

THE INTERNATIONAL
ARBITRATION
REVIEW

TENTH EDITION

Editor
James H Carter

THE LAWREVIEWS

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REVIEW

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PREFACE

International arbitration is a fast-moving express train, with new awards and court decisions of significance somewhere in the world rushing past every week. Legislatures, too, constantly tinker with or entirely revamp arbitration statutes in one jurisdiction or another.

The international arbitration community has created a number of electronic and other publications that follow these developments regularly, requiring many more hours of reading from lawyers than was the case a few years ago.

Scholarly arbitration literature follows behind, at a more leisurely pace. However, there is a niche to be filled by an analytical review of what has occurred in each of the important arbitration jurisdictions during the past year, capturing recent developments but putting them in the context of the jurisdiction's legal arbitration structure and selecting the most important matters for comment. This volume, to which leading arbitration practitioners around the world have made valuable contributions, seeks to fill that space.

The arbitration world often debates whether relevant distinctions should be drawn between general international commercial arbitration and international investment arbitration, the procedures and subjects of which are similar but not identical. This volume seeks to provide current information on both of these precincts of international arbitration, treating important investor–state dispute developments in each jurisdiction as a separate but closely related topic.

I thank all of the contributors for their fine work in compiling this volume.

James H Carter

Wilmer Cutler Pickering Hale and Dorr LLP

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June 2019

VIETNAM

*K Minh Dang and K Nguyen Do*¹

I INTRODUCTION

i Overview of Vietnam's legal system

Since its independence in 1945, Vietnam has applied a socialist legal system based on the civil law system.² However, there have been major changes in the country in recent years, including a reorganisation and harmonisation of its laws inspired by other civil law jurisdictions such as France and Germany, as well as the recognition of some court precedents as another source of law.³ In light of these developments, Vietnam is a peculiar jurisdiction, mixing aspects of socialist law, civil law and common law.

In Vietnam, legislation is still the most important source of law. Laws are passed by the National Assembly and enacted by the President. Courts are subordinate to the National Assembly and must issue rulings based on the laws in effect.

In 2015, as part of its efforts to reorganise existing legislation, the National Assembly passed the Law on the Promulgation of Legal Documents in which all Vietnamese legal documents are classified by their level of validity (the equivalent of the hierarchy of sources in other civil law jurisdictions).⁴ Article 4 of this statute categorises Vietnamese legal documents into 15 levels, with the Constitution at the highest level of validity. The second level is Vietnamese laws. At a lower level are implementing regulations for these laws issued by the government in the form of decrees of the government or decisions of the Prime Minister. Ministries and government agencies with ministerial rank (such as the State Bank of Vietnam, the Supreme People's Court and the Supreme People's Procuracy) may then issue circulars or joint circulars to further implement the decrees of the government.

ii Overview of Vietnam's judicial system

In Vietnam, the judicial system comprises people's courts (which include military courts) and people's procuracies.⁵

1 K Minh Dang is a senior partner and K Nguyen Do is a partner at YKVN. The authors are grateful to Cam Tu Vo Nguyen (associate) and Hoang Tran Thuy Duong (paralegal) for their kind assistance with the drafting of this chapter.

2 A look at Vietnam's legal system, The Report: Vietnam 2017, Oxford Business Group (2017).

3 Law No. 62/2014/QH13 on Organisation of People's Courts passed by the National Assembly on 24 November 2014, effective from 1 June 2015 (Law on Organisation of People's Courts).

4 Law No. 80/2015/QH13 on the Promulgation of Legal Documents passed by the National Assembly on 22 June 2015, effective from 1 July 2016.

5 Articles 102 and 107 of the Constitution of the Socialist Republic of Vietnam passed by the National Assembly on 28 November 2013, effective from 1 January 2014.

There are four levels of courts, and the highest court is the Supreme People's Court.⁶ The Supreme People's Court is organised into a Council of Judges and supporting apparatus. The Council of Judges consists of the Chief Judge (who is appointed by the National Assembly on nomination by the President),⁷ the deputy chief judges (who are appointed by the President on the nomination of the Chief Judge of the Supreme People's Court)⁸ and other judges of the Supreme People's Court (who are appointed by the National Assembly on the nomination of the Chief Judge of the Supreme People's Court).⁹ The Supreme People's Court is the court of last resort on all matters arising under Vietnamese law. It also recommends bills to the National Assembly and passes resolutions directing lower courts on the uniform enforcement or implementation of the law across the country.¹⁰ The three other levels of courts are (1) the superior people's courts (three courts across the country), (2) the provincial level people's courts (63 in the country) and (3) the district level people's courts (one for each district).¹¹

Military courts are established at various levels in the Vietnam People's Army, with the highest one being the Central Military Court.¹²

The people's procuracies (also known as the people's offices of inspection and supervision) serve as the prosecutorial authority in Vietnam. Their role is to supervise and inspect judicial compliance by judicial agencies and officials. There is a people's procuracy for every people's court, and the military has its own military procuracies. The highest procuracy is the Supreme People's Procuracy, headed by the Chief Procurator of the Supreme People's Procuracy, who is elected by the National Assembly.¹³

With respect to arbitration, there is no specialist arbitration court in Vietnam. However, the Supreme People's Court and the Ministry of Justice have recognised in public forums that the enforcement of foreign arbitral awards under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (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 have been active discussions on the need for a specialist court to promote greater uniformity and predictability in enforcing foreign arbitral awards.

iii Vietnam's Arbitration Law

In Vietnam, arbitrations are mainly governed by the Arbitration Law 2010, which came into force on 1 January 2011.¹⁴ Prior to the entry into force of the Arbitration Law 2010, arbitrations were governed by the Arbitration Ordinance 2003, which came into force on

6 The website of the Supreme People's Court (in Vietnamese) is available at www.toaan.gov.vn.

7 Article 26.1 of the Law on Organisation of People's Courts.

8 *Id.* at Articles 28.1 and 27.7.

9 *Id.* at Articles 72 and 27.7.

10 *Id.* at Articles 21, 22 and 26.

11 *Id.* at Article 3.

12 *Id.* at Articles 49 and 50.

13 Articles 7.1, 40 and 62.1 of Law No. 63/2014/QH13 on Organisation of People's Procuracies passed by the National Assembly on 24 November 2014, effective from 1 June 2015.

14 Law No. 54/2010/QH12 on Commercial Arbitration passed by the National Assembly on 17 June 2010, effective from 1 January 2011 (Arbitration Law 2010).

1 July 2003.¹⁵ Although the Arbitration Ordinance 2003 was superseded and replaced by the Arbitration Law 2010, it remains applicable to arbitrations conducted pursuant to arbitration agreements signed between 1 July 2003 and 31 December 2010.¹⁶

The Arbitration Law 2010, which is based on the UNCITRAL Model Law and incorporates international arbitration norms, reflects Vietnam's intention of becoming a pro-arbitration jurisdiction.¹⁷ For example, Article 10.4 of the Arbitration Ordinance 2003 invalidates an arbitration agreement if the arbitral institution is not specified and there is no additional agreement in this regard. Under the Arbitration Law 2010, such ground for invalidating an arbitration agreement is no longer provided. Rather, such arbitration agreement is considered unclear, and the claimant has the right to select the arbitral institution.¹⁸

Unlike arbitration laws in other jurisdictions, Vietnam's Arbitration Ordinance 2003 and its successor, the Arbitration Law 2010, do not recognise the concept of international arbitration (as opposed to domestic arbitration). Rather, these arbitration statutes distinguish between foreign arbitration and non-foreign arbitration. Foreign arbitration is defined as 'arbitration under foreign arbitration law as agreed by the parties to resolve the disputes, whether inside or outside of Vietnam.'¹⁹ Therefore, an arbitration seated inside Vietnam under the rules of a foreign arbitral institution (such as the ICC, SIAC, etc.) is still considered as a foreign arbitration. As more fully discussed in the next section, the law regarding the recognition and enforcement of an award is different depending on whether the award is issued in a foreign or non-foreign arbitration.

Another significant distinction is a dispute with a foreign element and a dispute without a foreign element.²⁰ A dispute with a foreign element means that the dispute involves:

- a* at least one foreign individual or foreign legal entity;
- b* parties that are all Vietnamese, but where the establishment, modification, implementation or termination of their relationship occurred in a foreign country; or
- c* parties that are all Vietnamese, but where the subject matter of their relationship is located in a foreign country.²¹

A contrario, a dispute without a foreign element does not involve any of the above. The presence of a foreign element in a dispute does not necessarily define whether an arbitration is foreign. Rather, as discussed below, the distinction is significant to determine, for example, the applicable substantive law or language of the arbitration.

15 Ordinance on Commercial Arbitration No. 08/2003/PL-UBTVQH11 passed by the Standing Committee of the National Assembly on 25 February 2003, effective from 1 July 2003 (Arbitration Ordinance 2003).

16 Prior to the issuance of the Arbitration Ordinance 2003, arbitrations were governed by Decision No. 204-TTg on organisation of VIAC issued by the Prime Minister on 28 April 1993, Decision No. 114-TTg on expanding VIAC's scope of jurisdiction to settle disputes issued by the Prime Minister on 16 February 1996 and Decree No. 116-CP on organisation and operation of economic arbitration issued by the Government on 5 September 1994.

17 K. Minh Dang and K. Nguyen Do, *GAR Know-How Commercial Arbitration 2019 – Vietnam* (2019).

18 Do Van Dai, *Pháp luật trọng tài thương mại tại Việt Nam - Bản án và bình luận bản án (Law on Commercial Arbitration in Vietnam – Cases and Review)* (in Vietnamese), 115–117, Volume 1 (2018).

19 Article 3.11 of the Arbitration Law 2010.

20 See *id.* at Article 3.4. See also Article 2.4 of the Arbitration Ordinance 2003.

21 Article 663.2 of Civil Code No. 91/2015/QH13 passed by the National Assembly on 24 November 2015, effective from 1 January 2017 (Civil Code 2015).

If a dispute does not involve a foreign element, the applicable substantive law shall be Vietnamese law.²² If the applicable substantive law is not agreed upon by the parties and the dispute involves a foreign element, the applicable substantive law shall be the law the arbitral tribunal deems most appropriate.²³ If the dispute does not have a foreign element, the applicable language shall always be Vietnamese regardless of the parties' agreement, except in a dispute where at least one party is an enterprise with foreign invested capital.²⁴ If the dispute has a foreign element, or has at least one party that is an enterprise with foreign invested capital, the applicable language shall be the language agreed upon by the parties, and in the absence of such an agreement, the applicable language shall be determined by the arbitral tribunal.²⁵

The Arbitration Law 2010 is supplemented by:

- a Decree No. 63/2011/ND-CP, which includes implementing regulations on the Arbitration Law 2010;²⁶
- b Resolution No. 01/2014/NQ-HDTP, which guides the implementation of certain provisions of the Arbitration Law 2010;²⁷ and
- c Decree No. 124/2018/ND-CP, which amends and supplements certain provisions of Decree No. 63/2011/ND-CP.²⁸

Notably, Resolution No. 01/2014 clarifies the provisions on the validity of arbitration agreements; the grounds for setting aside arbitral awards; and the supervisory and supporting role of Vietnamese courts, and their power over foreign arbitrations seated in Vietnam.

iv Recognition and enforcement of arbitral awards in Vietnam

In Vietnam, the procedure relating to the recognition and enforcement of arbitral awards varies depending on whether the award is foreign or non-foreign.

With respect to the recognition of arbitral awards, non-foreign arbitral awards are automatically recognised and are, therefore, effective from their date of issuance.²⁹

On the other hand, foreign arbitral awards must be formally recognised and held enforceable by the competent provincial people's court.³⁰ In 1995, Vietnam became party to the New York Convention. The New York Convention was adopted into Vietnamese law through the Civil Procedure Code (the Civil Procedure Code 2004,³¹ as amended by the

22 Article 14.1 of the Arbitration Law 2010.

23 *Id.* at Article 14.2.

24 *Id.* at Article 10.

25 *Ibid.*

26 Decree No. 63/2011/ND-CP detailing and guiding a number of articles of the Law on Commercial Arbitration issued by the Government on 28 July 2011, effective from 20 September 2011.

27 Resolution No. 01/2014/NQ-HDTP providing guidelines for a number of provisions of the Law on Commercial Arbitration issued by the Council of Judges of the Supreme People's Court on 20 March 2014, effective from 2 July 2014 (Resolution No. 01/2014).

28 Decree No. 124/2018/ND-CP amending and supplementing a number of articles of Decree No. 63/2011/ND-CP issued by the Government on 19 September 2018, effective from 19 September 2018.

29 Article 61.5 of the Arbitration Law 2010.

30 Article 427.2 of the Civil Procedure Code No. 92/2015/QH13 passed by the National Assembly on 25 November 2015, effective from 1 July 2016 (Civil Procedure Code 2015).

31 Civil Procedure Code No. 24/2004/QH11 passed by the National Assembly on 15 June 2004 (Civil Procedure Code 2004).

Civil Procedure Code 2011³² and replaced by the Civil Procedure Code 2015) and Supreme People's Court's Practice Note 246/TANDTC-KT.³³ The Civil Procedure Code 2015 includes a specific procedure for the recognition and enforcement of foreign arbitral awards,³⁴ and the Practice Note gives internal guidance on the consideration of petitions for the recognition and enforcement of foreign arbitral award. In principle, a foreign arbitral award shall be recognised and enforced in Vietnam if (1) the award is issued in a country party to an international convention on the recognition and enforcement of arbitral awards to which Vietnam is also a party (such as the New York Convention), or (2) on the basis of reciprocity if such country is not party to such a convention.³⁵ Under the Civil Procedure Code 2015, the grounds for refusing the recognition and enforcement are substantially similar to those in Article V of the New York Convention.³⁶ Once a foreign arbitral award is recognised and held enforceable by the competent provincial people's court, the award is legally effective like any decision or judgment of a Vietnamese court.³⁷

With respect to the enforcement of arbitral awards in Vietnam, the enforcement procedure is the same regardless of whether an award is non-foreign or foreign. The enforcement procedure is governed by the Civil Procedure Code 2015 and the Law on Enforcement of Civil Judgments.³⁸ The Law on Enforcement of Civil Judgments is guided by Decree No. 62/2015/ND-CP (Decree No. 62/2015).³⁹ Decree No. 62/2015 in turn, is guided by Circular No. 01/2016/TT-BTP⁴⁰ and Joint Circular No. 11/2016/TTLT-BTP-TANDTC-VKSNDTC,⁴¹ which provide specifications on the provisions of Decree No. 62/2015.

If the award debtor fails to comply with a non-foreign arbitral award, and the award is not set aside, the award creditor shall have the right to request the competent civil judgment enforcement agency to enforce it.⁴² Likewise, if the award debtor fails to comply with a foreign arbitral award, and the award is recognised and held enforceable, the award creditor shall also be entitled to request the assistance of the competent civil judgment enforcement agency for its enforcement.⁴³

32 Civil Procedure Code No. 65/2011/QH12 passed by the National Assembly on 29 March 2011 (Civil Procedure Code 2011).

33 Practice Note 246/TANDTC-KT giving internal guidance on the resolution of applications for the recognition and enforcement of foreign arbitral awards in Vietnam issued by the Supreme People's Court on 25 July 2014 (Practice Note).

34 Articles 451 to 463 of the Civil Procedure Code 2015.

35 Id. at Article 424.1.

36 Id. at Article 459.

37 Id. at Articles 37.1(b) and 427.2.

38 Law on Enforcement of Civil Judgments No. 26/2008/QH12, as amended by Law No. 64/2014/QH13 dated 25 November 2014, effective from 1 July 2015 (Law on Enforcement of Civil Judgments).

39 Decree No. 62/2015/ND-CP providing guidelines for the Law on Enforcement of Civil Judgments issued by the government on 18 July 2015, effective from 1 September 2015.

40 Circular No. 01/2016/TT-BTP guiding a number of procedures for administrative management and professional templates in the enforcement of civil judgment issued by the Ministry of Justice on 1 February 2016, effective from 16 March 2016.

41 Joint Circular No. 11/2016/TTLT-BTP-TANDTC-VKSNDTC on the provision of a number of issues and the coordination in the enforcement of civil judgment jointly issued by the Ministry of Justice, the Supreme People's Court and the Supreme People's Procuracy on 1 August 2016, effective from 30 September 2016.

42 Article 66 of the Arbitration Law 2010.

43 Ibid.

It is worth mentioning the peculiar requirement for non-foreign *ad hoc* arbitral awards in such a case. Like non-foreign arbitral awards, non-foreign *ad hoc* arbitral awards are automatically recognised, and therefore effective from their date of issuance. If the award debtor does not comply with the award, the award creditor shall also be entitled to request the assistance of the competent civil judgment enforcement agency. However, non-foreign *ad hoc* arbitral awards are required to be registered within one year of their issuance with the competent provincial people's court in order for the enforcement agency to enforce them.⁴⁴

v Arbitral institutions in Vietnam

The Ministry of Justice of Vietnam reports that, as of April 2019, there are 23 arbitral institutions in Vietnam.⁴⁵ The most active is the Vietnam International Arbitration Centre (VIAC) at the Vietnam Chamber of Commerce and Industry, based in Hanoi and Ho Chi Minh City. Other arbitral institutions include the Pacific International Arbitration Centre (PIAC) and Ho Chi Minh City's Commercial Arbitration Center (TRACENT), both of which are based in Ho Chi Minh City.

According to VIAC, 180 cases were filed with it in 2018.⁴⁶ The average time taken to resolve a VIAC case was 150 days.⁴⁷ The total value in dispute for all VIAC cases in 2018 was US\$407 million, and the highest dispute amount in a case was US\$145.2 million.⁴⁸ The top-three foreign parties in 2018 were from China, Singapore and Korea.⁴⁹ Finally, the main areas of dispute in 2018 were as follows:

- a sales of goods (40 per cent or 72 cases);
- b the provision of services (18 per cent or 32 cases);
- c construction (14 per cent or 25 cases);
- d insurance (8 per cent or 14 cases);
- e real estate (6 per cent or 11 cases);
- f business cooperation contracts (5 per cent or nine cases); and
- g banking and finance (4 per cent or seven cases).⁵⁰

In comparison to 2017, a significant growth was observed in both the number of cases filed with VIAC (180 cases in 2018 versus 151 cases in 2017) and in the total value in dispute for all VIAC cases (US\$407 million in 2018 versus US\$61 million in 2017).

44 Article 62.1 of the Arbitration Law 2010.

45 Ministry of Justice report accessible on its website at <http://btp.moj.gov.vn/qt/Pages/trong-tai-tm.aspx?Keyword=&Field=&&Page=1>.

46 VIAC Annual Report 2018 accessible at <https://drive.google.com/file/d/1AjR1FLuGigB51-TXZWmbTpuyRfor-qB5/view>.

47 Ibid.

48 Ibid.

49 Ibid.

50 Ibid.

II THE YEAR IN REVIEW

i Developments affecting international arbitration

The Civil Code 2015

As reported in 2018, the Civil Code 2015 became effective on 1 January 2017.⁵¹ It serves as the foundation for all other Vietnamese laws governing civil and business relationships.⁵² The Civil Code 2015 introduced the concept of basic principles of civil law,⁵³ which cannot be contradicted by any other civil laws that are lower in hierarchy. Indeed, Article 4 of the Civil Code 2015 generally provides that these basic principles of civil law take precedence over inconsistent provisions of other civil laws.⁵⁴ This new concept, which did not exist under the previous Civil Code of 2005, is another effort by Vietnam to harmonise its legal system.⁵⁵

The Civil Code 2015 did not provide any new provisions on international arbitration. However, its entry into force as general law cannot be ignored, since it affects international arbitration in Vietnam in multiple ways.

For instance, the Arbitration Law 2010 (which is now considered as a specific law, as opposed to the general law that is the Civil Code 2015) expressly refers to the provisions of the Civil Code 2015. Article 18.3 of the Arbitration Law 2010, which sets forth the grounds for invalidating arbitration agreements, provides that an arbitration agreement shall be invalid if the persons who entered into it lacked legal capacity pursuant to the Civil Code (2015). Likewise, Article 20.1(a) of the Arbitration Law 2010, which lists the minimum qualifications of an arbitrator, provides that the arbitrator must, *inter alia*, have ‘full civil legal capacity as prescribed in the Civil Code [2015]’.

Furthermore, specific laws include terms that are defined in the Civil Code 2015 rather than in the specific laws themselves. For example, the definition of a dispute with a foreign element discussed above is set forth in Article 663.2 of the Civil Code 2015. These examples illustrate the ways in which the Civil Code 2015 could affect international arbitration in Vietnam.

51 Article 689 of the Civil Code 2015.

52 *Id.* at Article 4.

53 Article 3 of the Civil Code 2015 provides as basic principles of civil law that:

1. Every individual or legal entity is equal and may not be discriminated against for any reason; and is equally protected by law for personal and property rights. 2. Individuals and legal entities establish, perform and terminate their civil rights and obligations on the basis of free and voluntary commitments and agreements. Any commitment or agreement which does not violate a prohibition by law or is not contrary to social morals is valid for performance by the parties and must be respected by other subjects. 3. Individuals and legal entities must establish, perform and terminate their civil rights and obligations with good will and honesty. 4. The establishment, performance and termination of civil rights and obligations may not infringe upon national or ethnic interest, public interest, or legitimate rights and interest of other people. 5. Individuals and legal entities must bear self-responsibility for non-performance or incorrect performance of civil obligations.

54 Article 4 of the Civil Code of 2015 provides that:

1. This Code is the general law to govern civil relations. 2. Other related laws governing civil relations in specific sectors must not be inconsistent with the basic principles of civil law prescribed in article 3 of this Code. 3. Where other related laws do not contain provisions [on civil relations] or contain provisions which are in breach of clause 2 of this article, the provisions of this Code shall apply.

55 It should be noted, however, that Article 4.4 states that in the event of a conflict between the Civil Code 2015 and an international treaty signed by Vietnam, the treaty prevails: ‘Where there is any difference between the provisions of this Code and of an international treaty to which the Socialist Republic of Vietnam is a member on the same issue, the provisions of the international treaty shall apply.’

It is worth noting that the application of the Civil Code 2015 in connection with the international arbitration field by the local courts, however, remains to be assessed due to the lack of publicly available reports from reliable sources.

The Civil Procedure Code 2015

As reported in 2018, the Civil Procedure Code 2015 also became effective on 1 January 2017.⁵⁶ Like the Civil Procedure Code 2004, the Civil Procedure Code 2015 includes substantial provisions related to international arbitration (such as a procedure for the recognition and enforcement of foreign arbitral awards). These provisions, however, remain substantially unchanged in the Civil Procedure Code 2015.

The substantial provisions related to international arbitration include those pertaining to interim relief. Similar to the Civil Procedure Code 2004, the Civil Procedure Code 2015 gives Vietnamese courts broader power to grant interim relief than the power given to arbitral tribunals under the Arbitration Law 2010. The broad powers given to Vietnamese courts include the ability to freeze bank accounts or assets held by third parties or to prohibit a party from leaving the country.⁵⁷

There were some key changes under the Civil Procedure Code 2015 pertaining to the types of disputes that are not arbitrable (i.e., those that fall under the exclusive jurisdiction of Vietnamese courts). Under the previous Civil Procedure Code 2004, the following disputes shall be exclusively resolved by Vietnamese courts:⁵⁸

- a* civil cases involving rights to properties being immovables in the Vietnamese territory;
- b* disputes arising out of transportation contracts where the carriers have their head offices or branches in Vietnam; and
- c* divorce cases between a Vietnamese citizen and a foreign citizen or a stateless person if both spouses reside, work or live in Vietnam.

Under Article 470.1 of the Civil Procedure Code 2015, Vietnamese courts now have the exclusive jurisdiction to rule on the following disputes:

- a* civil lawsuits involving rights to properties being immovables in the Vietnamese territory;
- b* divorce cases between a Vietnamese citizen and a foreign citizen or a stateless person if both spouses reside, work or live permanently in Vietnam; and
- c* other civil lawsuits where parties are allowed to choose Vietnamese courts to settle according to Vietnamese law or international treaties to which Vietnam is a signatory and the parties have agreed to choose Vietnamese courts.

As mentioned in respect of the application of the Civil Code 2015, the application of the Civil Procedure Code 2015 in connection with the international arbitration field by the local courts, however, remains to be assessed due to the lack of publicly available reports from reliable sources.

56 Article 517.1 of the Civil Procedure Code 2015.

57 Id. at Article 114.

58 Article 411.1 of the Civil Procedure Code 2004.

The recognition of some court precedents as a source of law

The Law on Organisation of People's Courts, which became effective in 2015, empowers the Council of Judges of the Supreme People's Court to select judgments and decisions issued from any court at any level, and to declare them court precedents.⁵⁹ Court precedents are defined as follows:

*reasonings, rulings in effective judgments and decisions on specific cases of the courts that are selected by the Council of Judges of the Supreme People's Court and published as the precedents by the Chief Judge of the Supreme People's Court in order for other courts to study and adopt them when deciding later cases.*⁶⁰

As of the end of 2018, the Chief Judge of the Supreme People's Court had published 27 judgments, none of which pertained to arbitration. It is expected that the Chief Judge of the Supreme People's Court will publish rulings pertaining to arbitration in the near future given the increased popularity of arbitration in Vietnam and the need for uniformity in the application of arbitration laws among the lower courts, particularly with respect to the recognition and enforcement of arbitral awards.

VIAC Rules of Arbitration 2017

On 1 March 2017, VIAC issued its new set of rules of arbitration: the New VIAC Rules.⁶¹ The highlight of the New VIAC Rules was the introduction of provisions on multiple contracts, the consolidation of arbitration and an expedited procedure.⁶² According to VIAC, these new provisions were meant to significantly reduce arbitration costs.⁶³

Under the New VIAC 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 on multiple contracts). The arbitral tribunal may also, at the request of a party, consolidate claims made in separate, but pending, arbitrations into a single arbitration with the earliest commencement date (Article 15 on the consolidation of arbitrations). Finally, the parties may agree to have their dispute resolved via an expedited procedure (Article 37 on an expedited procedure).⁶⁴

⁵⁹ Article 22.2(c) of the Law on Organisation of People's Courts.

⁶⁰ Article 1 of Resolution No. 03/2015/NQ-HDTP on process for selecting, publishing and adopting precedents issued by the Council of Judges of the Supreme People's Court on 28 October 2015, effective from 16 December 2015.

⁶¹ The new VIAC Rules of Arbitration 2017, VIAC News, 14 March 2017.

⁶² Ibid.

⁶³ Ibid. Article 6 and Article 15 of the New VIAC Rules intend to meet users' needs and to be in line with the current regulations on commercial arbitration, in particular Article 7.4 of Resolution No. 01/2014. Prior to Article 6 and Article 15 of the New VIAC Rules, claims arising out of multiple contracts may only be resolved through a single arbitration if the parties so agreed pursuant to Article 7.4 of Resolution No. 01/2014. Likewise, the consolidation of pending arbitrations was only possible based on the parties' express agreement under Article 7.4. Under the New VIAC Rules, any party may move for consolidation even in the absence of such express agreement.

⁶⁴ Ibid.

According to the VIAC Annual Report for 2018, (1) 15 to 37 per cent of the arbitration costs were saved based on the application of Article 6 of the New VIAC Rules on multiple contracts, and (2) the average time for the resolution of proceedings conducted under the expedited procedure of Article 37 of the New VIAC Rules was around 82 days.⁶⁵

ii Arbitration developments in local courts

Qualifications and liability of arbitrators

Pursuant to Article 20 of the Arbitration Law 2010, arbitrators must have the following minimum qualifications:

- a full civil legal capacity as prescribed in the Civil Code 2015;
- b a university qualification and at least five years of work experience in the discipline that he or she studied; and
- c 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 under point (b).

Article 20 of the Arbitration Law 2010 further provides that 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 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
- b a person who is currently under a criminal charge or 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.

The Arbitration Law 2010 contains a provision imposing personal liability on an arbitrator for a specific situation: Article 49.5 of the Arbitration Law 2010 provides that:

if an arbitral 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.

We are aware of at least one civil proceeding in which an arbitral tribunal was sued in a Vietnamese court under this provision. By way of update, it appears that the proceeding has been withdrawn.

Decisions rendered by the local courts

According to the Mr Nguyen Dinh Tien, Deputy Chief Judge of the Economic Court (People's Court of Hanoi), the People's Court of Hanoi accepted jurisdiction over 37 cases relating to arbitration between 2015 and the first half of 2018.⁶⁶ Among these 37 cases,

65 Ibid.

66 To be specific, seven cases in 2015, 11 cases in 2016, 14 cases in 2017 and five cases in 2018, accessible at <http://thoibaotaichinhvietnam.vn/pages/xa-hoi/2018-06-07/so-vu-giai-quyet-qua-trong-tai-van-chua-tao-duoc-nhieu-ky-vong-58411.aspx>.

26 cases relate to the setting aside of arbitral awards, seven cases relate to the recognition and enforcement of foreign arbitral awards, and four cases relate to objections raised against arbitral tribunals' jurisdiction.⁶⁷

However, due to the lack of publicly available reports from reliable sources, the content of these cases and any other cases or decisions rendered by local courts, which would be of interest to the international arbitration field, was not publicly available in 2018.

iii Investor–state disputes

There have been at least eight reported investor–state disputes involving Vietnam as a party:⁶⁸

- a three cases were decided in favour of Vietnam: *McKenzie v. Vietnam* (2010), *DialAsia SAS v. Vietnam* (2011) and *Recofi SA v. Vietnam* (2013);
- b one was decided against Vietnam: *Trinh Vinh Binh v. Vietnam* (2019);
- c one was discontinued: *Cockrell v. Vietnam* (2014); and
- d two cases are still pending: *ConocoPhillips and Perenco v. Vietnam* (2017) and *Shin Dong Baig v. Vietnam* (2018).⁶⁹

Based on these cases, it appears that arbitral tribunals have sought to redress the balance of power between foreign investors and host states.⁷⁰ Arbitral tribunals have also been willing to acknowledge that consideration should be given to host states since they might be under pressure to shoulder constitutional responsibilities: this is readily seen in cases between investors and Vietnam.⁷¹

The *Trinh Vinh Binh v. Vietnam* case was originally initiated in 2003 before the Stockholm Arbitration Institute of the Stockholm Chamber of Commerce by Mr Trinh, a Dutch–Vietnamese businessperson against the government. The case arose out of Mr Trinh's investment in real estate, food processing and several tourism assets in Vietnam in the 1980s.⁷² Mr Trinh was accused of asking his family and relatives to put their names on his Vietnamese assets and businesses, which is a violation of the Law on Investment.⁷³

In 1996, Mr Trinh was arrested and charged with several civil and criminal offences and sentenced to 11 years in prison, with all assets confiscated.⁷⁴ Mr Trinh escaped Vietnam and returned to the Netherlands.⁷⁵ In 2003, Mr Trinh initiated an UNCITRAL arbitration with the Stockholm Arbitration Institute of the Stockholm Chamber of Commerce against the

67 Ibid.

68 Investment Policy Hub, Vietnam as the respondent state, available at <http://investmentpolicyhub.unctad.org/ISDS/CountryCases/229?partyRole=2>.

69 Ibid.

70 Nguyen Phuong Dung, 'The Fair and Equitable Treatment in Investor–state Arbitration in Vietnam', *International Arbitration Asia*, 12 July 2016.

71 Ibid.

72 Thang Quoc, 'Vi sao ông Trịnh Vĩnh Bình kiện Chính phủ đòi 1,25 tỷ USD?' (in Vietnamese), *VN Express* (2017).

73 Ibid.

74 Linh Nguyen Phuong, Anh Dinh Hoang and Giang Chu Thanh, 'Vietnam Recognition and Enforcement of Foreign Arbitral Awards and Preparation for EVFTA', *SSRN Electronic Journal* (2017).

75 Ibid.

government alleging illegal asset confiscation, illegal detention and torture by the Vietnamese authority based on the Netherlands–Vietnam bilateral investment treaty (BIT). He sought US\$100 million in damages.⁷⁶

In 2006, the parties settled under a confidential agreement signed in Singapore.⁷⁷ However, in 2014, Mr Trinh initiated another arbitration against the government of Vietnam before the ICC to enforce the settlement agreement, and demanded US\$1.25 billion in compensation.⁷⁸ The final hearing took place at the end of August 2017 in Paris,⁷⁹ and the final award was issued on 10 April 2019.⁸⁰ According to the information provided by Mr Trinh to *VOA* newspaper, the award was rendered in his favour, and the arbitral tribunal ordered the government of Vietnam to pay him around US\$27.5 million for his confiscated assets, US\$10 million for his moral damage, around US\$786,000 for the arbitration costs and US\$7.1 million for his legal fees.⁸¹ The Ministry of Justice of Vietnam, however, published a press release on 12 April 2019 denying this information and these amounts.⁸² The Ministry of Justice is currently working with other relevant ministries and their counsel to review the award and to consider further actions to be taken by the government of Vietnam.⁸³

The *ConocoPhillips and Perenco v. Vietnam* case relates to the sale in 2012 of two oil companies owned by a UK subsidiary of ConocoPhillips to a UK subsidiary of Perenco for US\$1.3 billion.⁸⁴ It was reported that the only assets held by the two oil companies so sold were oil interests in Vietnam, and that such transaction raised a profit of US\$896 million for the ConocoPhillips subsidiary.⁸⁵ The sale of shares in subsidiary companies are not subject to capital gains tax in the UK, as opposed to Vietnam.⁸⁶ Vietnam, therefore, has claimed the right to levy such capital gains tax under the UK–Vietnam tax treaty, and has expressed its intention to do so.⁸⁷ In 2017, ConocoPhillips and Perenco initiated an arbitration under the 2002 UK–Vietnam BIT against the government of Vietnam to counter its intended

76 Luke Eric Peterson, *The Future of Moral Damages in Investment Treaty Arbitration*, Kluwer Arbitration Blog (2009).

77 ‘Vẻ vạ ông Trịnh Vĩnh Bình kiện VN hơn 1 tỷ US\$- BBC Tiếng Việt’ (in Vietnamese), BBC News (2017).

78 See footnote 72.

79 ‘Vụ kiện Trịnh Vĩnh Bình vs. Chính phủ Việt Nam: Một số nhận định sơ bộ’ (in Vietnamese), *The Observer*, Nghiên Cứu Quốc Tế, 4 September 2017.

80 ‘Chính phủ Việt Nam chính thức thua kiện Trịnh Vĩnh Bình tại Tòa án Quốc tế’ (in Vietnamese), *VOA*, 11 April 2019 accessible at <https://www.voatiengviet.com/a/tin-nong-vn-thua-kien-trinh-vinh-binh/4871491.html> and ‘Bộ Tư pháp thông tin vụ kiện của ông Trịnh Vĩnh Bình’, *plo.vn*, 12 April 2019, accessible at <https://plo.vn/thoi-su/bo-tu-phap-thong-tin-vu-kien-cua-ong-trinh-vinh-binh-827522.html>.

81 Ibid.

82 ‘Bộ Tư pháp thông tin vụ kiện của ông Trịnh Vĩnh Bình’, *plo.vn* (in Vietnamese), 12 April 2019, accessible at <https://plo.vn/thoi-su/bo-tu-phap-thong-tin-vu-kien-cua-ong-trinh-vinh-binh-827522.html>.

83 Ibid.

84 *The Guardian*, ‘Oil firms use secretive court hearing in bid to stop Vietnam taxing their profits’, accessible at <https://www.theguardian.com/global-development/2018/aug/15/oil-firms-use-secretive-court-hearing-in-bid-to-stop-vietnam-taxing-their-profits>.

85 Ibid.

86 Ibid; and *The Guardian*, ‘Oil firms use secretive court hearing in bid to stop Vietnam taxing their profits’, accessible at <https://www.theguardian.com/global-development/2018/aug/15/oil-firms-use-secretive-court-hearing-in-bid-to-stop-vietnam-taxing-their-profits>.

87 Ibid.

imposition of US\$179 million capital gains tax in respect of this transaction. The arbitration is to be conducted under the auspices of the UNCITRAL Rules.⁸⁸ Information regarding the location and dates of the hearing has not been disclosed.

The *Shin Dong Baig v. Vietnam* case constitutes the first International Centre for Settlement of Investment Disputes (ICSID) claim filed against Vietnam.⁸⁹ In March 2018, Mr Shin Dong Baig, a South Korean investor, initiated an arbitration under the 1993 Korea–Vietnam BIT against the government of Vietnam in respect of a real estate project. The arbitration is administered by ICSID under the auspices of the ICSID Additional Facility Rules since Vietnam is not a member of the ICSID Convention of 1965.⁹⁰ Little information on the case is publicly available, except that the arbitral tribunal was constituted in July 2018 and consists of (1) Judith Gill (British), appointed by the parties as the presiding arbitrator; (2) Klaus Reichert (German, Irish), appointed by the claimant; and (3) Albert Jan van den Berg (Dutch), appointed by the respondent.⁹¹ In respect of the status of the case, it was reported that the arbitral tribunal issued procedural order No. 2 concerning the government of Vietnam’s request to address objections as to jurisdiction as a preliminary question in March 2019. No other information has been disclosed.⁹²

III OUTLOOK AND CONCLUSIONS

With the entry into force in 2017 of the Civil Code 2015 and the Civil Procedure Code 2015, Vietnam confirmed its willingness to reorganise and harmonise its legal system, inspired by other civil law jurisdictions, and its intent to become a more pro-arbitration jurisdiction.

The outlook for arbitration in Vietnam, which has one of the fastest-growing economies in the world, appears promising. In addition to the above legislative changes, Vietnamese courts are also making an effort to provide clearer and more consistent rulings when asked to recognise foreign arbitral awards. Moreover, the government’s efforts to reassure and stimulate foreign investment and trade, notably via the signing of the EU–Vietnam Free Trade Agreement and the Comprehensive and Progressive Trans-Pacific Partnership (formerly known as the TPP), will only increase the need for arbitration as a preferred dispute resolution forum for the relevant foreign investors.

88 Investment Policy Hub, *ConocoPhillips and Perenco v. Vietnam*, accessible at <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/906/conocophillips-and-perenco-v-viet-nam>.

89 Arbitration Regional Overview: *Asia Pacific – International Arbitration Newsletter May 2018*, accessible at https://www.garrigues.com/en_GB/new/arbitration-regional-overview-asia-pacific-international-arbitration-newsletter-may-2018.

90 Ibid.

91 ICSID, *Shin Dong Baig v. Socialist Republic of Vietnam* (ICSID case No. ARB(AF)/18/2), accessible at [https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB\(AF\)/18/2](https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB(AF)/18/2).

92 Ibid.

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