

ARTICLE

RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS RELATING TO INTERNATIONAL COMMERCIAL DISPUTES IN VIETNAM

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Abstract

This article discusses issues related to the recognition and enforcement of arbitral awards in Vietnam. The author analyzes the procedure for obtaining a judgment for enforcement of foreign arbitral awards. The author also examines the causes for refusal to recognize foreign arbitral awards.

Keywords

Arbitration Law, Enforcement of Arbitration Award, Vietnamese court, Commercial Dispute, Investment, Public Policy, Vietnam

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¹ The views expressed in this paper are solely those of the author in his private capacity and do not in any way represent the views of his institution, or any other entity of Vietnam's Government.

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I. INTRODUCTION

One of the main problems economic actors in Vietnam facing today is an access to judicial system. This problem is particularly troubling in light of the constant growth of civil lawsuits on the court dockets. To that end, an alternative solution for business entities and other economic actors to overcome the problem is approaching the arbitration for dispute settlement. In international business practice, arbitration is often preferred to litigation for a number of reasons: it is entered into voluntarily; the parties choose the arbitrator or agree how the arbitrator will be chosen; the rules of procedure are more flexible; there is greater confidentiality and a speedier disposition. Vietnamese policy makers have been supporting the development of arbitration by adopting the laws on

arbitration since 2003.² Nonetheless, Vietnam's record with respect to the enforcement of arbitral awards leaves much to be desired as there was reluctance by courts to recognize and enforce the arbitration awards.³

Being aware of the fact that a failure to develop the arbitration regime and especially enforce arbitral awards has damaged its image as an attractive destination for foreign investment and hurt domestic enterprises as well, Vietnam has attempted to legislate its way out of trouble.⁴ The Law on Commercial Arbitration, adopted by the National Assembly in 2010 (the 'Arbitration Law'), was designed in response to the situation and strengthened the status of arbitration in Vietnam.⁵ The Supreme People's Court has also unleashed a number of notices and guidelines concerning the issues of recognition and enforcement of arbitral awards. Their efforts to overcome the doctrinal obstacles to enforcement of arbitral awards are remarkable; however, existing laws are still deficient to certain aspects, and required further reforms.

This paper overviews the regulatory framework on recognition and enforcement of arbitral awards in Vietnam and analyses the shortcomings in its application to propose some solutions for regulatory and doctrinal reforms.

² The National Assembly of Vietnam has adopted the Ordinance on Commercial Arbitration, the first arbitration legislation in Vietnam 2003.

³ While conceptually there are differences between recognition of an award and enforcement of an award, such differences are not significant for the purposes of this paper. In international practice, the issues of the enforcement of arbitral awards apply equally to the recognition of awards, given that recognition of an award is a prerequisite of the enforcement of awards (but not vice versa). Any potential problems faced in the enforcement of arbitral awards will similarly be problems faced in the recognition of awards. Accordingly, references to recognition and enforcement in this paper will, in the interest of economy, be to 'enforcement'. For a discussion of the differences between 'recognition' and 'enforcement' of an arbitral award, see Alan Redfern et al, *Law and Practice of International Commercial Arbitration* (5th edn, OUP 2009) para 11.20–11.24.

⁴ Dang Hoang Oanh, *Vietnamese regulations on recognition and enforcement of foreign arbitral awards – Griffin's View on International and Comparative Law* (2003) 48–65.

⁵ Do Van Dai, Tran Hoang Hai, *Vietnamese Law On Commercial Arbitration* (National Political Publishing House 2012) 12.

II. AN OVERVIEW OF THE REGULATORY FRAMEWORK

1. Types of arbitral awards

There are two main types of arbitral award recognized under the laws of Vietnam, namely (i) domestic arbitral award and (ii) foreign arbitral award. The first category is the arbitral award rendered by a local arbitration tribunal (*including both institutional and ad-hoc arbitration*).⁶ Pursuant to the Arbitration Law, this type of arbitral award is enforceable without a need to pass before the judges of the exequatur. Accordingly, when the execution of the award period has expired but the losing party fails to comply with the arbitral award voluntarily and not seeking setting aside the arbitral award, the beneficiary party of the performance may submit a written request directly to the civil judgment enforcement agency to enforce compliance with the arbitral award.⁷ Thus, unless the arbitral award is not a subject to setting aside, the award is considered as a civil judgement rendered by a Vietnamese court and is enforceable without being subject to recognition by the court.

The second category is the arbitration awards rendered in a foreign arbitration in order to resolve a dispute.⁸ It should be noted that arbitration award rendered within territory of Vietnam by an arbitration panel organized by foreign and international arbitration institution, are also regarded as foreign arbitral award in Vietnam. For this type of arbitration award, the transition before the local competent court for purpose of enforcement is necessary. According to Article 343 (4) of the Civil Proceeding Code, the enforcement in Vietnam of any foreign arbitral

⁶ The Vietnam arbitration system consists of primarily of the Vietnam International Arbitration Centre (VIAC) at the Vietnam Chamber of Commerce and 6 other local arbitration commissions set up in large cities of Vietnam, including Pacific International Arbitration Centre based in Ho Chi Minh City; Hanoi Commercial Arbitration Centre based in Hanoi; Ho Chi Minh City Commercial Arbitration Centre; Can Tho Commercial Arbitration Centre; Vien Dong Arbitration Centre based in Hanoi; Asia Arbitration Centre based in Hanoi; and based in Hanoi. By far, VIAC, established in 1993 on the basic of merging the Foreign Trade Arbitration Committee and the Marine Arbitration Committee, is considered as a reputable arbitration institute in Vietnam and gains much of reliance of domestic and international business communities.

⁷ Arbitration Law, Art. 64 (1).

⁸ Arbitration Law, Art. 3 (12).

award must be subject to the recognition and approval of the courts of Vietnam. It is observed a significant difference between a foreign arbitral award, which requires a court's recognition for the purpose of enforcement, and a Vietnamese arbitral award, which does not require such court's enforcement order.

According to general principle of civil procedural law, the courts of Vietnam would consider the recognition and enforcement in Vietnam of foreign civil judgements and/or foreign arbitration awards to be on a reciprocal basis⁹ or based on the international convention that includes Vietnam as a member. In practice, the enforcement process should be easier for arbitration institution of the countries that are signatories to the New York Convention 1958 on recognition and enforcement of Foreign arbitral Awards ('New York Convention') as the Convention requires the courts of a signatory country to the Convention to recognise and enforce foreign arbitral awards as court judgments unless one or more of the limited exceptions apply. Rules and principles on recognition of foreign arbitration award under the New York Convention have been also incorporated into Vietnamese law with some reservation.¹⁰ With this legal framework, a number of foreign arbitral awards have received enforcement in Vietnam, while others have been rejected by the judges of the exequatur.

2. The procedure of obtaining court judgment for enforcement of foreign arbitral awards

As mentioned above, foreign arbitral awards are required for court's formal recognition for enforcement in Vietnam. Pursuant to the civil procedural law, before involving a court for requesting the recognition and enforcement of foreign arbitral award, the requesting party must undergo pre-submission proceeding by lodging the application to the Ministry of Justice ('MOJ').¹¹ The application must include any documentation required by the relevant international treaty, if applicable. If the treaty does not set forth any procedural requirements, the petition must include

⁹ Civil Proceeding Code, Art. 343(3).

¹⁰ Vietnam has joined the New York Convention in 1995 by Decision No. 453 / QD-CTN of the President of the Socialist Republic of Vietnam, dated 28 July 1995.

¹¹ Civil Proceeding Code, Art. 364(1).

two principal documents namely (i) an original or notarized copy of the foreign arbitral award and (ii) an original or notarized copy of the arbitration agreement of the parties. In addition, the party, applying for recognition and enforcement of the award, must also have a power of attorney and documentation of the applicant's legal representative; and a notarized and legalized certificate of incorporation or analogous documentation. All documentation must be translated into Vietnamese.

Upon approval on the legality of the application dossier by MOJ, the application will then be forwarded to competent court. The court assigned to consider the application should notify relevant parties, agencies, or organizations.

If the consideration process is not suspended, the court must formally consider the application. Court meetings must be attended by a presiding panel of three judges, a public procurator, and the person or legal representative of the person against whom the requesting party is trying to enforce the award. Formal recognition and enforcement of a foreign arbitral award does not involve a substantive review of the dispute, but consideration of whether the procedural and provisional requirements are met. A foreign arbitral award recognised for enforcement has the same effect as any civil judgment or decision of a Vietnamese court.

Vietnam has established rules for 'two-step process' in regard to recognition of the foreign arbitral award. Firstly, the review on legality of the application dossier has to be made by the MOJ and only after this step is passed a court could start a review of the case. To promote the arbitration and facilitate enforcement of this alternative mode of dispute resolution, it is preferable a process of recognition of award to be speedy. To that end, it might be asked a review on legality of the application dossier for recognition of arbitral award to be carried out directly by a court itself without interference of the MOJ.

3. Grounds for the refusal to recognize and enforce arbitral awards

Pursuant to Article 68 (2) of the Arbitration Law, foreign arbitral awards will not be recognised if:

- the parties to the arbitration agreement were not enabled to sign an agreement in accordance with the applicable law of each party;

- the arbitration agreement is unenforceable or invalid in accordance with the governing law or the laws of the country in which the award was made – if the arbitration agreement does not stipulate the governing law;
- the individual, body or organization against which enforcement is sought has not been properly notified on the arbitrator’s appointment or the procedures for resolving the dispute by foreign arbitration, or had reasonable cause for failing to exercise his/her/its right to participate in the proceedings;
- the foreign arbitral award was made in respect of a dispute, which was not referred to arbitration by the parties, or which exceeds the scope of the request of the parties;
- it is possible to apply the arbitration award, on which the parties reasonably referred as to the one recognized and enforced in Vietnam;
- the composition of the foreign arbitration panel, or the foreign arbitration procedure, was inconsistent with the arbitration agreement or the laws of the country in which the foreign arbitral award was made in cases where such matters are not stipulated in the arbitration agreement;
- the foreign arbitral award is not yet enforceable or binding on the parties;
- the foreign arbitral award has been revoked or suspended by a competent body of the country in which the foreign arbitral award was made, or of the country which law governs the arbitration agreement.

Foreign arbitral awards will also not be recognised, when the court, based on the evidence provided by the parties, can conclude that:

- the relevant dispute cannot be resolved by arbitration in accordance with the laws of Vietnam; or
- the recognition and enforcement of the foreign arbitral award is contrary to the fundamental principles of the laws of Vietnam (public policy).¹²

¹² Arbitration Law, Art. 68.3; Civil Proceeding Code, Art. 370 (2) (b).

III. APPLICATION OF NEW YORK CONVENTION IN VIETNAM

1. General principle of application of the New York Convention

The courts of Vietnam consider the recognition and enforcement of foreign arbitration awards where such awards have been made in, or by arbitrators of a country which is a party to a relevant international treaty of which Vietnam is a participant or a signatory. As a member of the New York Convention, Vietnam shall take into consideration for recognition of the arbitral awards of arbitrators of other 149 members of the Convention. It is noted that the regulations on recognition and enforcement of foreign arbitration award in Vietnam, including Arbitration Law and the Civil Proceeding Code, have been made in the light of the Convention.

Under Article VII (1) of the Convention, *'the provisions of the present Convention shall not [...] deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon'*. Such an arrangement may be useful to the extent that Vietnamese law is more favourable than the Convention for the award. However, there is no evidence that Vietnamese law has more advantages compared to the New York Convention.

It should be noted that Vietnam has made three principal reservations to the New York Convention. The first reservation concerns the geographical scope of the arbitral awards. Specifically, Article 2.1 of the Decision 453/QĐ-CTN of the President of Vietnam on accession of the New York Convention (Decision 453) states that *'the Convention applies only to the recognition and enforcement in Vietnam of foreign arbitral awards made in the territory of a Member State of the Convention'*. There was an issue for application of this rule for arbitration award of Hong Kong. In 2001, the Hanoi People's Court, based on the opinion of MOJ, has found Hong Kong an administrative territory of People's Republic of China (a member of the New York Convention) and thus the award by Hong Kong arbitration can enjoy the status of foreign arbitral awards made in the territory of member country of the Convention.

The second reservation is that *'the rules of the New York Convention apply only to disputes arising out of commercial legal relationships'*

(Article 2 of Decision 453). Thus, for cases that are not commercial legal relationships by nature, the rules of New York Convention should not apply in Vietnam and, in this case, the recognition and enforcement of the foreign arbitral award (that are not under the definition of ‘commercial legal relationships’ of the laws of Vietnam) shall be subject to the rules of the Civil Procedure Code (Article 370.2 (a)). In practice, regarding the cases where the dispute is not commercial in its nature, the laws of Vietnam do not allow the application of the rules on commercial arbitration and only accept the court’s jurisdiction.¹³

The third reservation is about the requirement that the interpretations of the Convention by the courts or other competent agencies of Vietnam must not contradict the rules of the Constitution and laws of Vietnam (Article 2 of Decision 453). This reservation may cause some potential problems for implementation of the Convention in Vietnam in practice, which will be discussed in other parts of this paper.

2. Definition of arbitral award

New York Convention regulates the recognition and enforcement of foreign arbitral award, but it does not define what is meant by «arbitration award». For years, this has been a topic for discussion among scholars and practitioners in Vietnam because it is unclear which kind of decision by arbitration commission shall be considered as arbitral award.

Take an example, whether the order of arbitration tribunal during the arbitration proceeding for ‘interim measure’ or ‘temporary emergency measure’ would fall under scope of recognition for enforcement by the court based on the New York Convention? This issue is not clearly regulated in the New York Convention. The Civil Procedure Code and Ordinance on Commercial Arbitration are also silent on this issue, causing thus some legal uncertainty. Without guidelines of the law, the Vietnamese courts had taken conservative position by not accepting ‘interim measure’ of foreign arbitration as awards and object of the New York Convention. This court’s approach was criticized by many practitioners as unjustifiable and ungrounded.

¹³ Elena Blanco, Tran Anh Dung, & Umut Turksen, ‘Evolving to Perfection?: Enforcement of international arbitral awards in Vietnam’ (2011) 11 *Journal of World Investment and Trade* 965–1017.

With efforts to settle the above mentioned discussion, Vietnamese legislators have introduced a clarification on the concept of arbitration award in the new Arbitration Law. Article 3 of the Arbitration Law stipulates that ‘arbitral decision’ means a decision of the arbitration tribunal during the dispute resolution process, while ‘arbitral award’ means the decision of the arbitration tribunal resolving the entire dispute and terminating the arbitration proceedings. Here, there are two different terms, namely ‘arbitral decision’, which is normally a procedural decision and ‘arbitration award’, which is a decision on the merits of the case.

As Vietnam has made a reservation on the interpretation of the New York Convention (Reservation No. 3), the distinction between arbitral award and arbitral decision means that only the award of foreign arbitration will be subject to recognition by the courts in Vietnam. While arbitration decision, which may also include a provisional measure, taken by the foreign arbitrators shall not be considered by the court as it does not fall under the scope of New York Convention.

It is believed that the above mentioned position can make the tasks of the courts earlier, but at the same time it might create problems for an interested party. If the party has to wait until arbitration proceeding is completed, the other party would have an opportunity to hide or transfer assets or destroy the evidence. Parties may wish to apply for preservation of assets in order to avoid disclosure after a long and expensive arbitration, that the contractor party has hid or transferred its assets. This is particularly important in Vietnam where local governments/officials may help companies to hide assets or dodge debts in case they have an economic interest. Thus, if the law recognizes and allows the courts to consider the interim measures by foreign arbitration (permitted by the laws of Vietnam), it would help to prevent the defendant from transferring or encumbering the assets, and local government and Party officials are less likely to try to prevent enforcement of the judgment.

3. Causes for refusal to recognize the foreign arbitral awards

The New York Convention provides a list of grounds for refusal of a foreign arbitral award. The judicial practice in Vietnam shows that some of the provided grounds have never been used by the courts. For example, the following issues have not been assessed by Vietnamese courts, *the*

*award deals with a different not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration*¹⁴ and where *'the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made'*.¹⁵ In the following lines, we only tackle the causes already used by judges in considering the application for recognition and enforcement of arbitral awards in Vietnam.

(a) Legal representation: In general, arbitration is based on a valid arbitration agreement by the parties. One of the main conditions for validity of an agreement is that it must be executed by a legal representative in case of representation, especially for a corporation. Thus, under Article 370.1 (a) of the Civil Proceeding Code, the foreign arbitral award is not recognized in Vietnam if *'the parties to the arbitration agreement are unable to sign the agreement in accordance with the applicable law of each party [respective jurisdictions]*. This provision corresponds to Article V.1 (a) of the New York Convention.

This provision, denying the award of foreign arbitration, is very often used in Vietnam by the losing party under the arbitral award because the arbitration agreement is often signed on behalf of a company by a person who is not a legal representative of a company (such as a deputy director, branch manager, head of division...) without being provided with a power of attorney signed by a legal representative. Some foreign arbitral awards were refused because a person who signed an arbitration agreement was not a legal representative or was not authorized to sign an agreement on behalf of a company. In order to evaluate whether a person signing the arbitration agreement is authorized to represent a Vietnamese company, judges should refer to relevant provisions of Vietnamese law, but in case it is a foreign company, they would seek the answer in the applicable law of the country of incorporation or real seat of the foreign company. This approach by the Vietnamese court is insofar applicable, if the place of incorporation is the place of a real seat of the company. Hence, when these two places are different, a judge should, in our opinion, refer to the law of a country of a company's real seat.

¹⁴ New York Convention, Art. V.1 (c).

¹⁵ New York Convention, Art. V.1 (e).

(b) Validity of an arbitration agreement: According to Article V.1 (a) of the New York Convention, *‘the recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority of the country where recognition and enforcement is sought, proof that the agreement (arbitration) is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.’* This provision is reflected in Article 370.1 (b) of the Civil Proceeding Code, which stipulates that *‘the arbitration agreement is unenforceable or invalid in accordance with the governing law, or the laws of the country in which the award was made where the arbitration agreement does not stipulate the governing law’.*

This ground for refusal was exploited in a recent case of *Amara Hotel Properties Pte Ltd. et al vs. VINA Real Estate Development Co. Ltd (VINA)*¹⁶ relating to a dispute on a sale and purchase contract, which was settled by the Singapore International Arbitration Centre (SIAC). The losing party (VINA) realized that the award had to be set aside because the arbitration agreement was not valid under Vietnamese law (specifically under Article 10 of the Ordinance on Commercial Arbitration 2003), which provides for the invalidity of the arbitration agreement where the agreement does not specify the arbitration organization. However, the Supreme People’s Court in Ho Chi Minh City rejected the argument of Vietnamese company on the ground that the winning party was able to provide evidence proving that the intention of the arbitration agreement the dispute case must be settled by SIAC as *‘the agreement was drafted in accordance with the “SIAC Model Arbitration Clause”*.¹⁷ What’s more, upon assessing the SIAC Arbitration Rules (issued on July 1, 2007), the Court further stated that *‘the procedural rules set under the relevant arbitration agreement shall only be applied under the SIAC, not any other arbitration organisation, [therefore], the arbitration proceeding conducted by SIAC conforms to the arbitration agreement as well as Vietnamese law’*.¹⁸ Therefore, the claim for refusal to recognise and

¹⁶ Decision 90/2013/QĐ KDTM-PT of the Appellate Division of the Peoples’ Supreme Court at Ho Chi Minh City.

¹⁷ *ibid.*

¹⁸ *ibid.*

enforce arbitral award due to violation of Article 10 (4) of the Ordinance on Commercial Arbitration shall be dismissed and cannot be accepted.¹⁹ Some may find the above mentioned decision confusing, but the approach of the judge, according to the author's opinion, complies entirely with the provisions of the New York Convention and the Civil Proceeding Code because it has considered the arbitration agreement under the procedural rules of arbitration centre.²⁰

(c) Notification procedure: According to Article V.1 (b) of the New York Convention, the award is in the case of refusal when '*the party against whom the award is invoked was not given a proper notice of the arbitrator or proceedings or was it impossible for any other reason, to argue its case*'. This provision corresponds to Article 370.1 (c) of the Civil Proceeding Code, which stipulates that '*the award is not subject to execution, if an individual against whom, or body or organization against which, enforcement is sought, has not been notified properly and in a timely manner of the appointment of the arbitrator or the procedures for resolving the dispute by foreign arbitration, or had reasonable cause for failing to exercise its, or his or her, right to legal proceedings*'. The requirements of the New York Convention and the Civil Proceeding Code regarding this situation are vague and therefore make courts interpret and apply the provision with a discretion. Some judges would review the notification based on foreign law, but other judges would consider this notification under the Vietnamese law only. In some cases, foreign arbitral awards have been denied on the basis of this provision. For example, a foreign arbitral award was denied by the Vietnamese courts due to the fact that the notice of the appointment of the arbitrator or arbitration proceeding had been made without knowing if he/she was entitled to receive the notice or that the notice was sent to a branch of the company which was not empowered to receive the notification on behalf of the company. To avoid the problem on recognition of arbitral award due to above mentioned grounds, the judges of the exequatur should examine a validity of the notification according to the applicable law of the arbitration because the parties

¹⁹ *ibid.*

²⁰ Do Van Dai, *L'application de la Convention de New York de 1958 par les juridictions Vietnamiennes* (2014).

chosen the arbitration must accept the requirements on notification procedure under said arbitration.

(d) Public policy consideration: According to Article V.2 (b) of the New York Convention, the recognition and enforcement of an arbitral award may also be refused if the competent authority of the country where recognition and enforcement is sought finds out that the recognition or enforcement of the award contradicts to the public policy of this country. The term ‘public policy’ is not used in Vietnamese legal system, although there is an equivalent concept in the Civil Code, Civil Proceeding Code as well as the Arbitration Law.

According to Article 68.2(d) of the Arbitration Law, the award shall be cancelled in case of its contradiction to ‘fundamental principles of Vietnamese law’. The Civil Proceeding Code also mandates the court not to recognize foreign judgment and foreign arbitration award in Vietnam when the recognition and enforcement of such judgment or award in Vietnam contradicts to the fundamental principles of Vietnamese law.²¹

In fact, Vietnamese courts have never confronted the foreign arbitral award or foreign judgment on the ground of public policy of Vietnam; but often consider if the foreign judgment or arbitral award are against the fundamental principles of Vietnamese law. In other words, the concepts of ‘public policy’ and ‘public order’ exist neither in the Vietnamese law nor in judicial practice.

It seems that Vietnamese courts limit their analyses of foreign arbitral awards just to the aspects of their confrontation to the fundamental principles of Vietnamese law. That does not contradict to the New York Convention. It can be argued that Vietnam has transplanted the concept of ‘public order’ of the New York Convention in the sense of ‘fundamental principles of Vietnamese law’.

While it is believed that the terms ‘public order’, ‘public policy’ and ‘contrary to fundamental principles of Vietnamese law’ are similar in nature and shall be interchangeable, the problem is that there is no clear definition of ‘fundamental principles of Vietnamese law’. In 2014, the Supreme Court has attempted to define the arbitration award in contrary to the fundamental principles of the Vietnamese law as *‘the ruling that violates the basic principles of treatment having overall*

²¹ Civil Proceeding Code, 370 (2) (b).

effects on development and implementation of the law” and where “*seriously jeopardises the interest of the state, legitimate interests of any part(ies), third party*”.²² However, this definition is proved to be still too abstract, so local courts have different approaches to its implementation. Some courts consider ‘fundamental principles’ as ‘general principles of a substantive law’ and thus easily decide to deny recognition of foreign arbitration awards. For instance, in *Tisco vs. Agc*, enforcement was denied by the People’s Court of Hanoi because the compensation awarded by the arbitration tribunal was ‘inadequate’ in comparison to the general requirement under the law on products quality (however neither further explanation nor reference was provided).²³ This court decision was strongly criticized by commentators, as it would virtually make breach of any principle in all areas of law as violation of fundamental principle of the Vietnamese law, which is a big deviation from the generally accepted international practice on interpretation of the concept of ‘public policy’.²⁴

(e) Court’s jurisdiction: As enforcement is a court decision, it should seek a competent jurisdiction. According to Article 35 of the Civil Proceeding Code, in case of application for recognition and enforcement in Vietnam of a decision in civil, family, economic, commercial and social spheres made by a foreign court, the competent court should be a court of the place of residence or work of the applicant individual or place of the organization’s seat, or place of the location of property involved in the implementation of that decision. This analogy is also applied in case of recognition of foreign arbitration award. Such a transfer seat poses challenges to the applicant for enforcement. For example, in the case *Tyco Services Singapore Pte Ltd v Leighton Contractors*, after receiving the award from Australian arbitration, Tyco requested the recognition and enforcement of the award in Vietnam. The application was submitted to the MOJ and was then forwarded to the People’s Court in Da Nang where the

²² Resolution 01/2014/NQ-HĐTP of the Judicial Commission of the Supreme People’s Court on interpretation of some provisions of the Arbitration Law, dated 20/03/2014, Art.14 (dd).

²³ Court Decision 06/2014/QĐ-PQTT of the Peoples Court of Hanoi, dated 29/8/2014.

²⁴ Do Van Dai, ‘Setting aside arbitral award: Shortcomings and Resolutions’ in *Conference on “Refusal to Recognise the Arbitral Award”* (Ho Chi Minh City University of Law 2015).

losing company was headquartered. However, the Da Nang People's Court refused to hear the case because the company moved its headquarters in Ho Chi Minh City. The record was finally sent to the People's Court of Ho Chi Minh City. The seat to be considered to determine the jurisdiction of the local court is the current headquarter of the party to carry out the sentence and not the seat at the time of the contract.

(f) Authorized an representative for the applicant in the proceeding: According to the Arbitration Law, the party requesting the recognition for enforcement of the arbitral award is entitled to authorize a representative to act on its behalf at the proceeding (from the moment of submission of the application, supplement the dossiers, attending the meetings or hearing, obtaining the summons by the court and making appeal). This regulation on legitimate representative can be interpreted in broad sense to include both individuals and law firms. However, according to Civil Proceeding Code, involved parties shall be entitled to appoint individual as their representative in litigation proceeding. The Vietnamese courts do not accept appointment of an organisation, i.e. law firm, as an authorised representative in litigation proceeding.²⁵ The same approach is applicable by the courts in regard to proceeding of recognition of foreign arbitral award. Many foreign companies that do not know about this requirement have faced difficulties upon requesting for enforcement in Vietnam. In 2013, Hanoi People's Court dismissed the application for recognition and enforcement of the arbitral award on the grounds that under Vietnamese law the representative must be an individual, but a corporation cannot act as legitimate representative in the proceeding.

(g) Burden of proof in case of refusal to enforce the award: Except for cases of refusal related to public policy and arbitrability where the judges shall act on their own, the New York Convention provides that it deems to enforce the award party to 'provide the competent authority of the country where recognition and enforcement is sought, proof' (Article V.1). The Civil Proceeding Code, hence, is silence on this issue and thus is not specified which party must provide the proof.

²⁵ Nguyen Cong Phu, 'Practice of recognition and enforcement of foreign arbitral award at the People's Court of Ho Chi Minh City' in *Conference on 20 years of implementation of New York Convention 1958 on recognition and enforcement of foreign arbitral award, organized by Ministry of Justice*, (HCMC 2014).

Theoretically, based on the Constitution and the Law on conclusion, accession to and implementation of treaties assessment if there is a difference between the rules of the Civil Proceeding Code and the New York Convention regulating the same matter, the provisions of the Convention shall prevail.²⁶ To that end, the court may put the burden of proof on the party seeking for the refusal of enforcement of the award. However, in practice, as the judges would usually refer to regulations in the Civil Proceeding Code, while Article 370 of the Code does not specify which party shall bear the burden of proof, some judges have a position that the party to request recognition or enforcement of award shall have a burden of proof that the other party, obliging to perform the award, is duly notified by the arbitration. If that party does not certify the timely receipt of such notification, the arbitration award cannot be enforced, unless the party, requesting the enforcement of the award, can prove the opposite.²⁷ This practice, in fact, is not in the light of Article V of the New York Convention and therefore must be regulated by the law.

(h) Piercing the corporate veil: In some cases companies try to avoid liability by means of dissolution or reorganization when the company ceases to exist ending up as a hollow shell with only debts and no assets. Other times, a subsidiary will turn out to have no assets, because the assets have been transferred to sister companies, or because the parent company has kept the subsidiary undercapitalized. Claiming party therefore aims to collect debts from newly created companies, the sister companies, the parent company, or the owners of the companies. In such a case, the Arbitration Law provides that where an enterprise as legal person is consolidated, divided, merged, its rights and obligations shall be enjoyed and assumed by the new organization that results from the change.²⁸

The law, however, does not provide general criteria for piercing the corporate veil or determining when one person or company will be held responsible for the liability of another. It does, however, provide some guidelines for specific circumstances that will be useful for the parties within the enforcement of their awards. For instance, the guidelines of the

²⁶ Constitution 2013, Art. 12; Law on conclusion, accession to and implementation of treaties, Art. 6 (1).

²⁷ *ibid* (n 16).

²⁸ Arbitration Law, Art. 5 (3).

Supreme People's Court provide that where the respondent is unable to pay the amount owed, the applicant may obtain payment from the entity that established the respondent if the establishing entity's contribution of registered capital into the respondent was not paid in full or it withdrew some of its registered capital from the respondent. Similarly, if the respondent is unable to pay the award amount, because assets have been transferred without compensation to the department in charge or to the establishing entity, the applicant may seek compensation from such entities up to the amount of the value of such assets. Companies shall also be responsible for the liability of their branches.

IV. CONCLUSION

The recognition and enforcement of arbitral awards is of fundamental importance in the arbitral process. Proper recognition and enforcement of arbitral awards serves both as a means of ensuring the effectiveness of the arbitral process, and also as a key factor favouring the use of arbitration in preference to other modes of dispute resolution.²⁹ Parties choose arbitration as a dispute resolution process with the expectation that, absent a settlement, an award will be rendered at the end of the arbitral process. The end-product of the arbitral process, the award, is clearly of utmost importance for the parties, and the winning party expects the award to be performed without undue delay. Unless parties can be guaranteed that the award will be enforced at the end of the arbitral proceedings (if not complied voluntarily), 'the award in their favour will be only a pyrrhic victory' and would render the arbitral process largely meaningless. Put another way, there is '*no point in having arbitration friendly laws, well drafted arbitration rules, and competent arbitrators and counsel, if no effective enforcement mechanism is available, whether or not it is actually used*'.³⁰

²⁹ Lord Mustill, 'The History of International Commercial Arbitration' in Lawrence Newman & Richard Hill (eds), *The Leading Arbitrators' Guide to International Arbitration* (Juris Publishing 2004) 12.

³⁰ J Gillis Wetter, 'The Present Status of the International Court of Arbitration of the ICC: An Appraisal' (1990) 91 1 (American Review on International Arbitration) 25.

There exist many reasons for Vietnam's arbitral award enforcement problem, some of which apply, to one degree or another, to enforcement difficulties in other areas of law as well. Culture and tradition play their role, as evidenced in an enduring emphasis on settlement, the lack of respect for law, and the continued reliance on relationships often to subvert the legal process.

Ultimately, the institutional reasons must be analyzed for the improvement of enforcement. Working on with the rules will not address many of the more fundamental obstacles to enforcement, which are economic or institutional in nature. Deeper reforms are required. Nevertheless, there are a number of ways in which the regulatory framework could be strengthened that could make enforcement easier in some cases.

The rules regarding the grounds for refusal should be also reduced. As a criteria for refusal of recognition and enforcement of foreign arbitral award under Article V of the New York Convention is generally vague, the harmonizing such rules with the national law, does not help to promote the arbitration. The current regulations of the Civil Proceeding Code give too much discretion to judges in their recognition for enforcement of the foreign arbitral awards. As a part of the New York Convention laying the arbitral awards enforcement on the courts and too much dependence of that enforcement on judges undermines the effectiveness of the Convention. What's more a criteria for refusal of foreign arbitral awards should be more concrete and precise. Specifically, Article 370 of the Civil Proceeding Code must be amended to specify that the burden of proof must be put on the party requesting for refusal of recognition of arbitral award.

Another crucial issue that continues to bother foreign investors is the lack of guidance on what constitutes 'fundamental principles of Vietnamese law' (or public order/policy). For a long time there has existed a concern that Vietnamese courts would find the enforcement of virtually any award against a Vietnamese party violating the public order/policy. Such fears were not absolutely groundless. In many cases the court appears to have interpreted the Arbitration Law's reference to 'fundamental principles of Vietnamese law' as including domestic concepts of law and order. This is quite different from the generally accepted practice in the enforcement of international arbitral awards, where 'public policy' is assessed by the

court within the meaning of retaining social order.³¹ It is believed that the court's more expansive interpretation of 'public policy' likely will be a source of concern for international commercial parties assessing the reliability of arbitration award enforcement in Vietnam. To that end, it may be advisable that the Arbitration law and civil procedural law start applying the commonly known term of 'public policy'. The Supreme People's Court, on the other hand, must continue providing guidelines on implementation of concept of 'public policy' and supervise strictly the local courts' practice in implementing the concept with regard to recognition of foreign arbitration award.

The existing application mechanism should also be improved. The proceeding on recognition and enforcement of international/foreign arbitral awards could be more 'speedy' and efficient. The two-step process with involvement of MOJ is necessary to be removed. What's more, the current MOJ's decision-making process is lack of transparency. There is no hearing, and parties are not allowed to submit documents in support of their position. At least the parties should be notified that their case has been forwarded to the court and given an opportunity to provide additional documentation if they desire so.

The Supreme People's Court could further improve the situation by stipulating more clearly the time limits for each stage of the process and ensure the deadlines apply to all types of awards. It should also provide clearer guidelines as to what constitutes 'special circumstances', limit the circumstances under which deadlines may be suspended, and should require a hearing to extend a deadline. The court, at least, should be required to set forth the facts and reasoning in support of its decision. The parties should be then able to appeal the court's decision.

Predicting how Vietnam will end up is quite a 'risky' business. The road ahead is likely to be a long and bumpy one, but at least the way forward seems clear. Without deeper institutional reforms Vietnam would hardly be able to overcome its enforcement problems. Whether Vietnam's leaders have enough political will to carry out deeper

³¹ Michael Hwang S.C, 'Recognition and Enforcement of Arbitral Award' in Michael Hwang (eds), *Selected Essay on International Arbitration* (Academy Publishing 2013) 237–304; Alan Redfern et al, *Law and Practice of International Commercial Arbitration* (5th edn, OUP 2009) 103.

institutional reforms or not remains to be seen. In the meantime they can start by tightening the rules for enforcement and patching up holes in the regulatory framework.

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