

VIETNAM

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I INTRODUCTION

i Overview of Vietnam's legal system

Since gaining 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 and civil law with occasional borrowings from 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 In 2020, this law was amended and the amendment took effect from 1 January 2021.⁵ 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.

1 Do Khoi Nguyen is a partner at YKVN. The author is grateful to Nhan Nguyen (senior legal manager) and Danh Phan (associate) 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 Law No. 63/2020/QH14 amending and supplementing a number of articles of the Law on Promulgation of Legal Documents passed by the National Assembly on 18 June 2020, effective from 1 January 2021.

ii Overview of Vietnam's judicial system

In Vietnam, the judicial system comprises people's courts (which include military courts) and people's procuracies.⁶

There are four levels of courts, and the highest court is the Supreme People's Court.⁷ The Supreme People's Court consists mainly of a Judicial Council. The Judicial Council consists of all the justices of the Supreme People's Court sitting together as a council under the chairmanship of the Chief Justice (who is appointed by the National Assembly on nomination by the President).⁸ There are also deputy chief justices (who are appointed by the President on the nomination of the Chief Justice of the Supreme People's Court)⁹ and other justices of the Supreme People's Court (who are appointed by the National Assembly on the nomination of the Chief Justice of the Supreme People's Court).¹⁰ 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.¹¹ The three other levels of courts are the superior people's courts (three courts across the country), the provincial level people's courts (63 across the country) and the district level people's courts (one for each district).¹²

Military courts are established at various levels in the Vietnam People's Army, with the highest one being the Central Military Court.¹³

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.¹⁴

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 fora 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.

6 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.

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

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

9 *id.*, at Articles 28.1 and 27.7.

10 *id.*, at Articles 72 and 27.7.

11 *id.*, at Articles 21, 22 and 26.

12 *id.*, at Article 3.

13 *id.*, at Articles 49 and 50.

14 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.

iii Vietnam's Arbitration Law

In Vietnam, arbitrations are mainly governed by the Arbitration Law 2010, which came into force on 1 January 2011.¹⁵ 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.¹⁶

Unlike arbitration laws in other jurisdictions, Vietnam's Arbitration Law 2010 does not recognise the concept of international arbitration (as opposed to domestic arbitration). Rather, the Arbitration Law 2010 distinguishes between foreign arbitration and non-foreign arbitration. Foreign arbitration is defined as 'arbitration established under the provisions of foreign arbitration law as agreed by the parties to resolve the disputes, whether inside or outside the territory of Vietnam'.¹⁷ Therefore, an arbitration seated inside Vietnam under the rules of a foreign arbitral institution (such as the International Chamber of Commerce, Singapore International Arbitration Centre, etc.) may still be considered as a foreign arbitration. On the other hand, an arbitration seated inside Vietnam established under the Arbitration Law 2010 is a non-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.¹⁸ A dispute with a foreign element means that the dispute involves:

- a* at least one party that is a foreign individual or a 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 civil relationship is located in a foreign country.¹⁹

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 an arbitration.

If a dispute does not involve a foreign element, the applicable substantive law shall be Vietnamese law.²⁰ 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.²¹ 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.²² If the dispute has a foreign element, or has at least one party that is an enterprise with foreign

15 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).

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

17 Article 3.11 of the Arbitration Law 2010.

18 *id.*, at Article 3.4.

19 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).

20 Article 14.1 of the Arbitration Law 2010.

21 *id.*, at Article 14.2.

22 *id.*, at Article 10.

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.²³

The Arbitration Law 2010 is supplemented by:

- a Decree No. 63/2011/ND-CP, which includes implementing regulations on the Arbitration Law 2010;²⁴
- b Resolution No. 01/2014/NQ-HDTP, which guides the implementation of certain provisions of the Arbitration Law 2010;²⁵ and
- c Decree No. 124/2018/ND-CP, which amends and supplements certain provisions of Decree No. 63/2011/ND-CP.²⁶

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 an 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.²⁷

On the other hand, foreign arbitral awards must be formally recognised and held enforceable by the competent provincial people's court.²⁸ In 1995, Vietnam became party to the New York Convention. The New York Convention was codified into Vietnamese law through the Civil Procedure Code (the Civil Procedure Code 2004,²⁹ as amended by the Civil Procedure Code 2011³⁰ and replaced by the Civil Procedure Code 2015). In addition, the Supreme People's Court also provided guidance to the lower courts in Official Letter No. 246/TANDTC-KT dated 25 July 2014.³¹ In principle, a foreign arbitral award shall be recognised and enforced in Vietnam if the award is issued in a country party to an international convention on the recognition and enforcement of arbitral awards to which

23 *ibid.*

24 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.

25 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).

26 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.

27 Article 61.5 of the Arbitration Law 2010.

28 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).

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

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

31 Official Letter No. 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 (Official Letter).

Vietnam is also a party (such as the New York Convention), or on the basis of reciprocity if such country is not party to such a convention.³² 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.³³ 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.³⁴

With respect to the enforcement of arbitral awards in Vietnam, the enforcement procedure is the same 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.³⁵ The Law on Enforcement of Civil Judgments is guided by Decree No. 62/2015/ND-CP³⁶ (Decree No. 62/2015) as amended and supplemented by Decree No. 33/2020/ND-CP.³⁷ Decree No. 62/2015 in turn, is guided by Circular No. 01/2016/TT-BTP³⁸ and Joint Circular No. 11/2016/TTLT-BTP-TANDTC-VKSNDTC,³⁹ which provide specifications on the provisions of Decree No. 62/2015.

If the party against whom an award is invoked fails to comply with a non-foreign arbitral award, and the award is not set aside, the party entitled to enforcement shall have the right to request the competent civil judgment enforcement agency to enforce it.⁴⁰ Likewise, if the party against whom the award is invoked fails to comply with a foreign arbitral award, and the award is recognised and held enforceable, the party entitled to enforcement shall also be entitled to request the assistance of the competent civil judgment enforcement agency for its enforcement.⁴¹

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 party against whom an award is invoked does not comply with the award, the party entitled to enforcement 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.⁴²

32 Article 424.1 of Civil Procedure Code 2015.

33 *id.*, at Article 459.

34 *id.*, at Articles 37.1(b) and 427.2.

35 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).

36 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.

37 Decree No. 33/2020/ND-CP amending and supplementing a number of articles of Decree No. 62/2015/ND-CP issued by the government on 17 March 2020, effective from 1 May 2020.

38 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.

39 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.

40 Article 66 of the Arbitration Law 2010.

41 *ibid.*

42 Article 62.1 of the Arbitration Law 2010.

v Arbitral institutions in Vietnam

The Ministry of Justice of Vietnam reports that, as of March 2021, there are 31 Vietnamese arbitral institutions in Vietnam.⁴³ 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 and TRACENT, the Ho Chi Minh City's Commercial Arbitration Center, both of which are based in Ho Chi Minh City. It is worth mentioning that the first foreign arbitral institution opened in Vietnam on 17 December 2019. A representative office of the Korean Commercial Arbitration Board (the sole Korean arbitral institution statutorily authorised to settle disputes under the Korean Arbitration Act under the auspices of the Korean Ministry of Justice) was indeed set up in Hanoi.

According to VIAC, 221 cases were filed with it in 2020. The top three foreign parties in 2020 were from China, Korea and Singapore. There were 14 virtual and hybrid hearings at VIAC in 2020. Finally, the main areas of dispute in 2020 were as follows:

- a* sales of goods (47 per cent or 104 cases);
- b* construction (14 per cent or 30 cases);
- c* services (12 per cent or 27 cases);
- d* leasing (8 per cent or 18 cases);
- e* insurance (5 per cent or 10 cases);
- f* logistics (4 per cent or 9 cases);
- g* processing (3 per cent or 7 cases);
- h* finance and banking (2 per cent or 5 cases);
- i* business cooperation (2 per cent or 5 cases);
- j* labour (1 per cent or 2 cases); and
- k* others (2 per cent or 4 cases).

In comparison to 2019, a reduction (19.3 per cent) was observed in the number of cases filed with VIAC (221 cases in 2020 versus 274 cases in 2019).

II THE YEAR IN REVIEW

i Developments affecting international arbitration

Supreme People's Court's draft resolution regarding adopting a uniform approach in considering petitions for the recognition and enforcement of foreign arbitral awards

As reported in last year's edition, in an effort to overcome the uneven and inconsistent enforcement of foreign arbitral awards under the New York Convention in Vietnam, which is largely because of courts around the country not having the same level of experience in dealing with enforcement issues, the Judicial Council of the Supreme People's Court, consisting of all the judges of the Supreme People's Court, was working on a comprehensive resolution aimed at providing uniform guidelines for Vietnamese courts to apply in considering the recognition and enforcement of foreign arbitral awards in Vietnam. In late 2019, the Judicial Council circulated a draft resolution and invited comments and recommendations from the arbitration community in Vietnam.

⁴³ Ministry of Justice report accessible on its website at <https://bttp.moj.gov.vn/qt/Pages/trong-tai-tm.aspx?Keyword=&Field=&&Page=1>.

We believe this resolution will be a major step towards making the recognition and enforcement of foreign arbitral awards in Vietnam more consistent with global standards and practices. First, the key definition of foreign arbitral awards in the current draft resolution appears to follow closely the New York Convention. Second, the resolution is a legal document under the Law on the Promulgation of Legal Documents, which means that it will have the force of law. Third, it is a directive from the Supreme People's Court to all lower Vietnamese courts, which will have to apply it. For these reasons, the resolution should significantly improve the quality and consistency of judicial decision-making in the area of recognition and enforcement of foreign arbitral awards.

However, in 2020, because of the covid-19 pandemic, the progress on this resolution was delayed. We, however, expect that it will be resumed in 2021.

Establishment of an official database on the recognition and enforcement of foreign courts' judgments and foreign arbitral awards in Vietnam

On 25 September 2020, the Ministry of Justice, the United Nations Development Programme in Vietnam and the British Embassy in Hanoi jointly announced the establishment of an official database on the recognition and enforcement of foreign courts' judgments and foreign arbitral awards in Vietnam. The purpose is to provide statistics and updates on the enforcement of foreign judgments and awards in Vietnam with the aim to improve the process.⁴⁴

The data is published on the Ministry of Justice's website and will be updated from time to time.⁴⁵ As of the date of this article, the statistics from 1 January 2012 to 30 September 2019 are available. During such period, there were 83 petitions for recognition and enforcement of foreign arbitral awards in Vietnam. Among them, 30 were rejected. We note, however, that currently this database does not include the relevant court decisions. The database only contains key information and, if the petition is rejected, a brief summary of the grounds for rejection.

ii Arbitration developments in local courts

Supreme People's Court's guidance on emergency interim measures

On 24 September 2020, the Supreme People's Court issued Resolution No. 02/2020/NQ-HDTP (Resolution 02/2020) to provide guidance for the application of emergency interim measures in court proceedings under the Civil Procedure Code 2015. Resolution 02/2020 entered into force from 1 December 2020.⁴⁶ It provides guidance for various issues including, among others, the tests for granting emergency interim measures,⁴⁷ cases where emergency interim measures cannot be granted⁴⁸ and determination of security that the requesting party must provide to be granted the interim measures.⁴⁹

44 Vietnam Law Newspaper, Announcement of the database on the recognition and enforcement in Vietnam of judgments, decisions of foreign courts, available at <https://baophapluat.vn/tu-phap/cong-bo-co-so-du-lieu-cong-nhan-va-cho-thi-hanh-tai-viet-nam-ban-an-quyet-dinh-cua-toa-an-nuoc-ngoai-545616.html>.

45 The database is available at <https://moj.gov.vn/http/Pages/dlcn-va-th-tai-Viet-Nam.aspx>.

46 Article 20.1 of Resolution 02/2020.

47 *id.*, at Articles 2, 7, 8 and 9.

48 *id.*, at Article 4.

49 *id.*, at Article 13.

Resolution 02/2020 is relevant for arbitration matters seated in Vietnam if a party seeks interim measures from a competent court instead of the tribunal. In such circumstances, the Civil Procedure Code 2015 will apply with respect to the application, modification, supplementation or cancellation of interim measures.⁵⁰

iii Investor–state disputes

As reported in last year’s edition, there have been at least eight reported investor–state disputes involving Vietnam as a party:⁵¹

- 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).⁵²

It was reported in early 2020 that the *ConocoPhillips and Perenco v. Vietnam* case was settled in favour of Vietnam.⁵³ Regarding the *Shin Dong Baig v. Vietnam* case, a hearing on both jurisdiction and the merits was held in Singapore on 3 and 4 February 2020 and the tribunal rendered its award on 29 October 2020.⁵⁴

III OUTLOOK AND CONCLUSIONS

2020 continued to witness developments in the foreign and non-foreign arbitration scenes in Vietnam despite the covid-19 pandemic. On the recognition and enforcement of foreign arbitral awards, it is reasonable to expect more rather than less enforcement of foreign arbitral awards. Moreover, as Vietnam is being recognised as an attractive destination for foreign investments, the growth for arbitration matters relating to Vietnam will be inevitable.

⁵⁰ Article 53.4 of the Arbitration Law 2010.

⁵¹ Investment Policy Hub, Vietnam as the respondent state, available at <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/229/viet-nam/respondent>.

⁵² *ibid.*

⁵³ Finance Uncovered, Oil major settles huge capital gains tax bill to Vietnam after Finance Uncovered investigation, available at www.financeuncovered.org/capital-gains/oil-major-pays-179m-capital-gains-tax-bill-to-vietnam-after-finance-uncovered-investigation/.

⁵⁴ 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).

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