



ICLG

The International Comparative Legal Guide to:

International Arbitration 2019

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A practical cross-border insight into international arbitration work

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- **Preface** by Gary Born, Chair, International Arbitration Practice Group & Charlie Caher, Partner, Wilmer Cutler Pickering Hale and Dorr LLP

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Vietnam

K. Minh Dang



K. Nguyen Do



YKVN

1 Arbitration Agreements

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

Under the Law on Commercial Arbitration No. 54/2010/QH12 dated 17 June 2010 (the “LCA”), a valid arbitration agreement must:

- (i) be in writing, or other forms having similar effect (please refer to Article 16.2 of the LCA for the similar forms);
- (ii) involves disputes which are arbitrable in accordance with Article 2 of the LCA;
- (iii) be duly executed by a person having authority and civil capacity according to the law;
- (iv) not be obtained through fraud, duress or coercion; and
- (v) not violate Vietnamese law.

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

In practice, it is common to include the following elements in an arbitration agreement:

- (i) the parties’ choice of arbitral institution (if none is specified and there is no subsequent agreement, the claimant has the right to choose the arbitral institution);
- (ii) the arbitration rules;
- (iii) regarding the number of arbitrators, per Article 39.2 of the LCA:
 - (a) if there is no agreement between parties, the default number of arbitrators is three; and
 - (b) if there is an agreement, parties have the options to choose between a sole-member or a three-member tribunal;
- (iv) the place of arbitration, per Article 11 of the LCA;
- (v) the language of arbitration, per Article 10 of the LCA:
 - (a) if the dispute is without any foreign element and none of the party involved is a foreign invested company, the applicable language must be Vietnamese regardless of the parties’ agreement;
 - (b) if the dispute is with any foreign element, or at least one party is an enterprise with foreign invested capital, the applicable language can be agreed upon by the parties; and

(c) please refer to Article 663.2 of Civil Code No. 91/2015/QH13 dated 24 November 2015 (the “Civil Code”) for the definition of “civil relation involving a foreign element”; and

- (vi) the governing law of contract (please see question 4.1 below for more details).

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

Under Article 6 of the LCA, the court will give deference to the arbitration agreement if the agreement is valid and able to be performed, and the matter falls outside the exclusive jurisdiction of the Vietnamese courts. However, if the agreement is invalid or unable to be performed, the court will have jurisdiction.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

Arbitration proceedings are governed by following legislation:

- (i) Law on Commercial Arbitration No. 54/2010/QH12 dated 17 June 2010;
- (ii) Decree No. 63/2011/ND-CP dated 28 July 2011;
- (iii) Decree No. 124/2018/ND-CP dated 19 September 2018;
- (iv) Resolution No. 01/2014/NQ-HDTP dated 20 March 2014 (“Resolution No. 01/2014/NQ-HDTP”);
- (v) Civil Code No. 91/2015/QH13 dated 24 November 2015;
- (vi) Civil Procedure Code No. 92/2015/QH13 dated 25 November 2015 (the “Civil Procedure Code”); and
- (vii) Law on Enforcement of Civil Judgment No. 26/2008/QH12 dated 11 November 2008 (the “Law on Enforcement of Civil Judgment”).

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

Yes, the LCA governs both domestic and international arbitration proceedings in Vietnam. However, it is not clear whether the LCA applies to international arbitration proceedings with no other connection to Vietnam aside from being the location of their seat.

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

Yes, the LCA is based on the UNCITRAL Model Law, with supplementary and divergent provisions on:

- (i) principles of settling disputes;
- (ii) state administration of arbitration;
- (iii) the enforcement of arbitral awards (please see question 11.3 for more details);
- (iv) minimum qualifications of an arbitrator;
- (v) the right of the parties to request conciliation conducted by the arbitral tribunal; and
- (vi) setting aside an arbitral award for violation of fundamental principles of Vietnamese law.

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

Article 4 of the LCA provides the following principles that govern both domestic and international arbitrations in Vietnam:

- (i) arbitrators must honour parties' agreements, except when it violates the law or is contrary to social morals;
- (ii) arbitrators must be independent, objective, impartial, and must comply with the law;
- (iii) parties shall have equal rights and obligations;
- (iv) the tribunal shall enable the parties to exercise their rights and obligations;
- (v) arbitration proceedings shall be conducted *in camera*, unless otherwise agreed by the parties (please see section 12 for the analysis of confidentiality under the LCA); and
- (vi) arbitral awards shall be final.

3 Jurisdiction

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

The general approach is to perform a step-by-step analysis as follows:

- (i) First, Article 2 of the LCA limits the categories of dispute that may be resolved through arbitration to the following:
 - (a) arising from "commercial activities" (please refer to Article 3.1 of Commercial Law No. 36/2005/QH11 dated 14 June 2005 (the "Commercial Law"));
 - (b) at least one party is engaged in commercial activities; and
 - (c) where the law stipulates that arbitration is permissible.
- (ii) Second, the matter is not arbitrable if it belongs to the following matters which fall within the exclusive jurisdictions of Vietnamese courts per Article 470.1 of the Civil Procedure Code:
 - (a) civil cases over immovable property within Vietnamese territory;
 - (b) divorce proceedings between a Vietnamese citizen and a foreigner; or a Vietnamese citizen and a stateless person; and in both cases, the spouses have to be long-term residents of Vietnam; and

- (c) civil cases where the parties have the right, under Vietnamese law or an international treaty signed by Vietnam, to select the jurisdiction of Vietnamese courts, and have decided to make such selection.

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

Yes, per Article 43 of the LCA.

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

Assuming the arbitration agreement is valid and able to be performed, the court may not hear the case, unless the dispute falls under the exclusive jurisdiction of Vietnamese courts.

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

There are two circumstances under which a national court can address the issue of jurisdiction and competence of an arbitral tribunal:

- (i) if, during an arbitration proceeding, a party disagrees with the tribunal's decision of its own jurisdiction, that party may submit the challenge against such decision to the competent court within five business days from the date of receipt of such decision in accordance with Article 44 of the LCA. The petitioner must simultaneously notify the arbitral tribunal of the challenge. The competent court will decide within 15 business days and issue a final and binding decision. The arbitral tribunal may continue the arbitration proceeding in the meantime; or
- (ii) if a party disagrees with the jurisdiction decision in the award of the tribunal, under Article 69 of the LCA, the party shall have 30 days from the receipt of the award to challenge the jurisdictional decision. However, if the petitioning party did not raise its challenge against the tribunal's jurisdiction within the provided time limit by law, the party is considered to have waived the right to object to the tribunal's jurisdiction in the set-aside petition under Article 13 of the LCA.

There is no standard of review defined under Vietnamese law with respect to a court's review of the tribunal's decision as to its own jurisdiction. However, in practice, the standard of review is similar to the *de novo* standard.

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

There are two scenarios per Article 5 of the LCA:

- (i) in case of death or incapability, the heirs or the legal guardian will be bound by the arbitration agreement unless the parties agreed otherwise; and
- (ii) if a party ceases to legally exist, then the legal successor will be bound by the arbitration agreement unless the parties agreed otherwise.

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

Article 33 of the LCA provides that 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 law.

In practice, Vietnamese courts tend to consider rules prescribing limitation periods as substantive law.

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

Per Article 41.2 of the Law on Bankruptcy No. 51/2014/QH13 dated 19 June 2014 (the "Law on Bankruptcy"), if the court accepts the application for bankruptcy, the arbitration proceedings shall be temporarily suspended. Article 41.2 of the Law on Bankruptcy further stipulates that the procedure for temporary suspension shall be carried out in accordance with the LCA. We note, however, that the current LCA does not provide any procedure for temporary suspension of an arbitration proceeding.

Per Article 71 of the Law on Bankruptcy, if the court then opens the bankruptcy proceeding, the arbitration proceedings which were temporarily suspended before shall be dismissed.

4 Choice of Law Rules

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

It depends on whether the dispute involves any foreign element or not. Per Article 14 of the LCA, if the dispute does not involve any foreign element, the substantive law shall be Vietnamese law.

If the dispute involves any foreign element, the arbitral tribunal shall apply the law chosen by the parties. However, if the applicable substantive law is not already agreed upon by the parties, the applicable substantive law shall be the law the arbitral tribunal considers most appropriate.

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

Under Article 14.1 of the LCA, regarding disputes without any foreign element, Vietnamese law will be the governing law by default. That means Vietnamese law shall prevail over the law chosen by the parties, if any.

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

The applicable "choice of law" rule is Article 14 of the LCA. Under this Article 14, the following principles will apply:

- (i) If the disputes are without any foreign element, then the applicable law for all issues, including issues surrounding the arbitration agreement, shall be Vietnamese law.

- (ii) If the disputes contain any foreign element, then the parties can agree on the applicable law, including the applicable law for issues surrounding the arbitration agreement. In the absence of such agreement, the tribunal shall decide on the applicable law it considers most appropriate.

5 Selection of Arbitral Tribunal

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

Yes, Article 20 of the LCA imposes minimum qualifications for an arbitrator, which are:

- (i) sufficient civil capacity as prescribed in the Civil Code;
- (ii) a university qualification and at least five years of working experience in the discipline in which he or she studied; and
- (iii) in special circumstances, an expert with highly specialised qualifications and considerable practical experience may still be selected as an arbitrator, despite the fact that he or she fails to satisfy requirement (ii) above.

However, being any of these persons results in automatic disqualification as an arbitrator:

- (i) a judge, prosecutor, investigator, enforcement officer or officer of a people's court, of a people's procuracy, of an investigative agency or of a civil judgment enforcement agency; or
- (ii) 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.

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

Yes, Article 40 of the LCA provides for a default procedure for an institutional arbitration:

- (i) in case of a three-member tribunal, if the respondent fails to select an arbitrator or fails to request the president of the arbitration centre to appoint an arbitrator, the president shall appoint an arbitrator for the respondent; or
- (ii) in case of a sole-member tribunal, if no arbitrator was selected within 30 days from the receipt of the claimant's statement of claim, at the request of one or all parties, the president of the arbitration centre shall appoint the sole arbitrator.

Article 41 of the LCA provides for a default procedure for *ad hoc* arbitration, which is listed below in question 5.3.

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

Yes, but only in *ad hoc* arbitrations. Per Article 41 of the LCA:

- (i) regarding a three-member tribunal, if there is no appointment of arbitrator within 30 days from the date of receipt of the claimant's statement of claim, the claimant shall have the right to request the competent court to appoint an arbitrator for the respondent unless the parties agreed otherwise. In addition, if the co-arbitrators fail to appoint the presiding arbitrator of the tribunal within 15 days from the date of their appointment, the parties shall have the right to request the competent court to appoint such presiding arbitrator; and
- (ii) regarding a sole-member tribunal, if there is no appointment of the sole arbitrator within 30 days from the receipt of the

statement of claim, and there is no agreement to request the arbitration centre to appoint the sole arbitrator, the competent court shall appoint the sole arbitrator if requested to do so by any party.

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

Among the rights and obligations of arbitrators provided under Article 21 of the LCA, arbitrators are compelled to remain independent, impartial and must comply with the rules on professional ethics.

Article 42.2 of the LCA further imposes the duty on an arbitrator to notify the arbitration centre or the arbitral tribunal and the parties, in writing, of any circumstance which may affect his or her objectiveness and impartiality from the time of his or her appointment.

6 Procedural Rules

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

Yes, there are (please see question 2.2 for more details).

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

The LCA sets out the following procedural steps which are typical procedures in international arbitration proceedings:

- (i) Article 30 stipulates the submission of statement of claim;
- (ii) Article 32 stipulates the delivery of statement of claim to the respondent;
- (iii) Article 35 stipulates the submission of statement of defence; and
- (iv) Article 36 stipulates the submission of statement of counter-claim.

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

Yes, Vietnamese lawyers are subjected to the Law on Lawyers No. 65/2006/QH11 dated 29 June 2006 (the “Law on Lawyers”) when providing legal services, including an arbitration forum. Article 5 of the Law on Lawyers further provides that Vietnamese lawyers are subjected to the Ethical Rules and Professional Conducts of Vietnamese lawyers issued by the Vietnam Bar Federation. The same rule governs Vietnamese lawyers when they are involved in an arbitration seated outside of Vietnam.

Article 1 of the Law on Lawyers governs the professional conducts of both Vietnamese lawyers and foreign lawyers practising in Vietnam, including when the foreign lawyers are involved in an arbitration seated in Vietnam.

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

Article 21 of the LCA provides that the arbitrators have the following rights and obligations:

- (i) to accept or refuse to arbitrate a dispute;
- (ii) to remain independent during the arbitration;
- (iii) to refuse to provide information concerning a dispute;
- (iv) to receive remuneration;
- (v) to maintain confidentiality of the dispute, unless information must be provided to a competent State authority as required by law;
- (vi) to ensure the resolution of a dispute is fair, efficient and prompt; and
- (vii) to comply with the rules on professional ethics.

Article 42.1 of the LCA further provides four specific circumstances under which an arbitrator must excuse himself or herself from participating in the arbitration proceeding, and in these cases, the parties have the right to request the replacement of such arbitrator:

- (i) the arbitrator is a relative or a representative of a party;
- (ii) the arbitrator has an interest in the dispute;
- (iii) there are clear grounds showing that the arbitrator is not impartial or objective; or
- (iv) the arbitrator was a mediator, representative or lawyer for any of the parties prior to the dispute being brought to arbitration for resolution, and no written consent with regard to the participation of said arbitrator in the arbitration proceeding was provided.

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

Yes, Article 76 of the Law on Lawyers requires that foreign lawyers:

- (i) only provide advice on foreign law and international law and other legal services related to foreign law;
- (ii) only provide advice on Vietnamese law if they hold a Vietnamese Bachelor’s diploma in law and meet all requirements of Vietnamese lawyers; and
- (iii) cannot participate in legal proceedings as representatives or counsels before Vietnamese courts.

However, it is not clear if the limitations above apply to alternative dispute resolution. In practice, in arbitrations in Vietnam, foreign lawyers often participate as authorised representatives of their clients.

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

Under Vietnamese law, there is no ground for a party to sue an arbitrator, except as provided under Article 49.5 of the LCA. Article 49.5 states that “if an arbitral tribunal grants a different form of interim relief or an 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 [against the tribunal] for compensation in accordance with the law on civil procedure”.

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

Yes, but the courts will refrain from interfering with the arbitration, except in these circumstances:

- (i) appointing arbitrators in certain circumstances (please see question 5.3 for more details);
- (ii) considering challenges to appointment of arbitrators, per Article 42 of the LCA;
- (iii) assisting with the collection of evidence from individuals or organisations if the arbitral tribunal or the parties cannot obtain such evidence, per Article 46 of the LCA;
- (iv) issuing summons to witnesses to give oral evidence, per Article 47 of the LCA;
- (v) granting interim reliefs, per Article 53 of the LCA; and
- (vi) hearing petitions against decisions of arbitral tribunals on the arbitration agreement’s formation, validity and legality and the arbitral tribunal’s jurisdiction, per Article 44 of the LCA.

7 Preliminary Relief and Interim Measures

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

Yes, an arbitral tribunal is permitted to award interim reliefs pursuant to Article 48.1 of the LCA. Article 49.2 of the LCA lists the types of interim relief that an arbitral tribunal may grant:

- (i) enjoining any change of the assets in dispute;
- (ii) constraining the behaviour of any party in dispute to prevent adverse consequences to the arbitration proceedings;
- (iii) attachment of the assets in dispute;
- (iv) ordering the preservation of, deposit, sale or evaluation of any of the assets of any party in dispute;
- (v) ordering temporary payment between the parties; and
- (vi) enjoining any transfer of property rights of the property in dispute.

No, an arbitral tribunal needs not seek the assistance of a court when granting the above interim reliefs.

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?

Yes, a court is entitled to grant interim reliefs in arbitration proceedings, except when the parties have already applied to the arbitral tribunal for any one of the interim reliefs listed in question 7.1.

We note that the courts may grant the following additional reliefs:

- (i) freezing bank accounts at banks, other credit institutions, the State’s treasury, freezing assets under other parties’ detention;
- (ii) freezing assets of the obligated parties;
- (iii) enjoining the obligated party from leaving the country;

- (iv) detaining vessels, and aircrafts to ensure the resolution of a dispute; and
- (v) constraining the behaviour of any party, or ordering specific acts to be taken by a party in dispute.

Article 48.2 of the LCA provides that a party’s request to a court for an interim relief has no effect on the jurisdiction of the arbitral tribunal.

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

In practice, if an interim relief is on the list of relief in question 7.1, and it has never been requested to the arbitral tribunal before, the court will consider such request for that interim relief.

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

Anti-suit injunctions are not available under Vietnamese law.

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

Vietnamese law does not provide that a party can request an arbitral tribunal to order security for costs. A party, however, can request interim reliefs per Article 49.2 (d), (dd) and (e) of the LCA, which, in some circumstances, may serve the same purpose as security for cost.

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

Vietnamese courts can grant interim reliefs but cannot enforce those reliefs. The enforcement should be made by the competent civil judgment enforcement agency, per Article 50.5 of the LCA referencing Article 28.3 of the Law on Enforcement of Civil Judgment.

Because interim reliefs ordered by arbitral tribunals from other jurisdictions are not considered final awards, there is no procedure to recognise and enforce them in Vietnam.

8 Evidentiary Matters

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

Vietnam has no rule of evidence similar to the IBA Rules on the Taking of Evidence in International Commercial Arbitration. The IBA Rules on the Taking of Evidence are also not recognised under Vietnamese law.

A general rule of evidence in arbitration or litigation proceedings in Vietnam is that the parties have the rights and obligations to provide evidence to support their claims and arguments. The tribunal may, on its own initiative or at the request of a party, request evidence from the witnesses, consult opinions of professional experts and seek an assessment or valuation of the assets in dispute.

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

Article 46 of the LCA allows the tribunal to request documentary evidence from witnesses, to consult opinions from professional experts, appraisers or valuers and to request the attendance of witnesses pursuant to Article 47 of the LCA.

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

Article 46 of the LCA allows the tribunal: to seek assistance from the court to obtain evidence from any individuals, organisations in possession of evidence; and to summon witnesses to give oral evidence pursuant to Article 47 of the LCA.

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 and is cross-examination allowed?

In general, Vietnamese law on evidence is limited. Article 46.2 of the LCA allows the arbitral tribunal to request a witness to provide information and documents that are relevant to the resolution of the dispute, but it is silent on the production of witness' written and oral testimony.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? 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?

It appears that there is no clear concept of privilege under Vietnamese law. Article 25 of the Law on Lawyers provides that lawyers should not disclose information of their cases and their clients unless (i) there are written consents from the clients, or (ii) otherwise provided by law. In addition, Article 78.3 of the Civil Procedure Code provides that a witness has the right to refuse to give testimony pertaining to professional secrets, business secrets and personal secrets (among others), which can be applied to lawyers testifying against their clients.

However, it is not clear whether lawyers may use such provision as a 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 your jurisdiction that the award contain reasons or that the arbitrators sign every page?

Article 61 of the LCA provides the requirements for the content, form and validity of an arbitral award. Particularly, an arbitral award must be in writing and include the following compulsory elements:

- (i) date and location of issuance of the award;
- (ii) names and addresses of the claimant and the respondent;

- (iii) full names and addresses of the arbitrator(s);
- (iv) summary of the statement of claim and matters in dispute;
- (v) reasons for the issuance of the award, unless the parties agreed it is unnecessary to specify the reasons for the award;
- (vi) result of the dispute resolution;
- (vii) time limit for the enforcement of the award;
- (viii) allocation of arbitration fees and other relevant fees; and
- (ix) signature(s) of the arbitrator(s).

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

Per Article 63 of the LCA, within 30 days upon the receipt of an award, either party may request the arbitral tribunal to correct any typo in the award or to clarify any points of the award, as long as that party informs the opposing party. If the arbitral tribunal considers the request reasonable, it has 30 days upon the receipt of the request to correct or clarify its award.

10 Challenge of an Award

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

Under Article 69 of the LCA, a party may request the competent court to set aside an arbitral award within 30 days from the date of receipt of such award. The request must be accompanied by evidence proving that such application has sufficient grounds and is lawful.

Article 68 of the LCA provides the following grounds:

- (i) there is no arbitration agreement, or the arbitration agreement is invalid;
- (ii) the composition of the arbitral tribunal or the arbitration proceeding is not in compliance with the agreement of the parties or the LCA;
- (iii) the dispute does not fall within the jurisdiction of the arbitral tribunal; any part of the arbitral award that is outside the jurisdiction of the arbitral tribunal shall be set aside;
- (iv) the evidence, which was relied upon by the tribunal, and supplied by the parties, 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 the "fundamental principles of Vietnamese law".

Article 68 of the LCA 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 for the verification and collection of such evidence, in order to make the decision whether to set aside the award.

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

No, the parties may not agree on excluding 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?

The parties are not allowed to extend the scope of appeal. The parties' consent is limited per Article 15.2 of Resolution No. 01/2014/NQ-HDTP, which states that during hearing petition to set aside an arbitral award, the courts can only consider whether the award falls under one of the grounds in Article 68.2 of the LCA. If it does not, the court shall not set aside the arbitral award.

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

Pursuant to Article 4.5 of the LCA, arbitral awards are final and binding, and may not be appealed in Vietnam.

11 Enforcement of an Award

11.1 Has your jurisdiction 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?

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 Vietnam.

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

- (i) the Convention is 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, the rule of reciprocity applies;
- (ii) the Convention will be applied only to differences arising out of legal relationships which are considered "commercial activities" under the law of Vietnam (please see Article 3.1 of the Commercial Law for definition of "commercial activities"); and
- (iii) interpretation of the Convention before the Vietnamese courts or competent authorities should be made in accordance with the Constitution and the law of Vietnam.

Please see question 2.1 above for the relevant national legislation.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning 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 with regard to the recognition and enforcement of arbitral awards. Other than the New York Convention, Vietnam is not party to any other multilateral treaties, for example, the ICSID Convention.

However, according to the Investment Policy Hub, Vietnam is currently a party to 49 BITs, which all include provisions dealing with dispute settlement and the recognition and binding effect of arbitral awards.

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

There are distinct and separate mechanisms for recognition and enforcement of arbitral awards in Vietnam. In addition, the procedures for recognition and enforcement vary depending on whether the award is foreign or non-foreign, *ad hoc* or institutional:

- (i) regarding non-foreign arbitral awards:
 - (a) if such an award is an institutional award, then it is automatically recognised and is effective from the date of issuance; and
 - (b) if such an award is an *ad hoc* award, then it is automatically recognised and is effective from the date of issuance. However, to be enforced, an *ad hoc* award needs to be registered to the competent Vietnamese court in Vietnam within one year from the issuance, per Article 62 of the LCA;
- (ii) regarding foreign arbitral awards, both *ad hoc* and institutional must be formally recognised and held enforceable by the competent provincial People's Court as follows:
 - (a) within three years from the date the award takes legal effect, application for recognition shall be submitted to the Vietnam's Ministry of Justice, or the competent Vietnamese court as the case may be (please see Article 451 of the Civil Procedure Code for more details); and
 - (b) once the award is recognised and held enforceable by the competent provincial People's Court, it shall be considered as legally effective as any decision or judgment of a Vietnamese court; and
- (iii) the enforcement procedure is the same for non-foreign or foreign, institutional or *ad hoc* awards. The award creditor shall request the competent civil judgment enforcement agency, not the court, to enforce the award (per Article 66 of the LCA).

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? 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?

Please see question 10.4.

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

Under the Civil Procedure Code, the standard is "fundamental principles of Vietnamese law". These principles are broad and undefined and are generally considered to be synonymous with "public policy" in Vietnam.

12 Confidentiality

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

The LCA does not clearly define the concept of confidentiality.

However, there are different obligations regarding disclosure of the arbitration for all participants as follows:

- (i) in general, Article 4.4 of the LCA provides that arbitration proceedings are conducted *in camera*, unless the parties agreed otherwise;
- (ii) regarding the arbitrator, Article 21 of the LCA imposes an obligation of strict confidentiality on the arbitrator; and
- (iii) regarding the parties in dispute, they are obligated to keep the information about the arbitration proceedings out of the public domain (per Article 4.4 of the LCA). We note, however, there is no express obligation of strict confidentiality imposed on the parties under the LCA. Different arbitration centres may have different rules regarding strict confidentiality obligation for the parties.

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

Generally, no.

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)?

There are three types of monetary remedies under Vietnamese law: direct and actual damages; direct loss of profits; and penalty (as agreed by the parties subject to statutory limits).

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

The LCA is silent on whether interest would be awarded on the principal claim or cost. In litigation proceedings, there is guidance from the Ministry of Finance, the Ministry of Justice, the Supreme People's Prosecutor and the Supreme People's Court from 1997, which states that the court must provide in its judgment that interest must be included on the principal claim and cost to prevent any delay in the enforcement of the judgment by the loser. We believe that in arbitration, the tribunal can take the same view as the court.

Pursuant to Article 357 and Article 468 of the Civil Code, the applicable rate for interest due to delay in performing payment obligations is 10% *per annum*.

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?

The "loser pays" rule is the default per Article 34.3 of the LCA, unless:

- (i) agreed by the parties;
- (ii) provided under the arbitration rule of an arbitration centre; or
- (iii) allocated by the tribunal.

Please refer to Article 34.1 of the LCA for a breakdown of fees and costs.

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

In Vietnam, an arbitral award is not subject to tax.

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

Vietnamese law is silent on third-party funding in arbitration, as well as restriction for contingency fees arrangements.

Funding claim is not officially recognised in Vietnam. Therefore, there has been no "professional" funder officially recognised in the market.

14 Investor State Arbitrations

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

No, it has not.

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

According to Investment Policy Hub, Vietnam is currently a party to 49 BITs. Vietnam is also officially a party to 14 multilateral treaties, including the WTO, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTPP"), the Free Trade Agreement with the Eurasian Economic Union and its Member States ("Eurasian Economic Union – Viet Nam FTA"), the Association of Southeast Asian Nations ("ASEAN"), ASEAN with China, ASEAN with Korea, ASEAN with Australia and New Zealand, the Trade and Investment Framework Agreement between the United States and ASEAN ("ASEAN-US TIFA"), etc.

14.3 Does your jurisdiction 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 your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

Please see question 11.5.

15 General

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

The Supreme People's Court and the Ministry of Justice have publicly recognised that enforcement of arbitral awards under the New York Convention has been uneven and inconsistent largely because Vietnamese courts lack the specialisation and experience. Specialist courts are being considered as a potential solution.

With respect to types of disputes commonly being referred to arbitration, the Vietnam International Arbitration Centre revealed the main areas of dispute in 2018 were: sale of goods (40%); provision of service (18%); construction (14%); insurance (8%); real estate (6%); BCC (5%); and banking and finance (4%).



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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.

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

On 1 March 2017, Vietnam International Arbitration Centre issued its new Rules of Arbitration. Under these new rules, a claimant can now file a single request for arbitration regarding claims arising out of, or in connection with, multiple contracts and have them resolved through a single arbitration (Article 6 – Multiple Contracts). According to its Annual Report for 2018, 15%–37% of the arbitration costs were saved based on the application of such new provision. By request, the arbitral tribunal may consolidate claims made in separate, but pending, arbitrations into a single arbitration with the earliest commencement date (Article 15 – Consolidation of Arbitrations). Finally, the parties may agree to have their dispute resolved via an expedited procedure (Article 37 – Expedited Procedure).



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K. Nguyen Do 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 K. Nguyen Do 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.
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