.org/2021/10/2021/10/63fff1ec-pca-viet-nam-signing-ceremony-press-release.pdf>, last accessed on 18 July 2023.

16 Convention on the Recognition and Enforcement of Foreign Arbitral Awards dated 1958 of The United Nations Commission on International Trade Law.

17 Civil Procedure Code 92/2015/QH13 dated 25 November 2015 of the National Assembly (Civil Procedure Code).

Another difficulty is the rejection of applications by the Vietnamese courts for reasons that are not consistent with the NYC. For example, in many cases, the Vietnamese courts have determined that the foreign party to the arbitration agreement lacked the capacity to sign a contract by wrongly referring to Vietnamese law instead of the relevant law governing the foreign party. Similarly, they have determined that notices were not properly served on the respondent by wrongly applying Vietnamese law and not referring to the rules of arbitration governing the proceedings and the governing law of the arbitration agreement.

Recently, another difficulty arose in a case¹⁸. Under the Civil Procedure Code¹⁹, Vietnamese courts have exclusive jurisdiction over disputes involving foreign elements and concerning rights to real estate in Vietnam. Vietnamese courts take an expansive view of this jurisdictional privilege, refusing to enforce a foreign arbitral award because its enforcement would involve the realization of real estate in Vietnam.

According to figures released by the MOJ, from 1 January 2012 to 30 September 2019, 82 applications for recognition and enforcement of international arbitration awards have been filed.²⁰ A preliminary observation of these figures suggests that all first-instance decisions were appealed. In only 37 of the appealed cases were the awards recognised and accepted for enforcement. In 11 cases, the application for recognition and enforcement were suspended, and in 29 cases, the awards were not recognised.²¹ Unfortunately, these figures have not been officially updated by MOJ as of the date of this chapter.

The practice showed that one of the key reasons for which recognition and enforcement of arbitration awards are refused is due to recognition and enforcement contrary to basic principles of Vietnamese laws. This expression “basic principles of Vietnamese laws” was subject to a broad interpretation and as a result many arbitration awards were refused for the recognition and enforcement in Vietnam due to this reason. In the meantime, the NYC is silent on the term “basic principles of laws”. Article V.2(b) of the NYC only provides for refusal of recognition and enforcement of an arbitral award in a country if the recognition or enforcement of the award would be contrary to the public policy of that country. It appears that the term “basic principles of Vietnamese laws” is inconsistent with the term “public policy” as referred in the NYC.

In order to improve the situation, the introduction of the automatic referral to the relevant Superior People’s Courts of all cases where an application has been rejected by the Courts of First Instance would encourage the recognition and enforcement of foreign arbitral awards in Vietnam.

Moreover, seminars and training courses could be organised by the Supreme People’s Court for all judges of the provincial People’s Courts and the Superior People’s Courts. This would help to ensure that judges are properly trained to deal with applications for the recognition and enforcement of foreign arbitral awards in accordance with Vietnamese law and the NYC.

A more favourable trend towards the recognition of foreign arbitral awards seems to be emerging, since of the 11 decisions published by the Supreme People’s Court since October 2019²², only 3 have been suspended or refused. We hope that this trend will be confirmed in the coming years with a wider sample.

We further understand that a resolution is being drafted to guide the procedure for recognition and enforcement of foreign arbitral awards in Vietnam in compliance with the CPC. EuroCham Legal Sector Committee would be happy to provide comments and suggestions on this draft resolution.

Potential gains/concerns for Vietnam

The vast majority of state parties to the NYC properly apply its provisions in practice and duly recognise and enforce foreign arbitral awards within their own jurisdictions. The accession to, and implementation of, the NYC is widely seen as a key factor for the integration of a national economy into global trade.

18 Decision No. 09/2023/QĐ-PT dated 17 January 2023 of the High People’s Court in Hanoi.

19 Article 470.1(a), the Civil Procedure Code.

20 Ibid.

21 Ministry of Justice’s data base on the filed applications for recognition and enforcement of international arbitration awards. Available at: <https://moj.gov.vn/tttp/Pages/dlcn-va-th-tai-Viet-Nam.aspx?fbclid=IwAR3ML02FXdzugE5pZSO98eaEgWVTopdcUD4NnQ_wUgbb_B_b-I_JHnn66jY>, last accessed on 10 July 2023.

22 Available at: <<https://congbobanan.toaan.gov.vn/>>, last accessed on 21 Jul 2023.

Therefore, the fact that Vietnam does not apply these provisions makes it a less attractive destination for foreign investors since any procedure for recognition and enforcement is uncertain and, too often, leads to a decision that would have been different in other parties to the NYC (as evidenced by the figures released by the MOJ and discussed above).

Recommendations

- › Continue to publish updated figures on applications for recognition and enforcement of foreign arbitral awards to follow the publication of figures for 1 January 2012 to 30 September 2019;
- › Implement the Civil Procedure Code so that it provides for the strict application of the provisions of the NYC;
- › Clarify the term “basic principles of Vietnamese laws” in specific and clear criteria to secure that recognition and enforcement of an arbitration award in Vietnam would be transparent and consistent with those stipulated in the NYC;
- › Introduce the automatic referral to the relevant Superior People’s Courts of all cases where an application has been rejected by the Courts of First Instance; and
- › Organise more seminars and training courses to ensure that judges are properly trained to deal with applications for recognition and enforcement of foreign arbitral awards in accordance with Vietnamese law and the NYC.

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