

# Managing change

## Client Alert – Vietnam

Dispute settlement by Arbitration in Vietnam

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## Dispute settlement by Arbitration in Vietnam

Arbitration is one of an Alternative Dispute Resolution (“**ADR**”) that has become more and more popular and acquainted to enterprises for settlement of disputes arising from commercial activities

- > Advantages of arbitration as compared to drawn-out civil proceedings are: The necessary flexibility and contractual freedom are ensured
- > Greater expertise in the related fields of dispute, in particular in the case of complex situations
- > Parties are free in the establishment of arbitration tribunal, including the place of jurisdiction, legal language and choice of arbitrators;
- > Arbitral awards are final and binding, and local awards are immediately enforceable to parties without appeal; therefore, arbitration is a fast and effective dispute resolution that ensures greater legal certainty.

### 1. Arbitration agreement

Arbitration agreements are generally divided into two types:

- > Agreements which are signed after a dispute has arisen, agreeing that the dispute should be resolved by arbitration (submission agreement)
- > Agreements which provide that, if a dispute should arise, it will be resolved by arbitration.

If the arbitration is mandatory and binding, the parties waive their rights to access the courts and to have a judge or jury decide the case.

An arbitration agreement is only valid if it fulfils following requirements:

#### > Formal requirements:

The arbitration agreement must be written, but not necessarily signed.

#### > Signatories:

The person signing the arbitration agreement must be the legally entitled, e.g. the owner of sole proprietorship; the legal representative or authorized representative of a limited liability company or a joint stock company; the partner of a partnership. The signing person must have full capacity under the Civil Code. The contracting party must be voluntarily and freely in showing their will during the course of execution of the arbitration agreement. That means no any contracting party is deceived, threatened or coerced, neither by the other party nor by a third party.

#### > Content requirements:

- The Law on Commercial Arbitration 2010 regulates that 03 categories of disputes may be referred to Arbitration including: Disputes among parties which arise from commercial activities; Disputes among parties at least one of whom conducts commercial activities; other disputes among parties which are stipulated by law to be settled by arbitration.
- The arbitration agreement is invalid, if it fails to specify or specifies unclearly the disputed objects, or the arbitration institution that has competence to settle the dispute. As from 01 January 2011, in case the parties have an arbitration agreement but failure to indicate the form of arbitration or cannot identify a specific arbitration institution, if a dispute arises, the parties shall agree again on the form of arbitration or a specific arbitration in-

stitution to settle the dispute. If no agreement can be reached, the form of arbitration or an arbitration institution to settle the dispute shall be selected at the plaintiff's request and therefore won't no longer lead to an incurably void contract.

## 2. Choice of applicable laws

Parties of arbitration proceedings are reserved the right to agree on the governing law, including the involvement of a "foreign element". Therefore, disputes between purely domestic parties that do not involve any foreign element, the arbitral tribunal must apply the laws of Vietnam for settlement of the dispute.

"Foreign element" is referred to definition at the Civil Code, means:

- > where at least one disputing party who is foreign body, organization or individual; or
- > where at least one disputing party who is a Vietnamese residing overseas; or
- > where all disputing parties are Vietnamese but the basis for establishment or modification of such relationship is the law of foreign country, or such basis arose in a foreign country.

In case that an international commercial contract only comprise arbitration terms without agreement on applicable laws, after the arbitration tribunal is constituted, the arbitration tribunal shall base on principle of conflict of laws to determine the most suitable applicable laws as the case maybe.

Disputes between both parties being local enterprise or foreign-owned enterprise shall be considered as dispute without "foreign element" and the laws of Vietnam must apply. In practice, we found in a lot of contracts/agreements between parties that are foreign-owned enterprises, parties agreeing to refer the dispute to arbitration at a foreign arbitration centre (i.e. Singapore International Arbitration Center, German Institution of Arbitration, etc.). In principle, such agreement is still valid under the Vietnamese laws, provided that the arbitration institute/arbitrator can apply Vietnamese laws as the applicable laws for settlement of the dispute. However, application of the laws of Vietnam by such foreign arbitration centre may become unenforceable in practice. Therefore, we strongly recommend that parties should agree to choose a Vietnamese arbitration centre for settlement of disputes arising out from contracts/agreements without "foreign element" to avoid any unexpected event of un-realizable arbitration agreement.

## 3. Language of arbitration proceedings

For disputes between purely domestic parties that do not involve any foreign element, the language to be used in arbitral proceedings must be Vietnamese, except if at least one party is a foreign-owned enterprise.

A dispute involves "foreign element" or disputes to which at least one party is a foreign-invested enterprise, the parties reserve the right to reach an agreement on the language to be used in arbitral proceedings. If parties have no such agreement, the arbitration council shall decide on the language to be used in arbitral proceedings.

## 4. Recognition and enforcement of arbitral awards relating to international commercial disputes in Vietnam

### > Enforcement of domestic arbitral awards

The arbitral awards rendered by a local arbitration tribunal (including both institutional arbitration and ad-hoc arbitration) are enforceable without the need to pass/recognize by the court or other state jurisdiction.

The State encourages the parties to voluntarily implement the arbitral award. In case of expiry of the time limit for implementation of the arbitral award as set forth therein, if the parties fail to voluntarily implement such arbitral award, the party in favour of whom/which the arbitral award is issued may request in writing to the competent civil judgment enforcement agency.

Therefore, to implement the procedures for enforcement of arbitral awards, the requesting party must submit an application for implementation of arbitral awards to the civil judgment enforcement agencies of provinces or centrally run cities where arbitration councils issue the awards to enforce the award (based on the revenue of making the arbitral award as recorded thereof).

### > Recognition and enforcement of foreign arbitral awards in Vietnam

Foreign arbitral awards are arbitral awards made outside of Vietnam or within Vietnam by a Foreign Arbitration for settlement of a dispute by mutual agreement between parties. All foreign arbitral award must be recognized before to be enforceable in Vietnam.

Foreign arbitration means an arbitration established and operating under the foreign law on arbitration. So, an arbitral award which is issued by an arbitration

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centre established under Vietnamese laws shall be considered as domestic arbitral award, regardless of it is made by a foreign arbitrator or made in a foreign country (as venue for settlement of arbitration proceeding).

As from 1995, Vietnam has become a member of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the “**New York Convention 1958**”). Therefore, it should be easier for recognition and enforcement of foreign arbitral awards issued by countries that are members of this Convention.

Provisions of the New York Convention 1958 had been codified into domestic legislations with some reservation. Particularly, the petitions for recognition and enforcement in Vietnam of foreign arbitral award in Vietnam are prescribed at Chapter XXXVII of Civil Proceeding Code 2015. In principle, the courts of Vietnam would consider the recognition and enforcement in Vietnam of foreign civil judgements and/or foreign arbitration awards on a reciprocal basis or based on the international convention that Vietnam is a member of.

According to the provision of Vietnamese Civil Procedures Code, there are some significant points to be noted:

Time limitation for filing applications for recognition and enforcement: 03 years as from the effective date of the arbitral award.

The authority in charge: Ministry of Justice of Vietnam (“**MOJ**”) or Competent Court, depending on provisions of international treaties that Vietnam is a member of or in case of no international treaty between Vietnam and the country issuing the arbitral awards. The application dossier must include required supporting documents as set forth in the international treaties, at least with the following principle documents:

- Original or duly copy of arbitral award;
- Original or duly copy of arbitration agreement of parties;
- PoA from the authorized person in favour of the person who submits the application;
- Legal documentation of the involved parties.

Within 5 working days as from the date of reception of the application, the MOJ must send that application

to the competent court for their consideration and decision.

Within 5 working days as from the date that the Court received the application dossier, the Court must consider and inform in writing to the applicant and involved parties, the Procuracy at the same level and the MOJ whether the application is accepted or not.

Within 2 months as from the date of acceptance, as the case maybe, the Court shall issue one of the following decision:

- To suspend the consideration of the application;
- To terminate the consideration of the application;
- To open a meeting for consideration of the application.

The meeting for consideration of application shall be conducted by a Panel consisting of 3 Judges, one of whom shall act as the presiding Judge under the assignment of the Chief Justice of the Court. The meeting shall also include the participation of the Procuracy at the same level and the involved parties.

After checking the application and supporting documents provided by the applicant and listening to opinions of the summoned people and of the procurator, the Panel shall discuss and make decision under the majority rule. The Panel shall be entitled to make a decision to recognize and enforce in Vietnam the foreign arbitrator’s award or decide to not recognize a foreign arbitrator’s award.

#### > **Recognition and enforcement abroad arbitral awards issued in Vietnam**

Similar to the cases of recognition and enforcement of foreign arbitral awards in Vietnam as mentioned at Item II above, the recognition and enforcement abroad of arbitral awards issued in Vietnam shall depend on the applicable arbitration law and international treaties between Vietnam and the country where the enforcement is sought.

It is easier for enforcement of arbitral awards at the countries that are signatory of New York Convention 1958, other than more limited exception may be applied according to the laws of the country where the arbitral awards shall be implemented.

In general, as per Article IV of the New York Convention 1958, the requesting party must submit to com-

petent Court for recognition and enforcement of an arbitral award the following documents:

- Original or duly copy of arbitral award;
- Original or duly copy of arbitration agreement of parties.

Besides, each country where the arbitral awards must be implemented may have exclusive and different regulations governing these issues.

## 5. Conclusion

Arbitration has been popular and become a preferred method for settlement of dispute in the world due to its effectiveness. Compared with the Arbitration Ordinance, the Law on Commercial Arbitration has created a more flexible, adequate, and rational legal framework for development of arbitration activities in Vietnam, and more choice for trader in settlement of dispute.

In general, the laws respect the right on freedom of will of parties. The laws only require a written agreement between parties that the disputing matter shall be referred to be settled by arbitration proceeding.

However, for best benefits and to avoid any disagreement between the parties at the time of dispute, we recommend that parties should agree in detail on arbitration agreement to clearly state which arbitration institute shall be in charge of settlement of the dispute, and the arbitration procedures rule to be applied. In case of the dispute with involvement of foreign element, parties reserve the right to agree on applicable law for settlement of dispute and language of arbitration proceeding.

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