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Vietnam

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A. Legislation and rules

A.1 Legislation

Arbitration procedures in Vietnam continue to be mainly governed by Civil Procedure Code No. 92/2015/QH13, the Law on Commercial Arbitration No. 54/2010/QH12, which came into effect on 1 January 2011 (“LCA”) and Resolution No. 01/2014/NQ-HDTP dated 20 March 2014 issued by the Supreme Court of Vietnam, which provides further guidance on the implementation of certain provisions of the LCA (“Resolution No. 01”).

The LCA is generally based on the UNCITRAL Model Law. There are, however, some provisions which differ from the Model Law. These include: (i) principles in settling disputes; (ii) state administration of arbitration; (iii) required registration of ad hoc arbitration awards with national courts; (iv) minimum qualifications of arbitrators; (v) the right to settle and the right to request mediation by an arbitral tribunal; and (vi) setting aside an arbitral award for violating fundamental principles of Vietnamese law.

Compared to Ordinance No. 08/2003/PL-UBTVQH11 on Commercial Arbitration (the “Ordinance”), which became inactive as of 01 January

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2011, the LCA has had many notable developments, including: (i) the ability to refer to arbitration, provided that at least one of the parties is engaged in commercial activities; (ii) the option to appoint foreign arbitrators in Vietnam; and (iii) the ability to apply for interim measures to protect the legitimate interests of the parties.

Moreover, the Civil Procedure Code No. 92/2015/QH13 (the “CPC 2015”), specifically part 7 of CPC 2015, which came into effect on 01 July 2016, provides certain amendments regarding procedures for recognition and enforcement of foreign arbitral awards. The amendments have been praised for being more effective and in line with the New York Convention.

On 13 November 2017, the People’s Committee of Ho Chi Minh City issued Decision No. 5994 to establish the Ho Chi Minh City Commercial Arbitration Association (“HCMC CAA”). This is the first commercial arbitration association in the country. The key role of the HCMC CAA is to protect the legitimate rights and interests of arbitrators, maintain stability, encourage developments of commercial arbitration centers in the city, and build up the standard values of the arbitrators.

Interestingly, article 31 of the EU-Vietnam Free Trade Agreement (“EVFTA”) states that final awards issued by the ICS shall be binding, and once a judgment is final, such award must be enforced in Vietnamese courts. However, this stipulation is restricted to entities protected under the EVFTA. Moreover, the Agreement allows for a period of five years, starting from the date of the entry into force, for which the Vietnamese tribunal system has to comply with its rules regarding enforcement.

Under the CPTPP, claimants being a foreign investor have recourse to Investor-State Dispute Settlement (ISDS) mechanisms. Under article 9.29.10, member states of the CPTPP are required to provide for the enforcement of arbitral awards in its territory, the failing of which will result in the creation of a panel where the requesting Party may seek (i) a determination that the failure to abide by the final award is



inconsistent with the obligations of the Agreement, and (ii) a recommendation that the respondent abide by the final award. It is important to note, however, is that Vietnam has entered into the following side letters which would prevent investors from seeking arbitral awards provided for under chapter 28 (Dispute Settlement) of the CPTPP:

- (a) A side letter between Japan and Vietnam which states that Japan shall not seek recourse to dispute settlement with respect to measures adopted or maintained based on the Cybersecurity Law, Cross-Border Transfer of Information by Electronic Means (article 14.11), and location of computing facilities (article 14.13) for a period of five years from the date of entry into force of the Agreement for Vietnam; and
- (b) Side letter between Japan and Vietnam which states that Japan shall not seek recourse to dispute settlement with respect to Vietnam's obligations under article 18.47 (Protection of Undisclosed Test or Other Data for Agricultural Chemical Products), and of chapter 18 on intellectual property for a period of five years from the date of entry into force of the Agreement for Vietnam.

A.2 Institutions, rules and infrastructure

Under the LCA, arbitration centers may be established in various localities in accordance with the regulations of the government. The LCA sets the conditions and procedures for the establishment of arbitration centers, their duties and powers, as well as causes for the termination of their operations. The LCA also removes the requirement that an arbitrator must be a Vietnamese citizen. As such, foreign citizens can be appointed as arbitrators in Vietnam if they meet all the requirements under Vietnamese law.

Moreover, Vietnamese law allows foreign arbitration centers to operate in Vietnam through a branch or representative office after satisfying the required conditions and undergoing the correct

registration procedures. However, the arbitration awards issued by the local representative office or branch of a foreign arbitration center are considered foreign arbitration awards, and thus, have to go through the process of recognition by the competent court before enforcement can be made in Vietnam. There is currently no foreign arbitration center branches or representative offices in Vietnam.

As of November 2018, there are 22 local arbitration institutions in Vietnam registered with the Ministry of Justice,³ 11 of which have fewer than 10 arbitrators. Nonetheless, the Vietnam International Arbitration Centre (VIAC) at the Vietnam Chamber of Commerce and Industry remains the most well-known domestic arbitration institution in Vietnam. This is likely because, compared to other domestic arbitration institutions, VIAC has a long history of development with high-profile arbitrators (including a number of foreign arbitrators) who have expertise in contract law and can resolve commercial disputes through the English language, making access to arbitration more accessible for transactions involving a foreign party.

According to a published statistic by VIAC,⁴ the number of disputes which VIAC has settled has continuously increased year by year, and in 2017, this figure amounted to 151 cases. Notably, in 2017, there were no arbitral awards issued by VIAC that were set aside by the local courts. This consolidates VIAC's position as the leading arbitral center in comparison with other domestic arbitration institutions. Currently, there are over 60 countries and territories which have resolved their disputes via the VIAC for settlement. Entities from China, the United States, and Singapore are the most likely to bring their disputes to VIAC for settlement.

VIAC operates based on the LCA and VIAC's Rules of Arbitration issued on 1 March 2017. The 2017 VIAC's Rules of Arbitration contain three significant developments, including (i) single arbitration

³ <http://btp.moj.gov.vn/qt/Pages/trong-tai-tm.aspx?Keyword=&Field=&&Page=1>.

⁴ <http://viac.vn/thong-ke/thong-ke-tinh-hinh-giai-quyet-tranh-chap-tai-viac-nam-2017-a1141.html>



for multiple contracts, (ii) consolidation of claims, and (iii) expedited arbitral procedure, bringing such rules to generally be in line with international practice.

B. Cases

The number of foreign arbitral awards recognized and enforced in Vietnam has increased positively in recent years. That being said, there are still few cases where the local courts have taken a conservative view on the recognition of foreign arbitral awards.

The following is an example case where the Vietnamese court refused to recognize an international arbitral award on the ground that there was no valid arbitration clause due to one party's failure to sign the contract.

On 30 March 2017, the Superior People's Court in Hanoi issued Judgment No. 84/2017/KDTM-PT to uphold the decision of the People's Court of Nam Dinh Province, which refused to recognize the arbitral award dated 12 August 2013 issued by the Arbitration of the International Cotton Association regarding the dispute between Company G and Company N.

In 2011, Company G ("Seller") and Company N ("Buyer") entered into three contracts for the sale of cotton in which Company B acted as broker to facilitate this transaction. However, of the three contracts, one contract contained an arbitration clause but was not signed by Buyer. The remaining two contracts were signed by both parties but contained no arbitration clause. The governing law of these contracts was English law.

When the Buyer failed to pay to the Seller, the Seller sued the Buyer at the Arbitration of the International Cotton Association and obtained a favorable arbitral award. The Seller then sought enforcement of the arbitral award in Vietnam. However, at the first instance hearing, the People's Court of Nam Dinh Province refused to recognize the arbitral award. On 7 June 2016, Company G filed an appeal against the Nam

Dinh Province People's Court's decision on non-recognition of the arbitral award.

At the appellate hearing, the Buyer stated that the contract containing the arbitration clause was not valid because the Buyer did not sign this contract. The remaining two contracts have no arbitration clause; therefore, the International Cotton Association was acting beyond their power in settling the dispute. Further, the Buyer argued that during the arbitration proceedings, the Buyer did not receive any notices/documents from the tribunal via any mode of communication, including emails, fax or courier service (FedEx). Accordingly, the Buyer alleged that (i) the tribunal served the documents/notice to the wrong email address, and (ii) the Buyer did not recognize the receptionist whose name appeared on the signed receipt of acknowledgment.

In response, the Seller disagreed with the Buyer's arguments. Specifically, the Seller argued the fact that the governing law of the contract is English law, and under English Law, the contract is still valid regardless of whether the Buyer has signed it or not. Under English contract law, a message is considered to be delivered adequately, from the moment of sending, if it is sent to the agreed/stipulated address, in the mode of communication which has been agreed upon by the parties. In fact, all notices were emailed to the Buyer via the broker company's email, and (ii) FedEx confirmed that all couriered documents were received by the Buyer.

Nonetheless, both the Nam Dinh Province People's Court and the Superior People's Court in Hanoi agreed with the Buyer's defense that, in such a case, the lack of the Buyer's signature in the contract could not constitute a valid arbitration clause. In other words, it is insufficient to establish that all parties have agreed to arbitrate the dispute. Therefore, imposing arbitration will run contrary to the fundamental principle of Vietnamese laws (i.e. the party's autonomy).



C. Diversity in arbitration

Vietnamese law now recognizes mediation as a form of alternative dispute resolution. On 24 February 2017, the government issued Decree No. 22/2017/ND-CP (“Decree No. 22”) on commercial mediation, which came into effect on 15 April 2017. Commercial mediation is a growing trend and expected to be one of the key alternative dispute resolutions in Vietnam in the coming years.

Similar to arbitration, commercial mediation may commence only if the parties have a mediation agreement. Parties may enter into a mediation agreement before or after the dispute has arisen, or at any point during the dispute resolution process. Decree No. 22 provides that a mediation agreement must be in writing, either as a mediation clause in a contract or as a separate agreement. The information regarding the mediation must be kept confidential unless otherwise agreed by the parties or provided under the relevant legislation.

Commercial mediation services can be provided by mediation centers established under Decree No. 22 or by existing arbitration centers in Vietnam. Foreign mediation centers can also operate in Vietnam by setting up their branch and/or representative office. The first and most prominent mediation center of Vietnam is Vietnam Mediation Centre under VIAC, which was established in May 2018.

Regarding the process, the parties to commercial mediation may agree to follow the mediation rules of a commercial mediation center or apply the mediation procedure agreed between themselves. In the absence of an agreement on the commercial mediation procedure, the mediator(s) may apply the procedure that is most appropriate to the nature of the dispute, as long as the procedure is approved by the parties. Commercial mediation may be conducted by one or more mediators, as agreed by the parties. The mediators have the right to offer proposals on the resolution of the dispute at any time during the dispute resolution process.