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Vietnam

Vietnam

Frederick Burke,[1] Chi Anh Tran[2] and Maria S. Chung[3]

A. Legislation and rules

A.1 Legislation

After Vietnam joined the World Trade Organization in 2007, the Law on Commercial Arbitration No. 54/2010/QH12 (LCA), fundamentally based on the 2006 UNCITRAL Model Law, was passed by the National Assembly and came into effect on 1 January 2011. Prior to this date, Ordinance No. 08/2003/PL-UBTVQH11 on Commercial Arbitration (the "Ordinance") governed arbitration proceedings for settlement of disputes arising from "commercial activities" pursuant to the parties' agreement on such a method.

The LCA improved the commercial arbitration provisions provided in the Ordinance by addressing international expectations and finally put a spotlight on arbitration in Vietnam. Among other positive developments, the most significant changes that were adopted in the LCA are as follows: (i) the ability to refer to arbitration, provided that at least one of the parties is engaged in commercial activities; (ii) the option to appoint foreign arbitrators in Vietnam; and (iii) the ability to

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[1] Frederick Burke is the managing partner of Baker McKenzie's Vietnam offices. Frederick has over 25 years of experience in the planning, negotiation and operation of cross-border trade and investment projects in Vietnam and China, as well as in the related issues of finance, regulatory compliance, property development, construction, tax and dispute resolution. He is also an active arbitrator at the Vietnam International Arbitration Centre.

[2] Chi Anh Tran is a special counsel in Baker McKenzie's Ho Chi Minh City office. Anh Tran's practice encompasses arbitration, corporate compliance and competition. She has advised and represented major multinational companies in arbitration cases and arbitral award enforcement procedures in Vietnam.

[3] Maria S. Chung is a senior associate in Baker McKenzie's Hanoi office. Maria's practice focuses on corporate compliance, arbitration, competition and general commercial matters. She has training in international arbitration from the Singapore Institute of Arbitrators and is on the steering committee for Baker McKenzie's International Arbitration Associates Forum.

apply for interim measures to protect the legitimate interests of the parties.

Moreover, on 20 March 2014, the Supreme Court of Vietnam passed Resolution No. 01/2014/NQ-HDTP, providing further guidance on the implementation of certain provisions of the LCA ("Resolution No. 01") and on 10 June 2016, the People's Committee of Ho Chi Minh City issued Decision No. 3006/QD-UBND on approving the project for enhancing and improving the effectiveness of commercial arbitration in Ho Chi Minh City.

Last but not least, while the Civil Procedure Code No. 24/2004/QH11, as amended in 2011, regulated the recognition and enforcement of foreign arbitral awards in Vietnam, as of 1 July 2016, the revised Civil Procedure Code No. 92/2015/QH13 (the "CPC 2015") governs the recognition and enforcement of foreign arbitral awards in Vietnam. The procedures for recognition and enforcement of foreign arbitral awards under Part VII of CPC 2015 have been praised for being more effective and in line with the New York Convention.

A.2 Institutions, rules and infrastructure

There are 14 arbitration institutions in Vietnam currently registered with the Ministry of Justice,[4] six of which have fewer than 10 arbitrators. Most recently, in April 2016, the Vietnam Lawyers' Association inaugurated the Vietnam Lawyers' Commercial Arbitration Center, a non-governmental, non-profit and independent arbitration institution. Nonetheless, the Vietnam International Arbitration Centre (VIAC) at the Vietnam Chamber of Commerce and Industry remains the most prominent arbitration institution in Vietnam. This is likely because compared to other domestic arbitration institutions, VIAC has a long history of development with high-profile arbitrators (including 27 foreign arbitrators). Notably, in 2015, there were two VIAC cases that were resolved under 30 days. In

[4] See http://bttp.moj.gov.vn/qt/Pages/trong-tai-tm.aspx?Keyword=&Field=&&Page=1.

terms of operation, VIAC arbitral rules are generally in line with international practice.

B. Cases

Vietnam court decisions are not publicly published and it is difficult to access past judgments. That being said, we discuss below two noteworthy cases in which Vietnamese courts unreasonably set aside a domestic award and refused to recognize an international arbitral award on the ground that the award was contrary to the "fundamental principles of Vietnamese law."

B.1 A VIAC arbitral award is unreasonably set aside by a Vietnamese court.

In April 2015, the People's Court of Ho Chi Minh City ("HCMC Court") set aside an arbitral award issued by VIAC on the ground that it was contrary to the fundamental principles of Vietnamese law.

In October 2007, Mr. Nguyen Van L ("Mr. L"), a Vietnamese citizen, entered into the Share Purchase and Sales Agreement (SPSA) to sell 5% shares in a joint stock company ("Company Y") that he owned to a French company ("Company X"). In August 2008, Mr. L and Company X entered into a Supplemental Agreement to the SPSA (SA), which included a put option clause according to which Mr. L agreed to buy back Company X's shares in Company Y "within the Put Option Exercise Period for a price equal to an amount in United States Dollars." Accordingly, in January 2014 (ie, within the Put Option Exercise Period, as stipulated in the SA), Company X delivered a Put Option Exercise Notice to Mr. L. Mr. L disagreed and refused to exercise the put option. As such, Company X submitted a request for arbitration to VIAC, arguing for the enforcement of the put option by Mr. L.

In December 2014, the arbitral tribunal issued an award in favor of Company X. However, in January 2015, Mr. L submitted a request to set aside the award with HCMC Court. Eventually, HCMC Court issued a decision to set aside the award (the "Court Decision"). In the

Court Decision, HCMC Court set aside the award on the ground that it was contrary to the fundamental principles of Vietnamese law. More specifically, HCMC Court stated that the award, which demanded that Mr. L buy back the put option shares for a price in Vietnamese dong equal to its amount in United States dollars, contravened the fundamental principles of Vietnamese law because it violated the "principle of complying with the law" (given that foreign exchange regulations in Vietnam restrict the use of United States dollars in price listings), specifically Article 11 of the Civil Code No. 33/2005/QH11 ("Civil Code").

Under Vietnamese law, among various other reasons, the court may nullify or set aside an arbitral award if there are serious procedural flaws during the arbitration proceedings or if the arbitral award is deemed contrary to the fundamental principles of Vietnamese law. However, in the subject case, the put option provision in the SA should not have been viewed as contravening the fundamental principles of Vietnamese law because the price provision of the put option in the SA did not contravene the applicable regulation of foreign exchange in Vietnam. Recently, given that Vietnamese courts have been applauded for staying court proceedings in favor of arbitration and gradually respecting an increasing number of domestic arbitral awards, it is worrisome and questionable that HCMC Court broadly interpreted the term "fundamental principles" in this case to set aside the arbitral award.

B.2 A foreign arbitral award is unreasonably refused recognition and enforcement by a Vietnamese court

In 2011, the application of Toepfer (a German-based commodity trading firm) for recognition and enforcement of a foreign arbitral award against Sao Mai, a Vietnamese company ("Foreign Arbitral Award") was turned down by the court of the first instance and subsequently, by the Supreme Court of Hanoi on the ground that the Foreign Arbitral Award was contrary to the fundamental principles of Vietnamese law.

The Supreme Court of Hanoi held that by failing to mitigate its loss, Toepfer breached the principle of goodwill set out under Article 6 of the Civil Code. The Supreme Court of Hanoi also held that the Foreign Arbitral Award, which included liquidated damages, was contrary to the principle of damages under Vietnamese law.

Similar to the case in Section B.1, this case demonstrates the Vietnamese courts' excessive power to invalidate arbitral awards by what may be seen as arbitrary interpretations of Vietnamese law.

C. Trends and observations

Given its rapid economic growth in the last decade, Vietnam has become an attractive destination for both domestic and foreign investments. This has unfortunately led to a rise in the number of commercial disputes in Vietnam. However, due to lack of confidence in the capability and transparency of Vietnamese courts, dispute resolution by arbitration has steadily increased in popularity. Statistics obtained from VIAC show that, in 2015, there were 146 arbitration cases filed before VIAC, with 37% involving foreign elements. This is five times more than the case load in 2007. In addition, according to the Ministry of Justice's report, from 2011 to 2015, arbitration institutions in Vietnam accepted a total of 879 cases and issued 586 arbitral awards.[5]

Realizing the value of arbitration in both international and domestic commercial relations, Vietnam has been active in tailoring its legislation on commercial arbitration, as described in Section A.1. However, despite these encouraging efforts, Vietnamese courts are failing to respect foreign arbitral awards as often as they uphold domestic arbitral awards. In fact, although Vietnam has been a member of the New York Convention since September 1995 and the LCA supports the operation and implementation of arbitration proceedings and the enforcement of arbitral awards, Vietnamese courts have recognized only a limited number of foreign arbitral

[5] See http://bttp.moj.gov.vn/qt/tintuc/Pages/trong-tai-thuong-mai.aspx?ItemID=53.

awards. While reliable statistics are very hard to come by, according to a recent report published by the Supreme Court of Vietnam, in the period between 2005 and 2014, there were 52 applications for recognition and enforcement of foreign arbitral awards submitted to Vietnamese courts. Out of those 52 requests, 46% were rejected, 44% were recognized and 10% are still pending final decision.

These conditions for refusing recognition tend to be interpreted broadly and, to some extent, arbitrarily by the Vietnamese courts. The usual grounds for Vietnamese courts to refuse recognition include invalid arbitration agreements, errors in notice procedures, and the arbitral awards somehow being contrary to the fundamental principles of Vietnamese law. Among these grounds, violation of the "fundamental principles of Vietnamese law" is highly controversial due to its ambiguity. However, as demonstrated in Section B.2, this is one of the most frequently used rationales to refuse recognition and enforcement of foreign arbitral awards in Vietnam. Another common ground is lack of due process.

In the past, Vietnamese courts went as far as taking the position that anything that is not entirely compliant with Vietnamese administrative requirements and consistent with the outcome that would be reached under Vietnamese law somehow violates the "fundamental principles of Vietnamese law." Similar to case in Section B.2, in *Tyco Services Singapore v. Leighton Contractors Vietnam (2003),*[6] a party failing to obtain a foreign contractor's permit to perform the contract was interpreted by the court as having failed to respect the fundamental principles of Vietnamese law.

In order to eventually resolve this shortcoming, Resolution No. 01 was issued by the Supreme Court of Vietnam in 2014. Legislators, practitioners and stakeholders alike viewed Resolution No. 01 as a significant step to limit abuse of the Vietnamese courts' discretion to refuse recognition of foreign arbitral awards, especially by re-defining

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[6] Judgment No. 02/PTDS, 21 January 2003 (Court of Appeals of the Supreme People's Court of Vietnam, Ho Chi Minh City).

the concept of violation of fundamental principles of Vietnamese law. As a result, moving forward, it is hoped that Vietnamese courts will exercise caution and check for legal soundness before asserting this particular ground to set aside an arbitral award, whether from a foreign or a domestic arbitration institution.

In conclusion, there is little doubt that the Vietnamese government is invested in promoting arbitration as an alternative means of dispute resolution. As such, it is hoped that Vietnamese courts will align their attitude with changes and improvements in legislation. Educating and training Vietnamese judges about the concept of arbitration may be the key to developing a more robust arbitration infrastructure in Vietnam.