

The Enforcement of Foreign Arbitration Awards in Vietnam: Overview and Criticisms

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The purpose of this article is to present an overview of the changes in Vietnam's legal framework with regard to the enforcement of foreign arbitral awards and to emphasize the most urgent issues Vietnam needs to amend or to legislate on.

I. INTRODUCTION

Arbitration is a relatively new sphere of the Vietnamese legal system. International arbitration was first incorporated into Vietnam's positive law in 1995 with the Ordinance on Recognition and Enforcement of Foreign Arbitration Awards dated 14 September 1995. This Ordinance was adopted in response to the ratification of the New York Convention on 12 September 1995.¹ Thereafter, the Ordinance on Commercial Arbitration was issued on 25 February 2003, only to be abrogated by Law No. 54 of 17 June 2010 on Commercial Arbitration, which took effect on 1 January 2011.² Divided into eighty-one articles, Law No. 54 regulates national and international arbitration and constitutes a consolidated and a relatively complete corpus for the recourse to arbitration and the enforcement of its awards.

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¹ Ordinance on Recognition and Enforcement of Foreign Arbitral Awards in Vietnam, No. 42-L/CTN (Sept. 14, 1995); *see also* Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), Jun. 10, 1958, 21 UST 2517.

² Luật Trọng tài thương mại [Law on Commercial Arbitration], No: 54-2010-QH12 (June 17, 2010).

In a bid to set up a clearer legal framework for the enforcement of foreign arbitral awards, the Vietnamese legislature issued in 2014 a Resolution³ providing guidance on the interpretation of some provisions of the Law on Commercial Arbitration. Another notable effort along these lines was the replacement of the Civil Procedure Code (CPC) 2004⁴ by Civil Procedure Code 2015,⁵ which came into force on 1 July 2016 and sought to clarify certain provisions of the earlier CPC, as discussed below.

Although Vietnam has made great progress and has shown genuine efforts of alignment with international laws and standards, further efforts are needed to improve the enforceability of foreign awards. This article explores some of the challenges facing Vietnamese enforcement of arbitral awards.

II. THE WEAK ENFORCEMENT OF FOREIGN AWARDS

The last few years have witnessed great development of the arbitration legal framework in Vietnam, particularly regarding the enforcement of foreign awards. A foreign arbitration award⁶ is defined as “an award rendered by foreign arbitration either inside or outside the territory of Vietnam.”⁷ Only final arbitral awards that were not set aside by the foreign country’s Court of the seat of arbitration are subject to enforcement in Vietnam.⁸ The enforcement of such awards must be recognized and approved by the People’s Court of Vietnam.⁹ However, practice has shown that Vietnamese courts are reluctant to enforce arbitration awards.

A. AN OVERVIEW OF THE ENFORCEMENT OF FOREIGN AWARDS

A significant disparity persists between the Vietnamese courts’ enforcement of domestic awards and foreign awards. Indeed, Nguyen The Duc Tam and Nguyen Thi Thuy Linh reported in their article disturbing statistics communicated by the Supreme People’s Court.¹⁰ It appears that between 2005 and 2014, fifty-two requests were submitted for

³ Hướng dẫn thi hành một số quy định Luật Trọng tài thương mại [Resolution Guiding the Implementation of Certain Provisions of Law on Commercial Arbitration], No. 01/2014/NQ-HDTP (Mar. 20, 2014).

⁴ Bộ Luật Tố Tụng Dân Sự [Civil Procedure Code], No. 24/2004/QH11 (June 15, 2004).

⁵ Bộ Luật Tố Tụng Dân Sự [Civil Procedure Code], No. 92/2015/QH13 (Nov. 25 2015).

⁶ A “foreign arbitration award” (i.e., a determination on the merits, analogous to a verdict in a court of law) is to be distinguished from an “arbitration decision” (i.e., a determination on the substance of the dispute during the course of the arbitration) which was used in lieu of the term “arbitral award” in the CPC 2004.

⁷ Law on Commercial Arbitration, *supra* note 2 at Art. 3(12).

⁸ Civil Procedure Code, *supra* note 5 at Art. 424 (former Art. 343).

⁹ *Id.* at Art. 425 (former Art. 344).

¹⁰ See Nguyen The Duc Tam and Nguyen Thi Thuy Linh, “Vietnam Case Update: Recognition and Enforcement of Foreign Arbitral Awards (*Realogy Group LLC v. Minh Viet Investment JSC*)” International

recognition and enforcement of foreign arbitral awards. However, the Court accepted only twenty-eight requests, or just over half of those that were submitted.

This issue has also been raised by the Investment and Trade Working Group in a report¹¹ presented by Mr. Fred Burke¹² in 2015. The report highlighted the alarmingly weak enforcement of international arbitration awards in Vietnam. It also cited the broad provisions of the CPC as one of the main reasons for such weak enforcement. Indeed, Article 439, previously Article 370 in the 2004 CPC, sets out the grounds on which a court shall not recognize or enforce a foreign arbitral award, including inconsistency with the “basic principles of law of the Socialist Republic of Vietnam.”¹³

B. THE BROAD INTERPRETATION OF THE COURTS

Since no further legislative guidance has been given regarding the interpretation of this provision, inconsistency with basic Vietnamese legal principles has become “one of the bases Vietnamese courts most commonly cite as the reason for declining to recognize a foreign arbitration award,”¹⁴ and, *a fortiori*, for declining to enforce such an award. The main problem resides in the court's interpretation of what constitutes the basic principles of Vietnamese law. The courts have complete discretion in determining what can be considered to be against the basic principles of Vietnamese law; such discretion leads to a broad array of outcomes. For instance, in the case *Energo-Novus v. Vinatex*, the Supreme People's Court refused to recognize a foreign award on the basis that the Russian arbitration tribunal, by refusing to admit a notarized document submitted by the Vietnamese party, violated a Vietnamese governmental decree.¹⁵ In another case, the Vietnamese courts also considered the failure of the foreign party to register for a foreign

Arbitration Asia (Apr. 1, 2016), available at http://www.internationalarbitrationasia.com/vietnam_recognition_and_enforcement_of_foreign_arbitral_wards.

¹¹ The yearly report of the Investment and Trade Working Group, Vietnam Business Forum, Fred Burke, 2015. Mr. Fred Burke is the co-chairman of the Investment and Trade Working Group and the Managing Partner of Baker McKenzie (HCMC).

¹² Mr. Fred Burke is Managing Partner of Baker McKenzie in Vietnam.

¹³ Civil Procedure Code, *supra* note 5 at Art. 439(8).

¹⁴ The 2015 report of the Investment and Trade Working Group, Vietnam Business Forum, Fred Burke, p.1, 2015.

¹⁵ *Energo-Novus Co (Russia) v Vietnam Textile Corporation (Vinatext)*, Case No. 58, Decision of the Appellate Court of the Supreme People's Court of Vietnam in Hanoi (May 16, 2000).

contractor permit for construction, in accordance with the requirements of a Vietnamese ministerial circular, to constitute a violation of the basic principles of Vietnamese law.¹⁶

In most recent cases, the Vietnamese courts gave an even broader definition of the basic principles of Vietnamese law, which lead to a re-examination of the merits of the awards. Indeed, the courts cited provisions of the primary legislation,¹⁷ and sometimes even of the secondary legislation,¹⁸ for declining to enforce a foreign award. Such refusal was based on a revisitation of the merits and their compliance with the Civil Code, the Commercial Law and sometimes even procedural rules of Vietnamese Courts.¹⁹ For example, in *Toepfer v. Sao Mai*, the Court considered that the failure of the foreign party to mitigate its loss represented a violation of “the basic principles of Vietnamese law”²⁰ as it was considered a violation of the provisions of the Civil Code.²¹

C. THE RE-EXAMINATION OF THE MERITS

The analysis of the merits of foreign arbitral awards by Vietnamese courts can be considered, to a certain extent, a violation of the principle of *ne bis in idem*.²² Indeed, the International Covenant on Civil and Political Rights provides that no one should be tried twice for the same offence of which he has been either convicted or acquitted.²³

By recognizing the competence of arbitral institutions, whether national²⁴ or international,²⁵ as judicial institutions, Vietnamese tribunals have transferred their judicial competence to duly-established arbitrations. This transfer of competence is supported by language in the Resolution stating that Vietnamese courts shall not examine

¹⁶ *Tyco Services Singapore Pte Ltd v. Leighton Contractors (VN) Ltd*, Decision No. 02/PTDS, Decision of the Appellate Court of the Supreme People’s Court in Vietnam in Ho Chi Minh City (Jan. 21, 2003).

¹⁷ These include Acts of Parliament or statutes.

¹⁸ This is also called delegated legislation, and consists of the granting of law-making powers to a branch of the government. It is used to add information or make changes to an existing Act of Parliament.

¹⁹ See, e.g., *Toepfer v. Sao Mai*, Decision of the Appellate Court of the Supreme People’s Court in Vietnam in Hanoi (2011).

²⁰ *Id.*

²¹ Civil Procedure Code, *supra* note 5 at Art. 362.

²² *Ne bis in idem* is a legal principle equivalent to double jeopardy. It signifies that no legal action can be instituted twice for the same cause of action.

²³ International Covenant on Civil and Political Rights (ICCPR), Dec. 16, 1996, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171, Art 14(7).

²⁴ Law on Commercial Arbitration, *supra* note 2.

²⁵ See, e.g., New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38 (1959). Vietnam also holds investment bilateral treaties (BIT) with 62 countries to this effect.

disputes that fall under an arbitration agreement.²⁶ Moreover, the legislature strengthened this prohibition by imposing on the Court the responsibility of verifying that parties to a dispute have not entered into an arbitration agreement before considering the dispute.²⁷

Consequently, re-opening a trial on a case that has already been resolved by arbitration would mean re-examining the same case within the same jurisdiction. Thus, it would be legitimate to conclude that the court is incompetent to judge such cases. By re-examining the merits of a case that has already been decided by arbitrators, the court is violating the international principle of *ne bis in idem*.

A revisitation of the merits of a case, combined with other noted misapplications of the Law in Vietnam, generates uncertainty around the enforcement of foreign arbitral awards and contributes to unpredictability in Vietnamese courts. Such unpredictability can only result in driving away investors.

III. THE NEW GUIDANCE ON AWARDS ENFORCEMENT

To provide further guidance and clarify the interpretation of the basic principles of Vietnamese law, the Supreme People's Court issued a Resolution in 2014 requiring Courts to take a more restrictive approach towards awards enforcement.²⁸

A. THE DEFINITION OF “BASIC PRINCIPLES”

The Resolution defines the basic principles of Vietnamese law as “basic principles on conducts, of which effects are most overriding in respect of the development and implementation of Vietnamese Law.”²⁹ It also adds the condition that the violation of these principles shall not only represent an inconsistency of the Tribunal with the said provisions in making the award but also a violation of “the interests of the government, (and/or) the legitimate rights and interests of third party or parties.”³⁰

This Resolution marks a great effort to correct the interpretation of Vietnamese Courts to prevent Courts from failing to enforce an award on the ground of a violation of “the basic principles of Vietnamese Law.” Nevertheless, this improvement is not yet enough to ensure the consistent enforcement of foreign awards in Vietnam. Even though the

²⁶ Resolution, *supra* note 3, at Art. 2.

²⁷ *Id.*

²⁸ Resolution No 01/2014/NQ-HDTP Guiding the Implementation of Certain Provisions of Law On Commercial Arbitration, dated 20 March 2014.

²⁹ *Id.* at Art. 14(2)(dd).

³⁰ *Id.*

definition of the basic principles has been made clearer, it remains vague enough to allow an important number of refusals of enforcement or recognition of foreign awards.

B. THE NOTION OF “PUBLIC POLICY”

Instead of issuing a new resolution that would further clarify the definition of “basic principles of Vietnamese law,” it seems more appropriate to supplant such notion with the commonly understood notion of “public policy.” In such a case, and in the words of Justice Cardozo, the non-enforcement of an award would require such award to “violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.”³¹ Such an approach would considerably limit the cases of non-enforcement of foreign awards since the violation would have to be substantial enough to threaten the “public policy.”

In fact, Article 439 of the CPC represents a bifurcation vis-a-vis the international consensus. Article 439 came as a transposition of Article V of the New York Convention with some alterations, one of which being the reference to basic principles of Vietnamese law as a ground for non-enforcement of foreign awards. Indeed, most other parties to the New York Convention only consider manifest incompatibility with public policy when reviewing the merits of the awards.³² Consequently, the insertion of the notion of “public policy” would not only guarantee a more effective enforcement, but would also align the Vietnamese legislation with international laws.

IV. THE REFORM BROUGHT BY THE NEW CPC

The reform effort did not stop there. The Vietnamese legislature, aware of the foreign award enforcement issue, promulgated a new Civil Procedure Code that came into effect on 1 July 2016 and amended the 2004 CPC.

³¹ *Loucks v. Stand. Oil Co. of New York*, 120 N.E. 198, 200 (N.Y. 1918).

³² See, e.g., Code de Procédure Civile, [Code of Civil Procedure] [Fr.], at Art. 1514; see also *Thalès Air Defence BV v. GIE Euromissile*, Cour d’Appel [CA] Paris, 1e ch., sec. C, Nov. 18, 2004, No. 02-19606 (Fr.); *A v. R (Arbitration: Enforcement)*, [2009] 3HKLRD 389; *Karaha Bodas Co., LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina)*, 500 F.3d 111 (2d Cir. 2007); *Hebei Imp. & Exp. Corp. v Polytek Eng’g Co. Ltd.*, 2 HKC FAR 111 (2009); Case no. 2207/09.6TBSTB.E1.S1, Supremo Tribunal de Justiça (Port.) (Jan. 20, 2011); Case no. 5961/09.1TVLSB.L1.S1, Supremo Tribunal de Justiça (Mar. 10, 2011).

A. AN EFFORT OF CLARIFICATION

This new code brings many changes to solve the particular difficulties of foreign awards enforcement in Vietnam. First, the Code modifies its earlier repartition by dedicating a part to the procedure for recognition and enforcement of foreign awards. It also aligns its provisions with the New York Convention through a few modifications. For instance, it adds a terminological clarification by replacing the term “arbitral decision” with “arbitral award.”³³ The 2004 CPC made no distinction between those two terms, using the terms interchangeably, while the Law on Commercial Arbitration draws a clear distinction. Indeed, Article 3 of this Law defines the arbitral decision as a decision of the arbitration tribunal during the dispute resolution process, when an arbitration awards is defined as a decision of the arbitration tribunal resolving the entire dispute and terminating the arbitration process. This adjustment aligns the Code's definition not only with the Law on Commercial Arbitration but also with international law.

B. THE SILENCE OF THE PROVISIONS

The new CPC also corrects the absence of a clear time limitation for application for the enforcement of foreign arbitral awards. Since the old code remained silent on this matter, the Court applied the time bar for general civil cases of one year.³⁴ The new Code solved this problem by determining a clear limitation of three years starting from the date the foreign arbitral award takes effect.³⁵ This effort must be appreciated since it reveals the legislature's intent to ensure access to the enforcement right by granting it a longer time period than for ordinary law.

The old Code was also silent regarding the determination and the provision of foreign law, thus leaving it to the entire discretion of the Court. This new Code addressed this matter by providing that the civil party who chose a foreign law to be applied has the obligation to provide its contents.³⁶ It also addresses of the protocol of how to apply such contents when the parties fail to determine the applicable law.³⁷ Another notable

³³ The New York Convention explicitly mentions the term “arbitral award” and specifies in Article I.2 that “The term ‘arbitral awards’ shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.” New York Convention, *supra* note 1 at Art. I.2.

³⁴ *Cargill v. Dong Quanfg*, Decision No 01/2014/QDST-KDTM of the People's Court of Long An Province (2014); *see also* Decision No. 08/2015/QDST-KDTM of the Appellate Court of the Supreme People's Court in Ho Chi Minh City (2015) (upholding *Cargill v. Dong Quanfe*).

³⁵ Civil Procedure Code, *supra* note 5 at Art. 451.

³⁶ Civil Procedure Code, *supra* note 5 at Art. 481-1.

³⁷ *Id.*

omission of the old Code concerns the burden of proof. By default, in the absence of provisions, it was placed against the award creditor,³⁸ which was in total contradiction with the New York Convention.³⁹ It is henceforth placed against the award debtor.⁴⁰

One of the primary reasons for the weak enforcement of foreign awards in Vietnam is the insufficient regulation that allowed too much room for the Courts' interpretation. Addressing these issues and legislating on them with clarity lessens the risks of non-enforcement.

C. A MATTER OF TIME

The new code makes the two-step procedure, in the absence of provisions in the old CPC only applicable for parties to an international treaty of which provisions expressly require to first submit the application to the Ministry of Justice. In this procedure, the application is first to be submitted to the Minister of Justice in Step 1 and then to the competent court in Step 2. In the absence of such provisions, creditors can submit their applications directly to the competent Court. Such simplification of the procedure ensures the celerity of the resolution.

The alarming record of non-enforcement cases was also due to the fact that the High Court gave final decisions on recognition or non-recognition of foreign arbitral awards without any higher level of review. The new code allows a reconsideration of the decision by the Supreme People's Court under a cassation or reopening procedure.⁴¹ Such amendment can only be appreciated but a few additional changes are needed. Granting for the possibility of an appeal is a protection that will improve the chances of arbitral award enforcements. Nevertheless, the cassation or re-opening procedures in Vietnam suspend the enforcement of judgments. Such suspension nullifies one of the main benefits of the recourse to arbitration, namely the celerity of the procedure. The use of arbitration is, most of the time, driven by the fact that it leads to a speedier resolution than a proceeding in Court. The possibility of appealing the recognition or non-recognition decision is a double-edged sword since both of the parties can initiate the appeal. In that case, if the creditor finally obtains the recognition of the award, the debtor's appeal will extend the procedure. Such consequence can also be a motive for dilatory procedure tactics. More concretely, the debtor can be tempted to protest against

³⁸ In the absence of provisions in the old Code of Civil Procedure.

³⁹ New York Convention, *supra* note 1 at Art V.1.

⁴⁰ Civil Procedure Code, *supra* note 5 at Art. 459(1).

⁴¹ *Id.* at 462(6).

the judgment only in order to delay the final recognition decision and thus the enforcement of the arbitral award. The remedy to this issue would be that the appeal of a recognition or a non-recognition award has no suspensive effect, and that dilatory procedures are strictly sanctioned.

D. THE APPLICATION SYSTEM

Also of note is the adversarial system of the applications.⁴² Their consideration can only be conducted with the presence of both parties or their lawful representatives. Without conducting a retrial, the Court examines the documents but also listens to the opinions of the creditor and the debtor. This also has a dilatory effect with a risk, in practice, of creating an ersatz of a retrial. In order to comply with the New York Convention, numerous country members have opted to an enforcement application upon a simple request to the Court. Since Vietnam has shown great efforts of alignment with international laws, such amendment would be written in the continuity of the improvement and compliance work of the Vietnamese legislature.

⁴² *Id.* at Art. 458.