



ICLG

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- Preface by Gary Born, Chair, International Arbitration and Litigation Groups, Wilmer Cutler Pickering Hale and Dorr LLP

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Vietnam



Do Trong Hai



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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of Vietnam?

As provided in Article 16 of the Law on Commercial Arbitration No. 54/2010/QH12 dated 17 June 2010 of the National Assembly (the “Law on Commercial Arbitration”), an arbitration agreement must be in writing. The following forms of agreement shall also be deemed to constitute a written arbitration agreement:

- (a) An agreement established via an exchange between the parties by telegram, fax, telex, email or other form prescribed by law.
- (b) An agreement established via the exchange of written information between the parties.
- (c) An agreement prepared in writing by a lawyer, notary or competent organisation at the request of the parties.
- (d) Reference by the parties during the course of a transaction to a document such as a contract, source document, company charter or other similar documents which contains an arbitration agreement.
- (e) Exchange of a statement of claim and defence which expresses the existence of an agreement proposed by one party and not denied by the other party.

1.2 What other elements ought to be incorporated in an arbitration agreement?

The Law on Commercial Arbitration does not stipulate specific elements to be incorporated in an arbitration agreement. Normally, the following elements should be included:

- (a) Name of the Arbitration Centre. If the parties already have an arbitration agreement but do not clearly indicate the arbitration form or a specific arbitration institution, then if a dispute arises the parties must reach agreement on the arbitration form or a specific arbitration institution to resolve the dispute. If the parties are unable to reach such an agreement, then selection of the form of arbitration and the arbitration institution to resolve the dispute shall be implemented in accordance with the request of the claimant.
- (b) Arbitration rules applicable to the settlement of the dispute. The laws are silent as to whether the parties can choose an arbitration centre for the settlement of the dispute. Normally, an arbitration centre shall use its own rules for the settlement of a dispute.
- (c) Place of arbitration. Unless otherwise agreed by the parties or otherwise stipulated by the rules of the arbitration centre,

the arbitral tribunal shall make decisions on the location for conducting the arbitration.

- (d) Number of arbitrators. If the parties do not have an agreement on the number of arbitrators, an arbitral tribunal shall consist of three (3) arbitrators.
- (e) Applicable law for resolving the dispute. For disputes without a foreign element, the arbitral tribunal shall apply the law of Vietnam in order to resolve the dispute. For disputes with a foreign element, the arbitral tribunal shall apply the law chosen by the parties. If the parties do not have an agreement on applicable law, then the arbitral tribunal shall make a decision to apply the law which it considers the most appropriate.
- (f) Language to be used in the arbitration proceedings.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

As provided by Law on Commercial Arbitration, where the parties in a dispute have already reached an arbitration agreement but one of them initiates court proceedings, the court must refuse to accept jurisdiction unless the arbitration agreement is void or incapable of being performed.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in Vietnam?

The enforcement of arbitration proceedings in Vietnam is governed by the Law on Commercial Arbitration No. 54/2010/QH12 dated 17 June 2010 of the National Assembly and Decree No. 63/2011/ND-CP dated 28 July 2011 of the Government guiding the implementation of some provisions of Law on Commercial Arbitration on procedural and administrative matters relating to the establishment, operation and termination of arbitration centres (including foreign arbitration centres) and the enforcement of injunctions issued by arbitration tribunals.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

The Law on Commercial Arbitration governs both domestic and international arbitration proceedings.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

Yes, the Law on Commercial Arbitration of Vietnam was made based on the UNCITRAL Model Law. Actually, many provisions of the UNCITRAL Model Law are reflected in the Law on Commercial Arbitration. However, among others, there are some significant differences between those two, including:

- (a) Qualifications of arbitrators (Article 20 of the Law on Commercial Arbitration). Such qualifications are set forth in order to ensure that disputes are settled by reliable tribunals.
- (b) Registration of an *ad hoc* arbitral award (Article 62 of the Law on Commercial Arbitration). An *ad hoc* arbitration award is required to be registered at the court in the locality where the arbitral tribunal issued such award in order to guarantee its enforceability (registration or non-registration of an arbitral award shall not affect the contents and validity of such award).
- (c) Grounds for setting aside an arbitral award (Article 68 of the Law on Commercial Arbitration). Instead of providing that “the award is in conflict with the public policy of this State” as a ground for setting aside arbitral award under the UNCITRAL Model Law, the Law on Commercial Arbitration of Vietnam provides that an arbitral award shall be set aside if it is contrary to “the fundamental principles of the laws of Vietnam”.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in Vietnam?

The international arbitration proceedings sited in Vietnam must comply with, among others, the principles for dispute resolution by arbitration as set forth in Article 4 of the Law on Commercial Arbitration. Such principles are as follows:

- (a) Arbitrators must respect the parties’ agreement if such agreement neither breaches prohibitions nor contravenes social ethics.
- (b) Arbitrators must be independent, objective and impartial and shall observe the law.
- (c) Disputing parties are equal in their rights and obligations. The arbitration council shall create conditions for disputing parties to exercise their rights and fulfil their obligations.
- (d) Dispute settlement by arbitration shall be conducted in private, unless otherwise agreed by the parties.
- (e) Arbitral awards are final.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of Vietnam? What is the general approach used in determining whether or not a dispute is “arbitrable”?

As provided in Article 2 of the Law on Commercial Arbitration, disputes in the following areas can be referred to arbitration:

- (a) Disputes between parties arising out of, or in connection with, commercial activities.
- (b) Disputes arising between parties at least one of which is engaged in commercial activities.
- (c) Other disputes which the law stipulates shall be resolved by arbitration.

In order to decide whether a dispute is arbitrable or not, it is necessary to determine whether such dispute falls within the scope

of arbitrable subject matters as mentioned above. Actually, there are many types of dispute which are not arbitrable, such as: disputes on labour; inheritance disputes; administrative disputes; etc.

3.2 Is an arbitrator permitted to rule on the question of his or her own jurisdiction?

In accordance with Article 43 of the Law on Commercial Arbitration, the arbitral tribunal (but not the arbitrator) is permitted to consider and rule on its jurisdiction.

3.3 What is the approach of the national courts in Vietnam towards a party who commences court proceedings in apparent breach of an arbitration agreement?

As provided in Article 6 of the Law on Commercial Arbitration, in case the parties in dispute have reached an arbitration agreement but one party initiates a lawsuit with the courts, the court shall refuse to accept the case, unless the arbitration agreement is invalid or unrealisable.

Article 18 of the Law also provides the circumstances under which an arbitration agreement shall be considered as invalid. Such circumstances are as follows:

- (a) Disputes arising in domains not within the scope of the arbitration’s jurisdiction, as defined in Article 2 of this law.
- (b) Where the arbitration agreement was created by someone who has no competence under the law.
- (c) Where the arbitration agreement was created by someone who has no civil capacity under the Civil Code.
- (d) Where the form of the arbitration agreement is not in compliance with Article 16 of this Law.
- (e) Where a party is deceived, intimidated or compelled in the course of making the arbitration agreement and requests a declaration that such arbitration agreement is invalid.
- (f) Where the arbitration agreement breaches prohibitions specified by law.

3.4 Under what circumstances can a court address the issue of the jurisdiction and competence of the national arbitral tribunal? What is the standard of review in respect of a tribunal’s decision as to its own jurisdiction?

As provided in Article 44 of the Law on Commercial Arbitration, if the parties disagree with any decision of the arbitral tribunal, including the decision on jurisdiction, they shall have the right, within five (5) business days from the date of receipt of such decision, to lodge a petition to the competent court for the review of such decision of the arbitral tribunal. The petitioner must simultaneously notify the arbitral tribunal of such petition.

And, as provided in Article 69 of the Law on Commercial Arbitration, if a party has sufficient evidence that the arbitral tribunal issued the arbitral award in any of the cases prescribed in Article 68.2 of the Law, including that the dispute does not fall within the jurisdiction of the arbitral tribunal, the party shall have the right, within thirty (30) days from the date of receipt of such award, to lodge a petition with the competent court to set aside the arbitral award.

It is required by law that, in order to be reviewed by the court, together with the petition, the petitioner must submit to the court any materials and evidence to prove that his/her petition has grounds and is lawful.

3.5 Under what, if any, circumstances does the national law of Vietnam allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

Under Vietnamese law, the arbitral tribunal is not allowed to assume jurisdiction over any third party which is not a party to an arbitration agreement.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in Vietnam and what is the typical length of such periods? Do the national courts of Vietnam consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

As provided in Article 33 of the Law on Commercial Arbitration, the limitation period for commencement of arbitration in Vietnam is two years from the date of infringement of legal rights and interests, unless otherwise stipulated by a specific law. Two years is the typical length of such periods. This is a procedural rule and all arbitrable disputes shall be governed by this rule of the Law on Commercial Arbitration.

3.7 What is the effect in Vietnam of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

As provided in Article 27 of the existing Law on Bankruptcy of Vietnam (“Law on Bankruptcy”), as of the date the courts receive an application for the opening of bankruptcy procedures, the settlement of the following requests (understood as including requests/claims submitted to arbitration) for fulfilment of property obligations by enterprises or cooperatives which fall into the state of bankruptcy must be temporarily suspended:

- (a) The enforcement of civil judgments regarding property where the enterprises or cooperatives are the judgment debtors.
- (b) The settlement of cases demanding the enterprises or cooperatives to fulfil their property obligations.
- (c) The handling of secured assets of the enterprises or cooperatives for guaranteed creditors, except where so permitted by courts.

And, as provided by Article 57 of the Law on Bankruptcy of Vietnam, as of the date the courts issue decisions to open bankruptcy procedures, the enforcement of civil judgments (also applicable to arbitral decisions/awards) regarding property in which the enterprises or cooperatives in the state of bankruptcy are judgment debtors must be suspended. Also, as from the date the courts issue decisions to open the bankruptcy procedures, the settlement of cases related to property obligations (understood as including requests/claims submitted to the arbitration) in which the enterprises or cooperatives constitute an involved party must be suspended.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

As provided in Article 14 of the Law on Commercial Arbitration, the law applicable to disputes without a foreign element shall be the law of Vietnam. For disputes with a foreign element, the arbitral

tribunal shall apply the law chosen by the parties. If the parties do not have an agreement on applicable law, then the arbitral tribunal shall make a decision to apply the law which it considers the most appropriate. And, if the law of Vietnam or the law chosen by the parties does not contain specific provisions relevant to the matters in dispute, then the arbitral tribunal may apply international customs in order to resolve the dispute if such application or the consequences of such application are not contrary to the fundamental principles of the law of Vietnam.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

As mentioned above, without a foreign element, the law of Vietnam shall be applied. And, if the law chosen by the parties does not contain specific provisions relevant to the matters in dispute, then the arbitral tribunal may apply international customs in order to resolve the dispute if such application or the consequences of such application are not contrary to the fundamental principles of the law of Vietnam.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

In accordance with Article 14 of the Law on Commercial Arbitration, the law governing the formation, validity and legality of arbitration agreements shall be the law chosen by the parties or the law applicable to the dispute.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

There is no limit on the parties' autonomy to select arbitrators.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

If the parties' chosen method for selecting arbitrators fails, establishment of an arbitral tribunal shall be conducted in accordance with a default procedure set forth in Article 40 or 41 of the Law on Commercial Arbitration. Depending on the form of arbitration (i.e.: institutional arbitration or *ad hoc* arbitration), either party shall have the right to request the selected Arbitration Centre or the competent court to appoint the arbitrator(s).

5.3 Can a court intervene in the selection of arbitrators? If so, how?

As mentioned above, the courts can only intervene in the selection of arbitrators in *ad hoc* arbitration cases where the party(ies) failed to select arbitrators and subsequently requested the court to appoint the arbitrator(s). Particularly, Article 41 of the Law on Commercial Arbitration provides that:

- (a) The court may appoint an arbitrator for the respondent(s) at the request of the claimant only if upon expiry of a 30-day period from the date on which the respondent(s) receives the statement of claim of the claimant, the respondent(s) has failed to notify the claimant of the name of the selected arbitrator and the parties do not have another agreement on the appointment of an arbitrator.

- (b) The court may appoint the chairman of the arbitral tribunal at the request of the parties if the arbitrators are unable to elect a chairman and there is no other agreement between the parties.
- (c) The court may appoint a sole arbitrator at the request of one or all parties if the parties agree to dispute resolution by a sole arbitrator but are unable to agree on the selection of an arbitrator within 30 days from the date on which the respondent received the statement of claim, and the parties do not have an agreement to request an arbitration centre to appoint an arbitrator.

5.4 What are the requirements (if any) as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators imposed by law or issued by arbitration institutions within Vietnam?

Article 21 of the Law on Commercial Arbitration provides the obligations of the arbitrator under which an arbitrator shall be obliged, among others to (i) remain independent during dispute resolution, (ii) ensure that resolution of a dispute is impartial, speedy and prompt, and (iii) comply with professional ethics rules. Further, the selected arbitrator must refuse to resolve the dispute and the parties shall have the right to request the replacement of the arbitrator in cases as provided in Article 42 of the Law on Commercial Arbitration as follows:

- (a) The arbitrator is a relative or representative of a party.
- (b) The arbitrator has an interest related to the dispute.
- (c) There are clear grounds demonstrating that the arbitrator is not impartial or objective.
- (d) The arbitrator was a mediator, representative or lawyer for either of the parties prior to the dispute being brought to arbitration, unless the parties provide written consent.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in Vietnam? If so, do those laws or rules apply to all arbitral proceedings sited in Vietnam?

The procedure of arbitration sited in Vietnam is generally governed by the Law on Commercial Arbitration. Besides, each arbitration centre has its own rules, including those regarding procedure, which are applied to the dispute brought for settlement.

6.2 In arbitration proceedings conducted in Vietnam, are there any particular procedural steps that are required by law?

In arbitration proceedings, certain procedural steps are required under the Law on Commercial Arbitration; such steps include: (i) preparing and submitting a statement of claim (Article 30); (ii) notification of the statement of claim (Article 32); (iii) preparing and submitting a statement of defence (Article 35); (iv) establishment of an arbitral tribunal (Article 40 and 41); (v) dispute resolution sessions (Article 55); and (vi) arbitral awards (Article 61).

6.3 Are there any particular rules that govern the conduct of counsel from Vietnam in arbitral proceedings sited in Vietnam? If so: (i) do those same rules also govern the conduct of counsel from Vietnam in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than Vietnam in arbitral proceedings sited in Vietnam?

Yes, among others, Article 5 of the Law on Lawyers of Vietnam (“Law on Lawyers”) provides the obligations and principles regarding the conduct of counsel from Vietnam in providing legal services, including those in arbitral proceedings sited in Vietnam. These obligations and principles are also applied to their conduct elsewhere. And, the same obligations and principles are also applied to the conduct of counsel from countries other than Vietnam in arbitral proceeding cited in Vietnam.

6.4 What powers and duties does the national law of Vietnam impose upon arbitrators?

The rights and obligations of arbitrators are provided in Article 12 of the Law on Commercial Arbitration. Particularly, arbitrators have the following rights and obligations:

- (a) To accept or refuse to resolve a dispute.
- (b) To remain independent during the dispute resolution.
- (c) To refuse to provide information about a dispute.
- (d) To receive remuneration.
- (e) To maintain confidentiality of the contents of the dispute which he or she resolves, unless information must be provided to a competent State authority in accordance with the law.
- (f) To ensure that resolution of the dispute is impartial, speedy and prompt.
- (g) To comply with professional ethics rules.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in Vietnam and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in Vietnam?

In accordance with Article 76 of the Law on Lawyers, lawyers from other jurisdictions are restricted from advising Vietnamese law and participating in legal proceedings as representatives or counsels for clients before Vietnamese courts. However, Vietnamese law is silent on the appearance of lawyers from other jurisdictions in arbitration proceedings sited in Vietnam.

6.6 To what extent are there laws or rules in Vietnam providing for arbitrator immunity?

Vietnamese law is silent on this issue.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

Yes, the courts have jurisdiction in certain cases, for instance: appointment of arbitrators; replacement of arbitrators; review of an appeal on the jurisdiction of the arbitration; application of preliminary and interim reliefs; etc.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitrator in Vietnam permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitrator seek the assistance of a court to do so?

An arbitrator or a group of arbitrators in the capacity of the arbitral tribunal is permitted, at the request of either of the parties to a dispute, to award preliminary and interim relief as provided in Article 49 of the Law on Commercial Arbitration. Those reliefs may include the following:

- The prohibition of any change in the *status quo* of the assets in dispute.
- The prohibition of acts, or the ordering of a party to carry out one or more specific acts, in order to prevent conduct adverse to the process of the arbitration proceedings.
- Attachment of the assets in dispute.
- The preservation, storage, sale or disposal of any of the assets of one or all of the parties in dispute.
- Interim payment of money between the parties.
- Prohibition of the transfer of asset rights of the assets in dispute.

Once awarded by the arbitral tribunal, the said preliminary or interim reliefs would be enforceable (through the Civil Enforcement Agency) as if they are so decided by the courts without seeking any assistance from a court. The arbitral tribunal must refuse to award any of said reliefs if the party seeking has already sought such reliefs from the competent courts.

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

Under Article 49 of the Commercial Arbitration Law, instead of seeking any of the forms of preliminary or interim reliefs set forth in question 7.1 from the arbitral tribunal, either of the parties to the dispute may directly request that the competent courts grant such reliefs. The courts must refuse to grant any of said reliefs if the party seeking the reliefs has already submitted and sought such reliefs from the arbitral tribunal.

A request to a court to grant preliminary or interim relief shall not be deemed to be a denial of the arbitration agreement or a waiver of the right to dispute resolution by arbitration.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

Courts normally are reluctant to grant preliminary or interim relief at the request of a party to a dispute. Actually, the number of cases in which the court grants preliminary or interim relief is very limited.

7.4 Under what circumstances will a national court of Vietnam issue an anti-suit injunction in aid of an arbitration?

As provided by the Law on Commercial Arbitration, the court will refuse to accept a case if there is a valid arbitration agreement relating to the settlement of the dispute.

7.5 Does the national law allow for the national court and/or arbitral tribunal to order security for costs?

Yes, the court and/or arbitral tribunal may order security for costs in some cases, including (i) where the applicant is required to provide financial security prior to the arbitral tribunal ordering interim relief (Article 49 of the Law on Commercial Arbitration), and (ii) where the judge issues a decision ordering the applicant to implement security measures before receiving interim relief (Article 53 of the Law on Commercial Arbitration).

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in Vietnam?

The Law on Commercial Arbitration provides, among others, that the parties shall have the right and responsibility to provide evidence to the arbitral tribunal to prove facts relevant to the issues in dispute.

In principle, the evidence submitted to the arbitration shall have to satisfy the requirements as provided for in the Civil Proceedings Code of Vietnam ("Civil Proceedings Code").

Vietnam does not have a specific law dealing with the evidentiary matters. Generally, evidences under the laws of Vietnam include: (i) readable, audible or visible materials; (ii) exhibits; (iii) testimonies of parties involved; (iv) witness testimonies; (v) expert conclusions; (vi) on-site appraisal minutes; (vii) property evaluation results; and (viii) other sources as prescribed by law.

8.2 Are there limits on the scope of an arbitrator's authority to order the disclosure of documents and other disclosure (including third party disclosure)?

Article 46 of the Law on Commercial Arbitration deals with the jurisdiction of an arbitral tribunal in terms of collecting evidence. However, there exists no mechanism for the arbitral tribunal to force a third party to disclose documents or provide evidence if a request for evidence is refused by a third party.

8.3 Under what circumstances, if any, is a court able to intervene in matters of disclosure/discovery?

In accordance with Article 46.5 of the Law on Commercial Arbitration, if the arbitral tribunal or one or both parties has already taken necessary measures to collect evidence by themselves, but has not had any success, then a petition may be made to the competent court seeking an order for other bodies, organisations or individuals to provide legible, audible or visual materials or to provide other objects relevant to the dispute. Such petition must specify the matters being resolved by arbitration, the evidence which needs to be collected, the reasons the evidence has not been collected, and the name and address of the body, organisation or individual currently managing and/or holding the evidence which needs to be collected.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal or is cross-examination allowed?

In accordance with Article 47 of the Law on Commercial

Arbitration, the arbitral tribunal shall have the right at the request from one or both parties and if the tribunal considers it necessary, to require a witness to attend a dispute resolution session. As provided by laws, the witness has the obligation to make the testimony truthfully and honestly.

8.5 What is the scope of the privilege rules under the law of Vietnam? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

Vietnamese law is currently silent on the issue of privilege.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of Vietnam that the Award contain reasons or that the arbitrators sign every page?

Article 61 of the Law on Commercial Arbitration provides the requirements for contents, form and validity of an arbitral award. Particularly, an arbitral award must be in writing and contain the following main particulars:

- (a) Date and location of issuance of the award.
- (b) Names and addresses of the claimant and of the respondent.
- (c) Full names and addresses of the arbitrator(s).
- (d) Summary of the statement of claim and matters in dispute.
- (e) Reasons for issuance of the award, unless the parties agree it is unnecessary to specify reasons for the award.
- (f) Result of the dispute resolution.
- (g) Time-limit for enforcement of the award.
- (h) Allocation of arbitration fees and other relevant fees.
- (i) Signatures of the arbitrator(s).

The Law on Commercial Arbitration does not specifically require arbitrator(s) to sign every page of the award. On a practical level, it is our opinion that signing every page of the award by arbitrator(s) is the best way to avoid possible questions or challenges during enforcement.

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in Vietnam?

The parties are entitled to challenge an arbitral award made in Vietnam if it falls within either of the cases set forth in Article 68.2 of the Law on Commercial Arbitration as follows:

- (a) There was no arbitration agreement or the arbitration agreement is void.
- (b) The composition of the arbitral tribunal or the arbitration proceedings was inconsistent with the agreement of the parties or contrary to the provisions of this Law.
- (c) The dispute was not within the jurisdiction of the arbitral tribunal; where an award contains an item which falls outside the jurisdiction of the arbitral tribunal, such item shall be set aside.
- (d) The evidence supplied by the parties on which the arbitral tribunal relied to issue the award was forged; or an arbitrator received money, assets or some other material benefit from

one of the parties in dispute which affected the objectivity and impartiality of the arbitral award.

- (e) The arbitral award is contrary to the fundamental principles of the law of Vietnam.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

All parties to a dispute subject to arbitral proceedings are required to comply with the principles and requirements provided by the law. Accordingly, parties are not allowed to agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

No, they are not allowed.

10.4 What is the procedure for appealing an arbitral award in Vietnam?

Within thirty (30) days from the date of receipt of the arbitral award, one of the parties has the right to lodge a petition with the competent court to set aside the arbitral award. A petition requesting an arbitral award be set aside must be accompanied by materials and evidence proving that such petition has sufficient grounds and is lawful.

11 Enforcement of an Award

11.1 Has Vietnam signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Vietnam signed and ratified the New York Convention on 12 September 1995, with the reservation that arbitral awards must be issued by an arbitral tribunal sited in a member territory or country party to the Convention.

The national legislation of Vietnam ratifying the New York Convention is Decision No. 453/QĐ-CTN dated 28 July 1995 of the President of Vietnam.

11.2 Has Vietnam signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

So far, no such regional conventions or agreements have been signed by Vietnam.

11.3 What is the approach of the national courts in Vietnam towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

According to the Civil Proceedings Code, in order to enforce a foreign arbitral award, a petition for the recognition and enforcement in Vietnam of such foreign arbitral award must be submitted by the party seeking enforcement to the Ministry of

Justice (the “MOJ”) of Vietnam with the following principal details:

- a) The full names and addresses of residence places or work places of lawful representatives of the party seeking enforcement in Vietnam.
If the party seeking for enforcement is an agency or organisation, their full names and head-office addresses must be included.
- b) Full names and addresses of residence places or work places of the party against whom enforcement is sought; if such party is an agency or organisation, their full names and head-office addresses must also be included. If such party is an individual who has no residence place or work place in Vietnam or such party is an agency or organisation with no head-office in Vietnam, the petitions must be clearly inscribed with the addresses of the property or assorted assets related to the enforcement in Vietnam of the foreign arbitral awards.
- c) Requests of the party seeking enforcement.

Once received, the MOJ shall pass the petition to the competent court of Vietnam for review. The party seeking enforcement and the party against whom the enforcement is sought may be requested to explain unclear contents and/or submit further documents during this time. The hearing shall be opened with the attendance of the party against whom the enforcement is sought.

11.4 What is the effect of an arbitration award in terms of *res judicata* in Vietnam? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

The definition of *res judicata* is not directly provided in the legal system of Vietnam. However, the Law on Commercial Arbitration provides, among others, a principle that the arbitral award is final. It means that the arbitral award is not appealable unless it falls within the cases as provided in Article 68.2, as discussed in question 10.1 above.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

Pursuant to Article 370 of the Civil Proceedings Code, an arbitral award will not be enforced in Vietnam if it is contrary to the “fundamental principles of the laws of Vietnam”. However, there is no clear standard for the interpretation and application of this provision.

12 Confidentiality

12.1 Are arbitral proceedings sited in Vietnam confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

As a principle provided in Article 4 of the Law on Commercial Arbitration, dispute resolution by arbitration shall be conducted in private and remain confidential, unless otherwise agreed by the parties.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

Complying with the principle mentioned in question 12.1 above,

information disclosed in arbitral proceedings shall not be referred to and/or relied on in subsequent proceedings.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

As provided under Article 293 of the Law on Commerce of Vietnam (“Law on Commerce”), unless otherwise agreed, aggrieved parties are not entitled to suspend the performance of contracts, cease the performance of contracts or cancel contracts as a result of insubstantial breaches. And, under Articles 300 and 301 of the Law on Commerce, fines for breach of contract are applied only if it is agreed by the parties in the contract and such fines cannot exceed 8% of the value of the part of the contract which has been breached. Where construction contracts are breached, fines may be up to 12% of the value of the part of the contract which has been breached. Also, under Article 302 of the Law on Commerce, the value of damages is limited to the value of the material and direct loss suffered by the aggrieved party due to the breach and the direct profit which the aggrieved party would have earned if such breach had not been committed. Punitive damages are not currently available under the laws of Vietnam.

13.2 What, if any, interest is available, and how is the rate of interest determined?

Article 306 of the Law on Commerce provides that where a contract-breaching party delays making payment for goods or payment of service charges and other reasonable fees, the aggrieved party may claim interest on such delayed payment at the average interest rate applicable to overdue debts in the market at the time of the payment for the delayed period, unless otherwise agreed or provided for by law. On a practical level in Vietnam, the applicable overdue interest rate is determined as equal to 150% of the normal interest rate.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

In principle, fees and/or costs shall be paid proportionally by the losing party(ies) under the arbitral award, unless otherwise agreed by the parties. The arbitration fees are normally paid in advance by the Claimant and then allocated to the winning party in the arbitral award.

It is noteworthy that, in practice, normally claims for the reimbursement of the winning party’s lawyer fees are not accepted by arbitral tribunals in Vietnam.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

The award itself is not subject to tax.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of Vietnam? Are contingency fees legal under the law of Vietnam? Are there any “professional” funders active in the market, either for litigation or arbitration?

The laws of Vietnam are silent on the issue of funding claims.

Contingency fees can be negotiated and are legal under the law of Vietnam. Funding claims is not a business officially recognised in Vietnam. Therefore, there have been no “professional” funders in the market.

14 Investor State Arbitrations

14.1 Has Vietnam signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as “ICSID”)?

Vietnam has not signed this Convention.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is Vietnam party to?

Vietnam is officially party to 65 bilateral treaties on investment and trading and 7 multilateral treaties including the World Trade Organization (“WTO”), the Association of Southeast Asian Nations (ASEAN), ASEAN with China, ASEAN with Japan, ASEAN with Korea, ASEAN with India, and ASEAN with Australia and New Zealand.

14.3 Does Vietnam have any noteworthy language that it uses in its investment treaties (for example in relation to “most favoured nation” or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

The language of “most favoured nation” or exhaustion of local remedies provisions are used in several investment treaties in accordance with international standards. No significance of that language is intended.

14.4 What is the approach of the national courts in Vietnam towards the defence of state immunity regarding jurisdiction and execution?

Vietnamese law does not specifically deal with this matter. To the best of our knowledge, to date state immunity has not been used as grounds for the court to set aside a foreign arbitral award.

15 General

15.1 Are there noteworthy trends in or current issues affecting the use of arbitration in Vietnam (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

With the enactment of the Law on Commercial Arbitration, which came into force in 2011 and replaced the former Ordinance on Commercial Arbitration, there have been great improvements to Vietnam’s arbitration system. Accordingly, the number of disputes brought to arbitration for settlement have gradually increased in recent years.

15.2 What, if any, recent steps have institutions in Vietnam taken to address current issues in arbitration (such as time and costs)?

More meetings and workshops have recently been held for discussion and co-ordination between some arbitration institutions, especially the Vietnam International Arbitration Centre and Vietnamese court leaders and representatives from other relevant authorities towards stronger recognition of arbitration and support for arbitration practices during the intergration of Vietnam into the global economy.

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Bizlink Lawyers & Consultants is a professional law firm providing a full range of legal services to clients. The firm is currently staffed by nearly 40 lawyers and consultants with proficient command of knowledge and experience, making it eligible to deliver high quality and specialised services to its clients. The firm's founder, Mr Do Trong Hai is recognised as one of the leading lawyers in Vietnam. He has over 20 years of experience of the legal and consultancy practice in Vietnam.

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