

GAR KNOW HOW COMMERCIAL ARBITRATION

Vietnam

K Minh Dang and Do Khoi Nguyen

YKVN LLP

MAY 2019

Infrastructure

1 The New York Convention

Is your state a party to the New York Convention? Are there any noteworthy declarations or reservations?

Yes, Vietnam has been a party to the New York Convention since 12 September 1995 and the Convention came into force on 11 December 1995.

In its accession to the Convention, Vietnam made three declarations pursuant to article I(3) and article X(1) of the Convention:

- Vietnam considers the Convention to be applicable to the recognition and enforcement of arbitral awards made only in the territory of another Contracting State. With respect to arbitral awards made in the territories of non-contracting states, it will apply the Convention on the basis of reciprocity.
- The Convention will be applied only to differences arising out of legal relationships that are considered as “commercial” under the laws of Vietnam. The Vietnamese Commercial Law No. 36/2005/QH11 dated 31 December 2005 considers activities to be “commercial” if those activities are “for profit-making purposes comprising the purchase and sale of goods, provision of services, investment, commercial enhancement, and other activities for profit-making purposes”.
- Interpretation of the Convention before the Vietnamese courts or competent authorities should be made in accordance with the Constitution and the law of Vietnam.

2 Other treaties

Is your state a party to any other bilateral or multilateral treaties regarding the recognition and enforcement of arbitral awards?

There is no published comprehensive list of the bilateral or multilateral treaties to which Vietnam is a party. As far as we are aware of, other than the New York Convention, Vietnam is not party to other multilateral treaties regarding the recognition and enforcement of arbitral awards such as, for example, the ICSID Convention.

However, Vietnam is currently party to 49 bilateral investment treaties (BIT), which all include provisions dealing with dispute settlement and the recognition and binding effect of arbitral awards. Below are sample provisions providing for the recognition and enforcement of arbitral awards in those BITS:

- (i) BIT Vietnam - Bulgaria
Article 9.4 The decision of the arbitral tribunal shall be final and binding on the parties to the dispute and the Contracting Party shall execute the decision in accordance with its national legislation.
- (ii) BIT Vietnam - China
Article 8.6. The tribunal shall reach its decision by a majority of votes. Such decision shall be final and binding on both parties to the dispute. Both Contracting States shall commit themselves to the enforcement of the decision in accordance with their respective domestic law.
- (iii) BIT Vietnam - Greece
Article 10.4 The arbitral tribunal shall decide the dispute in accordance with the provisions of this Agreement, the law of the Contracting Party that is party to the dispute, (including its rules on the conflict of laws) and such rules of international law as may be applicable. The awards of arbitration shall be final and binding on both parties to the dispute. Each Contracting Party shall carry out without undue delay any such award and shall provide in its territory for the enforcement of such award.

3 National law

Is there an arbitration act or equivalent and, if so, is it based on the UNCITRAL Model Law? Does it apply to all arbitral proceedings with their seat in your jurisdiction?

Arbitral proceedings in Vietnam are governed by the Law on Commercial Arbitration No. 54-2010-QH12 dated 17 June 2010, which came into force on 1 January 2011 (the Law on Commercial Arbitration). The Law on Commercial Arbitration is based on the UNCITRAL Model Law (Model Law) but contains additional or different provisions on:

- principles in settling disputes;
- state administration of arbitration;
- required registration of ad hoc arbitration awards with national courts;
- minimum qualifications of arbitrators;
- the right to settle and the right to request mediation by the arbitral tribunal; and

- setting aside an arbitral award for violating fundamental principles of Vietnamese law (the Vietnamese equivalent concept of “public policy” in the Model Law).

The Law on Commercial Arbitration applies to all domestic arbitrations. With respect to international arbitration proceedings, it is not clear whether they apply to arbitral proceedings with only their seat in Vietnam and no other connection to the jurisdiction.

4 Arbitration bodies in your jurisdiction

What arbitration bodies relevant to international arbitration are based within your jurisdiction? Do such bodies also act as appointing authorities?

The Vietnam International Arbitration Centre (VIAC), at the Vietnam Chamber of Commerce and Industry, is the most popular and active international arbitration centre in Vietnam. Other arbitration centres include the Pacific International Arbitration Centre (PIAC) based in Ho Chi Minh City, and the ASEAN Commercial International Arbitration Centre (ACIAC) based in Hanoi and Ho Chi Minh City.

There are no provisions under the VIAC 2017 Rules of Arbitration dealing with the VIAC acting as the appointing authority. In practice, we have not experienced any cases where the VIAC acted as the appointing authority.

5 Foreign institutions

Can foreign arbitral providers operate in your jurisdiction?

Yes, they can. Article 73 of the Law on Commercial Arbitration allows foreign arbitration centres to be established in Vietnam. However, there is currently no foreign arbitral provider established in Vietnam.

6 Courts

Is there a specialist arbitration court? Is the judiciary in your jurisdiction generally familiar with, and supportive of, the law and practice of international arbitration?

There is no specialist arbitration court in Vietnam. However, the Supreme People’s Court and the Ministry of Justice have recognised in public fora that enforcement of international arbitration awards under the New York Convention has been uneven and inconsistent largely because courts located throughout the country do not have the same experience dealing with enforcement issues. Accordingly, there has been active discussion of the need for a specialist court to promote greater uniformity and predictability in enforcing international arbitration awards.

In light of the above, provincial courts in bigger cities (for example, the provincial courts in Hanoi and Ho Chi Minh City) appear to be more familiar with the law and practice of international arbitration. However, as Vietnamese courts are bound to apply Vietnamese law, they will be supportive of the law and practice of international arbitration within the boundaries of Vietnamese law.

Agreement to arbitrate

7 Formalities

What, if any, requirements must be met if an arbitration agreement is to be valid and enforceable under the law of your jurisdiction? Can an arbitration agreement cover future disputes?

Articles 16 and 18 of the Law on Commercial Arbitration provide the following requirements for an arbitration agreement to be valid. It must:

- be in writing; which can be satisfied in many forms:
 1. an exchange of telegram, fax, telex, email or other form prescribed by law between the parties;
 2. an exchange of correspondence between the parties;
 3. an agreement prepared in writing by a lawyer, notary public or competent organisation at the request of the parties;
 4. a 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 contain an arbitration agreement; or
 5. an exchange of a statement of claim and defence expressing the existence of an agreement proposed by a party and not denied by the other;
- relate to a commercial dispute and be arbitrable;

- be validly executed by a person having legal authority and civil capacity;
- not be obtained through deceit or coercion nor declared void on the basis of such deceit or coercion; and
- not be in violation of Vietnamese law.

In addition, article 5.1 of the Law on Commercial Arbitration provides that an arbitration agreement can be made either prior to, or after, the dispute arises.

8 Arbitrability

Are any types of dispute non-arbitrable? If so, which?

Article 470.1 of the Civil Procedure Code No. 92/2015/QH13 dated 25 November 2015, which came into force on 1 January 2017, specifies that the following disputes are subject to the exclusive jurisdiction of the Vietnamese courts and are therefore not arbitrable in Vietnam:

- civil cases related 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.

9 Third parties

Can a third party be bound by an arbitration clause and, if so, in what circumstances? Can third parties participate in the arbitration process through joinder or a third-party notice?

Under the Law on Commercial Arbitration, there are two situations where an arbitration agreement will be binding upon third parties:

- if a party to an arbitration agreement is an individual who has died or lost civil capacity, then the party's heirs or the legal guardian will be bound by that agreement unless specifically provided otherwise (article 5.2); and
- if a party to an arbitration agreement is a legal entity which ceases to legally exist, then a successor entity that has succeeded to all the rights and obligations of the former will be bound by the agreement unless specifically provided otherwise (article 5.3).

Vietnamese law does not provide for third parties to participate in the arbitration process through joinder or a third-party notice.

10 Consolidation

Would an arbitral tribunal with its seat in your jurisdiction be able to consolidate separate arbitral proceedings under one or more contracts and, if so, in what circumstances?

Yes, a Vietnamese arbitral tribunal is able to consolidate separate arbitral proceedings. Resolution No. 01/2014/NQ-HDTP of the Council of Judges of the Supreme People's Court dated 20 March 2014 (in effect, an administrative circular of the Supreme Court) provided that separate arbitral proceedings can be consolidated into one proceeding when the parties agree to such consolidation or the applicable arbitration rules allow for such consolidation.

For example, article 15.1 of the VIAC 2017 Rules of Arbitration provides that the parties may agree to consolidate two or more arbitrations pending under these rules into a single proceeding. The centre shall decide on such consolidation based upon all relevant factors.

11 Groups of companies

Is the "group of companies doctrine" recognised in your jurisdiction?

The "group of companies doctrine" is not recognised under Vietnamese law. Under certain circumstances specified in the Law on Enterprises No. 68/2014/QH13 dated 26 November 2014 and which came into force on 1 July 2015, shareholders can be held liable for corporate liabilities. None of these circumstances relates to arbitration.

12 Separability

Are arbitration clauses considered separable from the main contract?

Yes. Article 19 of the Law on Commercial Arbitration expressly provides that “an arbitration agreement shall exist totally independently of the contract. Any modification, extension or rescission of the contract, or invalidity or unenforceability of the contract shall not result in the invalidity of the arbitration agreement.”

13 Competence-competence

Is the principle of competence-competence recognised in your jurisdiction? Can a party to an arbitration ask the courts to determine an issue relating to the tribunal’s jurisdiction and competence?

Yes, the principle of competence-competence is recognised in Vietnam. In particular, article 43.1 of the Law on Commercial Arbitration expressly provides that the arbitral tribunal must consider whether it has jurisdiction prior to dealing with the merits of a dispute.

A party may only request the Vietnamese courts to review a decision of an arbitral tribunal, whether related to its jurisdiction or not, after the decision is issued, if that party disagrees with it. Pursuant to article 44 of the Law on Commercial Arbitration, if a party disagrees with any decision of the arbitral tribunal, such party has the right to petition the competent court to review the decision within five business days of receipt of such decision. The petitioner must simultaneously notify the arbitral tribunal of the complaint. The competent court will then have to make a decision within 15 business days of receipt of the complaint. The decision of the court shall be final and binding on the parties and the arbitral tribunal. However, the arbitral tribunal shall continue to conduct the proceedings while the court is considering the petition.

The competent court is the provincial court of the city or province where the arbitral tribunal issues its decision.

14 Drafting

Are there particular issues to note when drafting an arbitration clause where your jurisdiction will be the seat of arbitration or the place where enforcement of an award will be sought?

When drafting an arbitration clause where Vietnam is the seat of arbitration, the following issues should be considered:

- the Law on Commercial Arbitration will be the *lex arbitri*, therefore, the drafter should be careful in selecting the applicable arbitration rules;
- the requirements for an arbitration agreement to be valid and therefore, enforceable, under articles 16 and 18 of the Law on Commercial Arbitration (see question 7); and
- the drafter should specify not only the seat of arbitration but also the venue for the hearing.

When drafting an arbitration clause with Vietnam as the country where enforcement of an arbitral award is to be sought, the drafter should pay attention to the formality requirements as well as the validity requirements provided under the Law on Commercial Arbitration (see question 7).

15 Institutional arbitration

Is institutional international arbitration more or less common than ad hoc international arbitration? Are the UNCITRAL Rules commonly used in ad hoc international arbitrations in your jurisdiction?

Based on our experience, institutional international arbitration is more common than ad hoc international arbitration in Vietnam. Since ad hoc arbitrations are confidential in nature, it appears difficult to ascertain whether or not UNCITRAL Rules are commonly used in such cases. In our practice, however, we have seen more ad hoc international arbitrations using UNCITRAL Rules than other rules.

16 Multi-party agreements

What, if any, are the particular points to note when drafting a multi-party arbitration agreement with your jurisdiction in mind? In relation to, for example, the appointment of arbitrators.

The Law on Commercial Arbitration does not expressly refer to multi-party agreements but contemplates the possibility of having multiple respondents in an arbitration proceeding. In particular, with respect to the appointment of arbitrators, articles 40.2 and 41.2 of the Law on Commercial Arbitration provide that the respondents shall agree either on the selection of their arbitrator or on a request to appoint an arbitrator within 30 days after the receipt of a statement of claim. If they fail to do so, the

chairman of the arbitration centre shall appoint the arbitrator, in case of an institutional arbitration, or the competent court shall proceed to the appointment, if it is an ad hoc arbitration.

Commencing the arbitration

17 Request for arbitration

How are arbitral proceedings commenced in your jurisdiction? Are there any key provisions under the arbitration laws of your jurisdiction relating to limitation periods of which the parties should be aware?

In Vietnam, an institutional arbitration is initiated by sending claimant's statement of claim to the arbitration centre. The proceedings are deemed to have commenced when the respondent receives the statement of claim. In the same way, an ad hoc arbitration is initiated by sending claimant's statement of claim to the respondent, and the proceedings are deemed to have commenced when the respondent receives the statement of claim.

Under article 33 of the Law on Commercial Arbitration, arbitration proceedings must be initiated within two years from the date of infringement of a party's legal rights and interests, unless otherwise stipulated by a specific law. The Law on Commercial Arbitration is silent on how to determine such date of infringement. However, Resolution No. 03/2012/NQ-HDTP of the Council of Judges of the Supreme People's Court dated 3 December 2012 provides some guidance in this regard.

Choice of law

18 Choice of law

How is the substantive law of the dispute determined? Where the substantive law is unclear, how will a tribunal determine what it should be?

Article 14.1 of the Law on Commercial Arbitration provides that, for domestic disputes, i.e. disputes without a foreign element, the arbitral tribunal shall apply Vietnamese law. For disputes with a foreign element, the arbitral tribunal shall apply the law chosen by the parties in accordance with article 14.2 of the Law on Commercial Arbitration. If, however, the parties have not chosen the applicable law, the arbitral tribunal will apply the law that it considers to be the most appropriate. Finally, if Vietnamese law 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 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.

The reservation relating to fundamental principles of the law of Vietnam appears often in Vietnamese statutes and regulations. They do not refer to a specific or identified set of principles. Instead, it should be understood in the same manner as the expression "void as against the public policy of the forum," which also does not refer to a specific or identified set of public policies.

Appointing the tribunal

19 Choice of arbitrators

Does the law of your jurisdiction place any limitations in respect of a party's choice of arbitrator?

Yes. Article 20 of the Law on Commercial Arbitration imposes the following minimum qualifications for an arbitrator:

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

However, if a person has all the qualifications above but falls within one of the following categories, he or she may not act as arbitrator:

- 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

- a person who is currently prosecuted, or a person who is serving a criminal sentence or who has fully served his or her sentence but his or her criminal record has not been cleared yet.

It is worth noting that an arbitration centre may require higher qualifications than the above.

20 Foreign arbitrators

Can non-nationals act as arbitrators where the seat is in your jurisdiction or hearings are held there? Is this subject to any immigration or other requirements?

Yes, non-nationals can act as arbitrators in Vietnam as long as they meet the qualifications set out under question 19.

Yes, they are subject to the usual immigration requirements as any person doing business in Vietnam.

21 Default appointment of arbitrators

How are arbitrators appointed where no nomination is made by a party or parties or the selection mechanism fails for any reason? Do the courts have any role to play?

Articles 40 and 41 of Law on Commercial Arbitration set forth the procedure for the default appointment of arbitrators. Article 40 governs the establishment of an arbitral tribunal in case of an institutional arbitration, and Article 41 governs such establishment in an ad hoc arbitration. These provisions are mostly similar and provide that:

- if, within 30 days of the receipt of the statement of claim and request to select an arbitrator by the claimant, the respondent fails to either (i) select an arbitrator by the claimant, the respondent fails to either (i) select an arbitrator and notify its selection to the arbitral institution (or to the claimant in an ad hoc arbitration) or (ii) request the chairman of the arbitral institution to appoint an arbitrator on its behalf, then within a further seven days after the expiration of the above 30-day period, the chairman of the arbitral institution shall appoint the respondent's arbitrator. It is worth noting that such right for the respondent to request the appointment of an arbitrator on its behalf does not exist in an ad hoc arbitration. In an ad hoc arbitration, it is the claimant who shall have the right to request the competent court to appoint an arbitrator for the respondent if the respondent fails to do so;
- if, within 15 days of the selection by the parties, or appointment by the chairman of the arbitral institution of the parties' arbitrators, the arbitrators so elected or appointed fail to elect the third arbitrator who will be the chairman of the arbitral tribunal, then within a further seven days after the expiration of the above 15-day period, the chairman of the arbitral institution shall appoint the chairman of the arbitral tribunal; and
- If the parties have agreed to a sole arbitrator but fail to select him or her within 30 days of receipt of the statement of claim by the respondent, then at the request of a party, or all the parties, the chairman of the arbitral institution shall appoint the sole arbitrator within 15 days of receipt of this request.

It is noted that in case of an ad hoc arbitration, the competent court acts in lieu of the chairman of the arbitral institution.

22 Immunity

Are arbitrators afforded immunity from suit under the law of your jurisdiction and, if so, in what terms?

No, arbitrators are not afforded immunity from suit under Vietnamese law. For example, article 49.5 of the Law on Commercial Arbitration provides that "if an arbitration tribunal orders a different form of interim relief or interim relief which exceeds the scope of the application by the applicant, thereby causing loss to the applicant, or to the Party against whom the interim relief was applied or to a third Party, then the Party incurring loss shall have the right to institute court Proceedings for compensation in accordance with the law on civil Proceedings."

23 Securing payment of fees

Can arbitrators secure payment of their fees in your jurisdiction? Are there fundholding services provided by relevant institutions?

There are no specific provisions under Vietnamese law that would enable arbitrators to secure payment of their fees. The VIAC 2017 Rules of Arbitration do, however, include provisions whereby the parties are to pay in full, expenses for the remuneration of the arbitrators and the centre's administrative expenses when submitting their request for arbitration or counterclaim. Failure to provide such payment would result in the withdrawal of the request for arbitration or the counterclaim respectively. Therefore, it can be considered that the VIAC provides fundholding services.

The above referenced expenses of the arbitrators and the VIAC are calculated by reference to the amount in dispute.

Challenges to arbitrators

24 Grounds of challenge

On what grounds may a party challenge an arbitrator? How are challenges dealt with in the courts or (as applicable) the main arbitration institutions in your jurisdiction? Will the IBA Guidelines on Conflicts of Interest in International Arbitration generally be taken into account?

Article 42.1 of the Law on Commercial Arbitration provides for four specific circumstances under which an arbitrator must refuse to hear a dispute, and accordingly, the parties have the right to request the replacement of such arbitrator:

- the arbitrator is a relative or the representative of a party;
- the arbitrator has an interest related to the dispute;
- there are clear grounds for believing that the arbitrator is not impartial or objective; and
- the arbitrator was a mediator, representative or lawyer for either of the parties prior to the dispute being brought to arbitration for resolution, and the parties did not provide written consent to let the arbitrator being part of the tribunal.

Articles 42.3 and 42.4 of the Law on Commercial Arbitration further provide for the procedure to replace an arbitrator in an institutional arbitration and ad hoc arbitration, respectively.

In an institutional arbitration, such as a VIAC arbitration:

- prior to the constitution of the arbitral tribunal: the chairman of the arbitral institution (for example, the President of the VIAC) shall decide on the replacement of the arbitrator;
- after the constitution of the arbitral tribunal: the remaining members of such tribunal shall take the decision. If these members are unable to decide, the chairman of the arbitral institution shall decide on the replacement of the arbitrator(s); or
- after the constitution of the arbitral tribunal: if all the arbitrators or the sole arbitrator refuse(s) to decide on the replacement, the chairman of the arbitral institution shall decide.

In case of an ad hoc arbitration, the procedure to replace an arbitrator is as follows:

- prior to the constitution of the arbitral tribunal: the Law on Commercial Arbitration is silent on the procedure to replace an arbitrator;
- after the constitution of the arbitral tribunal: the remaining members of such tribunal shall make the decision. If these members are unable to decide, the competent court shall decide on the replacement of the arbitrator(s); or
- after the constitution of the arbitral tribunal: if all the arbitrators or the sole arbitrator refuse(s) to decide on the replacement, the competent court shall decide.

Finally, article 42.5 of the Law on Commercial Arbitration provides that the decision taken by the chairman of the arbitration centre or the competent court on the replacement of the arbitrator(s) is final.

The IBA Guidelines on Conflicts of Interest in International Arbitration are generally not taken into account, unless the parties expressly agree to refer to them in their arbitration agreement. However, the VIAC has issued a Code of Ethics for an Arbitrator which provisions refer to, and adopt, some parts of the IBA Rules on Ethics for International Arbitrators and the IBA Guidelines on Conflicts of Interest in International Arbitration.

Interim relief

25 Types of relief

What main types of interim relief are available in respect of international arbitration and from whom (the tribunal or the courts)? Are anti-suit injunctions available where proceedings are brought elsewhere in breach of an arbitration agreement?

Both the tribunal and the courts have the power to grant interim reliefs pursuant to article 48.1 of the Law on Commercial Arbitration. Article 49.2 of the Law on Commercial Arbitration sets forth the types of interim reliefs available:

- prohibiting any change in the status quo of the assets in dispute;
- prohibiting acts, or ordering one or more specific acts to be taken by a party, to prevent conduct adverse to the process of the arbitration proceedings;
- attaching assets in dispute;
- requiring the preservation, storage, sale or disposal of any of the assets of a party or all parties;
- requiring the provisional payment of money between the parties; and
- prohibiting the transfer of rights in the assets in dispute.

The courts, however, have broader power than an arbitral tribunal. Article 114 of the Civil Proceedings Code No. 92/2015/QH13 passed by the National Assembly on 25 November 2015, and fully effective since 1 January 2017, provides that in addition to the above interim reliefs, the courts may grant the following reliefs relating to commercial disputes:

- freezing bank accounts at banks, other credit institutions, the state's treasury, freezing assets under other parties' detention;
- freezing assets of the obligated parties;
- prohibiting the obligated party from leaving the country;
- detaining vessels, aircrafts to ensure the resolution of a dispute; and
- prohibiting acts by, or ordering one or more specific acts to be taken by, a party in dispute.

There are other interim reliefs available to the courts but those are only relevant to non-contractual or labour disputes. Anti-suit injunctions are not available under Vietnamese law.

26 Security for costs

Does the law of your jurisdiction allow a court or tribunal to order a party to provide security for costs?

Security for costs is not expressly provided under Vietnamese law. However, article 34.3 of the Law on Commercial Arbitration provides that "the party that loses the case must pay the arbitration costs, unless otherwise agreed by or stipulated by the procedural rules of the arbitration centre, or unless the arbitral tribunal makes some other allocation of costs." Pursuant to article 34.1 of the Law on Commercial Arbitration, arbitration costs comprise of the arbitrators' remuneration, costs for consulting experts required by the tribunal, administrative fees of the arbitration centre, fees for the appointment of arbitrator by the arbitration centre and fees for the use of other facilities or services provided by the arbitration centre, but does not include the prevailing party's legal fees.

Although security for costs is not available per se under Vietnamese law, a party may apply for a security for costs within the arbitration proceedings as an interim relief. In addition, within the award enforcement process, article 47 of Law on Enforcement of Civil Judgment No. 26/2008/QH12, as amended by Law No. 64/2014/QH13 passed by the National Assembly on 25 November 2014, effective from 1 July 2015, provides that the enforcement agency will deduct from the recovered amount: (i) its enforcement costs and (ii) the arbitration costs. Therefore, if the court has applied an interim relief on the losing party, such as freezing its bank accounts or assets to secure the enforcement of the arbitral award, the enforcement agency will deduct its enforcement costs and the arbitration costs before transferring the remaining of the amount awarded to the winning party.

Procedure

27 Procedural rules

Are there any mandatory rules in your jurisdiction that govern the conduct of the arbitration (eg, general duties of the tribunal and/or the parties)?

Article 4 of the Law on Commercial Arbitration sets out the following principles governing the conduct of the arbitration:

- Arbitrators must respect the agreement of the parties if it does not breach prohibitions and is not contrary to social morals.
- Arbitrators must be independent, objective and impartial, and must comply with provisions of law.
- Parties in dispute shall have equal rights and obligations. The arbitral tribunal shall be responsible to facilitate the parties to exercise their rights and to discharge their obligations.
- Dispute resolution by arbitration shall be conducted in private, unless otherwise agreed by the parties.
- An arbitral award shall be final.

28 Refusal to participate

What is the applicable law (and prevailing practice) where a respondent fails to participate in an arbitration?

There is no concept of “default judgment” under Vietnamese law. Pursuant to article 35.5 and article 56 of the Law on Commercial Arbitration, if a respondent fails to reply to a notice of arbitration or participate in an arbitration, the arbitration shall proceed and the arbitral tribunal will review the case and issue an award based upon the evidence submitted to it.

29 Admissible evidence

What types of evidence are usually admitted, and how is evidence usually taken? Will the IBA Rules on the Taking of Evidence in International Arbitration generally be taken into account?

Vietnamese law does not expressly list out the types of evidence admitted in arbitration or litigation proceedings. The IBA Rules on the Taking of Evidence in International Commercial Arbitration are not referred to in the Law on Commercial Arbitration or the arbitration rules of the leading arbitration centre in Vietnam (ie, the VIAC).

As a general rule in arbitration and litigation proceedings in Vietnam, the parties have the rights, and also the obligations, to provide evidence to support their claims and arguments. In addition to the evidence provided by the parties, and in accordance with article 46 of the Law on Commercial Arbitration, the arbitral tribunal may, on its own initiative or at the request of a party, request evidence from witnesses or consult opinions from professional experts or seek an assessment or valuation of the assets in dispute.

In respect of the ‘Prague Rules,’ their application will be subject to the Parties’ agreement (such as the IBA Rules on the Taking of Evidence in International Commercial Arbitration). However, as the issuance of such rules is quite recent, their application has not been seen in practice yet.

30 Court assistance

Will the courts in your jurisdiction play any role in the obtaining of evidence?

Yes, Article 46.5 of the Law on Commercial Arbitration provides that “if the arbitral tribunal or one or both parties has already taken the necessary measures to collect evidence without success, then a petition may be made to the competent court with jurisdiction to require other bodies, organisations or individuals to provide [evidence] relevant to the dispute.” In addition, article 47.2 of the Law on Commercial Arbitration also allows the arbitral tribunal to seek the assistance of the competent court when a witness, who has been duly summoned by the arbitral tribunal, fails to attend the hearings without a legitimate reason.

31 Document production

What is the relevant law and prevailing practice relating to document production in international arbitration in your jurisdiction?

Article 46 of the Law on Commercial Arbitration requires the parties to produce documentary evidence in support of their claims and defences and allows the arbitral tribunal to request documentary evidence from witnesses, opinions from professional experts, appraisers or valuers.

However, Vietnamese law is silent on whether a party to an arbitration has the right to request documents from the other party. In practice, we have been involved in a substantial arbitration proceeding administered by the VIAC where the arbitral tribunal allowed the parties to request documents from each other during the document production stage pursuant to the parties’ agreement.

32 Hearings

Is it mandatory to have a final hearing on the merits?

There are no provisions under the Law on Commercial Arbitration that expressly require a hearing on the merits. However, article 56.3 of the Law on Commercial Arbitration provides that, based upon the request of the parties, the arbitral tribunal may hold a hearing on the merits without the presence of the parties. In other words, it is understood that the arbitral tribunal must hold a hearing on the merits, but the presence of the parties is not mandatory. Likewise, article 37.2(c) of the VIAC 2017 Rules of Arbitration, which pertains to expedited procedures, provides that the arbitral tribunal may rely on the documents and evidence available to proceed with a hearing, without the presence of the parties.

33 Seat or place of arbitration

If your jurisdiction is selected as the seat of arbitration, may hearings and procedural meetings be conducted elsewhere?

Yes. Article 54.1 of the Law on Commercial Arbitration allows the arbitral tribunal to decide on the venue for the hearings or procedural meetings, unless the parties agree otherwise, or the arbitration rules of the arbitration centre provide otherwise. There are, therefore, no express restrictions on where such hearings or meetings can take place. In practice, we have had an arbitration governed by the VIAC Rules of Arbitration in which the arbitral tribunal decided to hold a procedural meeting outside of Vietnam.

Award

34 Majority decisions

Can the tribunal decide by majority?

Pursuant to article 60 of the Law on Commercial Arbitration, the tribunal must decide by majority. Article 60 also provides that in case of lack of majority, the award will be made in accordance with the opinion of the presiding arbitrator. However, this provision is unlikely to be applicable in practice as article 40.2 of the Law on Commercial Arbitration seems to suggest that a tribunal may comprise of one sole arbitrator or three arbitrators, since it provides that if there are multiple respondents, the respondents must agree to appoint an arbitrator. Therefore, there is unlikely to be a situation when a three-member tribunal would not have a majority.

35 Limitations to awards and relief

Are there any particular types of remedies or relief that an arbitral tribunal may not grant?

No. The arbitral tribunal may grant any types of remedies or reliefs, final or interim, provided that they are not contrary to Vietnamese law.

It is noted that, with respect to interim remedies or reliefs, courts have broader power than the arbitral tribunal to grant them. Article 114 of the Civil Proceedings Code No. 92/2015/QH13 passed by the National Assembly on 25 November 2015, and fully effective since 1 January 2017, provides that, in addition to the interim reliefs available to arbitral tribunals (question 25), the courts may grant other reliefs relevant to non-contractual or labour disputes and the courts have the sole competence to grant interim relief to secure the enforcement of an award.

36 Dissenting arbitrators

Are dissenting opinions permitted under the law of your jurisdiction? If so, are they common in practice?

Dissenting opinions are permitted under Vietnamese law. Article 61.2 of the Law on Commercial Arbitration provides that when an arbitrator refuses to sign an arbitral award, the chairman of the tribunal must record such fact in the award and specify the reasons for which the dissenting arbitrator refuses to sign.

It appears difficult to ascertain whether dissenting opinions are common in practice but we have been involved in a case where a tribunal's decision on interim relief included a dissenting opinion from one of the arbitrators.

37 Formalities

What, if any, are the legal and formal requirements for a valid and enforceable award?

Article 61.1 of the Law on Commercial Arbitration provides that an arbitral award must be in writing and contain the following requirements to be valid and enforceable:

- date and place of issuance of the award;
- names and addresses of the claimant and the respondent;
- name(s) and address(es) of the arbitrator(s);
- summary of the notice of arbitration and the disputing issues;
- grounds for the award, unless otherwise agreed by the parties;
- the resolution of the dispute;
- period for implementing the award;

- allocation of arbitration fees and other fees; and
- signature(s) of the arbitrator(s).

38 Time frames

What time limits, if any, should parties be aware of in respect of an award? In particular, do any time limits govern the interpretation and correction of an award?

Article 63.1 of the Law on Commercial Arbitration provides that a party may, within 30 days from receipt of the award, request the arbitral tribunal to correct any typos or to interpret any content of the award, and must immediately notify the other party of such request. If the arbitral tribunal considers the request reasonable, it shall make the rectification within 30 days from receipt of the request.

Costs and interest

39 Costs

Are parties able to recover fees paid and costs incurred? Does the “loser pays” rule generally apply in your jurisdiction?

Yes, the “loser pays” rule applies in Vietnam. Article 34.3 of the Law on Commercial Arbitration provides that “the party that loses the case must pay the arbitration costs, unless otherwise agreed by or stipulated by the procedural rules of the arbitration centre, or unless the arbitral tribunal makes some other allocation of fees.” Pursuant to article 34.1 of the Law on Commercial Arbitration, arbitration costs comprise of the arbitrators’ remuneration, costs for consulting experts required by the arbitral tribunal, administrative fees of the arbitration centre, fees for the appointment of arbitrator by the arbitration centre and fees for the use of other facilities or services provided by the arbitration centre, but does not include the winning party’s legal fees.

40 Interest on the award

Can interest be included on the principal claim and costs? Is there any mandatory or customary rate?

The Law on Commercial Arbitration is silent on whether an arbitral tribunal can award interest on the principal claim or costs. However, in Vietnamese litigation proceedings, the Ministry of Finance, the Ministry of Justice, the Supreme People’s Prosecutor and the Supreme People’s Court have enacted a joint circular stating that interest will be included on the principal claim and costs in a judgment to prevent any delay in the enforcement of the judgment by the losing party. An arbitral tribunal may apply this rule in its award.

Pursuant to articles 357 and 468 of the Civil Code No. 91/2015/QH13 dated 24 November 2015, which became effective on 1 July 2017, the applicable rate for interest due to delay in performing payment obligations is 20 per cent per annum.

Challenging awards

41 Grounds for appeal

Are there any grounds on which an award may be appealed before the courts of your jurisdiction?

Article 69 of the Law on Commercial Arbitration provides that a party may apply to the competent court to set aside an arbitral award within 30 days from the date of receipt of such award. The application must be accompanied by materials and evidence proving that such application has sufficient grounds and is lawful.

Article 68 of the Law on Commercial Arbitration provides that an arbitral award shall be set aside on the following grounds:

- (i) *There is no arbitration agreement or the arbitration agreement is invalid;*
- (ii) *The composition of the tribunal or the arbitration proceedings is not in compliance with the agreement of the parties or the Law on Commercial Arbitration;*
- (iii) *The dispute does not fall within the jurisdiction of the arbitral tribunal; if any part or aspect of the dispute fall outside the scope of the jurisdiction of the arbitral tribunal, such part or aspect shall be set aside;*

- (iv) *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; or*
- (v) *The arbitral award is contrary to the fundamental principles of Vietnamese law.*

There is, however, no explicit provision on what “the fundamental principles of Vietnamese law” (ie, public policy) are. Those principles are broad, undefined, and have historically been the main basis by which a losing party was able to convince a Vietnamese court to set aside or refuse to enforce an arbitral award.

Article 68 of the Law on Commercial Arbitration further requires that, with respect to grounds (i) to (iv), the parties bear the burden of bringing the evidence supporting these grounds, and with respect to ground (v), the court is responsible to verify and collect such evidence in deciding whether to set aside the award.

42 Other grounds for challenge

Are there any other bases on which an award may be challenged, and if so what?

No, the parties to an arbitration proceeding can only appeal an award on the basis of one of the grounds set forth in question 41.

43 Modifying an award

Is it open to the parties to exclude by agreement any right of appeal or other recourse that the law of your jurisdiction may provide?

It appears that Vietnamese law does not allow the parties to agree on excluding the right to appeal an award. Article 68.1 of the Law on Commercial Arbitration only provides that the court shall hear an application for setting aside an award if a party so petitions, without contemplating the possibility for them to exclude such right.

Enforcement in your jurisdiction

44 Enforcement of set-aside awards

Will an award that has been set aside by the courts in the seat of arbitration be enforced in your jurisdiction?

With respect to domestic arbitral awards, when the enforcement is sought before the enforcement agency, the agency will request the requesting party to seek a confirmation from the competent court that the award has not been set aside.

With respect to foreign arbitral awards, article 459 of the Civil Proceedings Code No. 92/2015/QH13 dated 25 November 2015 and effective since 1 January 2017 provides that the setting aside of the award by a court in the seat of arbitration constitutes a ground for not recognising the enforcement of the award in Vietnam. Accordingly, an award that has been set aside by a court in the seat of arbitration will not be enforced in Vietnam.

45 Trends

What trends, if any, are suggested by recent enforcement decisions? What is the prevailing approach of the courts in this regard?

If the foreign arbitral award is issued in a country not party to the 1958 New York Convention, the prospect of getting such award recognised and enforced in Vietnam is extremely low. The only basis for such award to be recognised and enforced in Vietnam is the reciprocal principle which, in practice, is rarely if ever applied.

If the foreign arbitral award is issued in a country party to the 1958 New York Convention, there is an application procedure under the Civil Procedure Code No. 92/2015/QH13 dated 25 November 2015, and which became effective on 1 January 2017, for its recognition and enforcement in Vietnam. With respect to the likelihood of the recognition and enforcement, historically, the prospect is low. However, in recent years, more recognition and enforcement have been granted. Whether a foreign arbitral award can be recognised and enforced is to be considered on a case-by-case basis.

46 State immunity

To what extent might a state or state entity successfully raise a defence of state or sovereign immunity at the enforcement stage?

As discussed in our response to question 41, Vietnamese courts may set aside an award or to refuse its recognition and enforcement in Vietnam on the ground that the award, or the enforcement of the award, is contrary to “the fundamental principles of Vietnamese law.” There is, however, no explicit provision on what “the fundamental principles of Vietnamese law” (ie, public policy) are. Those principles are broad, undefined, and have historically been the main basis by which a losing party was able to convince a Vietnamese court to set aside or refuse to enforce an arbitral award.

Further considerations

47 Confidentiality

To what extent are arbitral proceedings in your jurisdiction confidential?

As a general rule, article 4.4 of the Law on Commercial Arbitration provides that arbitration proceedings are conducted in private, ie. confidential, unless otherwise agreed by the parties. Article 55.1 of the Law on Commercial Arbitration further provides that the hearing shall be conducted in private, unless otherwise agreed by the parties. Accordingly, the arbitral tribunal can only allow non-parties to participate in the hearings if the parties so agree.

48 Evidence and pleadings

What is the position relating to evidence produced and pleadings filed in the arbitration? Are these confidential? Is there any way that they might be relied on in other proceedings (whether arbitral or court proceedings)?

Vietnamese law is silent on this issue. However, article 68.3(a) of the Law on Commercial Arbitration requires the party requesting to set aside an award to bear the burden of proof that a recognized statutory ground for the request exists. Such burden of proof may entail presenting the evidence and pleadings used during the arbitration proceedings leading to the issuance of the disputed award. As a result, in this case, the evidence produced and pleadings filed are not confidential and might be relied on in the review of the application for the setting aside of the award by the competent court.

49 Ethical codes

What ethical codes and other professional standards, if any, apply to counsel and arbitrators conducting proceedings in your jurisdiction?

Vietnamese lawyers are subject to the Ethical Rules and Professional Conducts of Vietnamese Lawyers issued by the Vietnam Bar Federation. In addition, two arbitration centres in Vietnam, namely the VIAC and the PIAC, have issued ethical rules imposed on arbitrators to ensure their impartiality and objectivity.

50 Procedural expectations

Are there any particular procedural expectations or assumptions of which counsel or arbitrators participating in an international arbitration with its seat in your jurisdiction should be aware?

No. Like other jurisdictions, Vietnamese law does not specifically provide for the procedural aspects of an arbitration. Therefore, procedural issues may be considered and decided at the sole discretion of the arbitral tribunal. In our experience, the procedural aspects of an arbitration can be agreed upon between the parties and recorded in a procedural order issued by the arbitral tribunal.

51 Third-party funding

Is third-party funding permitted in your jurisdiction? If so, are there any rules governing its use?

Vietnamese law is silent on third-party funding in arbitration. Accordingly, there are no rules governing its use either.



K Minh Dang

YKVN LLP

K Minh Dang is the senior partner of YKVN and has more than 35 years of experience in a wide variety of international matters around the globe. He was previously a partner and held leadership positions with leading international law firms. He is the head of YKVN's international arbitration practice and has led or participated in many complex and Vietnam-related arbitrations over the past four years.



Do Khoi Nguyen

YKVN LLP

Do Khoi Nguyen is dual US/Vietnam qualified and is a key partner of YKVN's litigation/arbitration practice. Nguyen has handled a broad range of disputes in construction, international trade, banking and oil and gas. He regularly represents state-owned groups and entities, multinational enterprises and private companies. He is a sought-after speaker on Vietnam-related arbitration.



YKVN is the only Vietnamese law firm with an office outside Vietnam. Our lawyers in the Hanoi, Ho Chi Minh City and Singapore offices are thoroughly integrated and frequently work together seamlessly on the same matters.

YKVN's dispute resolution practice is backed-up by a very strong transaction team for banking, finance and corporate matters. The dispute resolution practice is specialised and focused on domestic and international litigation and arbitration involving complex foreign investment, construction and international commercial disputes.

K Minh Dang and Do Khoi Nguyen have led YKVN Singapore into a significant expansion of the international arbitration practice since 2015, making YKVN perhaps the only Vietnamese law firm with extensive international arbitration experience.

YKVN fields a diverse mix of internationally trained and domestically qualified lawyers allowing the practice to comfortably advise on the resolution of cross-border disputes involving foreign parties doing business in Vietnam or with Vietnamese parties or Vietnamese parties doing business internationally, whether through litigation or VIAC arbitration in Vietnam, ICC, SIAC or other foreign arbitration or foreign litigation.

YKVN is the only Vietnamese firm that frequently acts as lead counsel on international arbitrations, coordinating the work of international and local firms in the applicable jurisdiction. YKVN Singapore has handled all of those mandates.

Suite 401 International Centre
17 Ngo Quyen Street
Hanoi, Vietnam
Tel: (84-24) 3 934 5410/1
Fax: (84-24) 3 934 5412

K Minh Dang
minh.dang@ykvn-law.com

Do Khoi Nguyen
nguyen.do@ykvn-law.com

www.ykvn-law.com