



ENFORCEMENT OF ARBITRAL AWARDS IN VIETNAM: THEORY AND PRACTICES

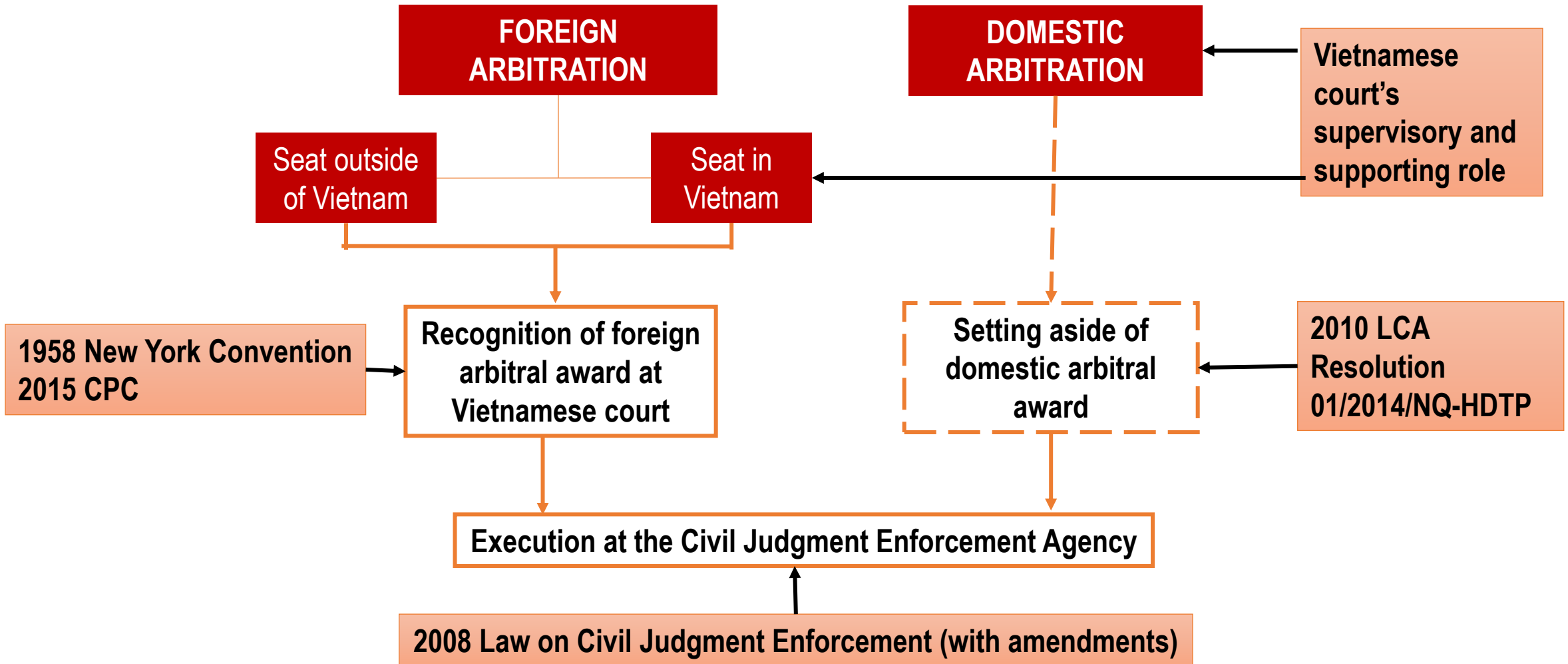
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1. CONTENT



- I. Arbitrability Exception
- II. Public Policy Exception
- III. Staying the enforcement of awards pending the challenge of an enforcement order
- IV. Enforcement Of Award Which Is Being Requested For Setting Aside, Or Set Aside
- V. Correct the mistakes to eliminate the grounds for setting aside the arbitral awards aside
- VI. Recommendations
- VII. Interest

2. COMPARATIVE CHARTS





Non-arbitrability as a ground to resist enforcement under Vietnamese laws

Grounds to set aside domestic arbitral awards

- **Art. 68.2 LCA**

- a/ There is no arbitration agreement or the arbitration agreement is invalid;

- c/ The dispute does not fall within the arbitration tribunal's jurisdiction

- **Article 3 of the Resolution 01/2014**

An arbitration agreement is void if *“The dispute arises in a sector where arbitration is incompetent”* or *“The person who entered into the arbitration agreement lacked authority to sign as provided by law”*

Grounds for non-recognition of foreign arbitral awards

- **Art. 459.1 CPC 2015**

- a) The parties of the arbitration agreement do not have capacity to conclude such agreement according to law applicable to each party;

- b) The arbitration agreement is not legally effective according to the law of a country which is chosen to be applied or according to the law of where the award is made in case the parties cannot choose a law to be applied to such agreement;

- **Art. 459.2 CPC 2015**

- a) According to Vietnam's law, the dispute shall not be settled by arbitration;



Objective arbitrability (types of disputes)

Article 2 of the 2010 Law on Commercial Arbitration (“LCA”)

1. Disputes among parties which arise from **commercial activities**;
2. [...]
3. Other disputes among parties which are stipulated by law to be settled by arbitration.

Article 3.1 of the 2005 Law on Commerce

Commercial activity means activity for profit-making purposes, comprising purchase and sale of goods, provision of services, investment, commercial enhancement, and other activities for profitmaking purposes.

- Matters such as criminal, administrative, and matrimonial disputes are considered to be non-arbitrable.
- Tort claims can not be arbitrable. However, reportedly there has been a tort claim such as collision claim resolved by arbitration in Vietnam.



5. ARBITRABILITY

Objective arbitrability

Decision No. 755/2018/QD-PQTT dated 12 June 2018 of the People's Court of Ho Chi Minh City

The employer and the employee signed an employment contract and a non-disclosure agreement (NDA). The employer sued the employee to the VIAC for a violation of the NDA. During the setting aside proceeding, the employee raised that, as this dispute about the NDA was a labor dispute, it was non-arbitrable.

Court s' ruling:

- *The employer is **engaging in commercial activities** pursuant to the Law on Commerce → Article 2(2) of the Law on Commercial Arbitration is satisfied*
- *In its statement of defence and during the arbitration proceedings, the employee asserted that the NDA was completely separate from and not a part of the employment contract → No ground for non-arbitrability → The arbitral tribunal has the jurisdiction to resolve a dispute.*



Objective arbitrability (exclusive jurisdiction)

Article 470 of the CPC 2015- Exclusive jurisdiction of Vietnamese Courts

1. The following civil lawsuits involving foreign elements shall fall under the exclusive jurisdiction of Vietnamese courts:

- a) *Dispute involving rights to immovable properties in the Vietnamese territory;*
- b) *Divorce case between a Vietnamese citizen and a foreign citizen or a stateless person if both spouses reside, work or live permanently in Vietnam;*
- c) *Other disputes where parties are allowed to choose Vietnamese Courts to settle according to Vietnamese law or International treaties to which the Socialist Republic of Vietnam is a signatory and parties agreed to choose Vietnamese Courts.*

→ **Exclusive jurisdiction of Vietnamese courts against foreign courts? OR Exclusive jurisdiction of Vietnamese courts against arbitration ?**



Objective arbitrability

Article 470 of the 2015 Civil Procedure Code (“CPC”)

Decision No.86/2012/QDPT-KDTM dated 20 February 2012 of the High Court in Ho Chi Minh City:

The dispute concerns the assignment agreement related to capital contribution in form of the right to use land, which is immovable property within the territory of Vietnam => the Court declared that the arbitration agreement under the contract is null/ void since the matter **falls within the exclusive jurisdiction of Vietnamese Court.**

Decision No. 1222/2014/QD-PQTT dated 14 October 2014 of the People’s Court of Ho Chi Minh City:

*“A dispute arose from a contract signed by two companies with legal capacity, the purpose of which is to lease land [land-use right] to build manufacturing factory is [...] **in compliance with Article 2 [.2] of the LCA and Article 3.1 of the Law on Commerce [...]**” => the Court declined the application to set aside a VIAC Arbitral Award;*



Subjective arbitrability (signatory)

Article 2 of LCA- Arbitration's jurisdiction to settle disputes

2. Disputes among parties at least one of whom conducts commercial activities.

→ Non-commercial parties: under Art 76 of the 2015 Civil Code, including State authorities

→ Legal capacity: Article 18 of the LCA, Article 3.2 and 3.3 of Resolution 01/2014

[...]

2. The person who entered into the arbitration agreement lacked authority to sign as provided by law;

3. The signatory to an arbitration agreement lacks legal capacity;



Subjective arbitrability

Decision No. 25/2018/QDKDTM-PT dated 28/06/2018 of the High Court in Ho Chi Minh City

Fact: Company C and Company P signed a Contract for purchasing of oil. The person signed the Contract on behalf of Company P is Ms. Phuong, who is not legal representative or is authorized by the legal representative of the Company P. Since company P failed to perform the Contract, Company C commenced an arbitration at the Swiss Arbitration Centre to resolve the dispute

Ruling: Pursuant to Article 3.2 of Resolution 01/2014, *“The person who entered into the arbitration agreement lacked authority to sign as provided by law”* is any signatory who was not a legal representative or not a legally authorized representative or was a legally authorized representative but acted beyond his power. As a result, the arbitration agreement is null and void Article 18.2 of LCA => refused to recognise and enforce the award pursuant to Article 459.1.a of CPC 2015



International framework

Article V(2)(b) of the Convention:

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) [...]

(b) The recognition or enforcement of the award would be contrary to **the public policy** of that country.

- The notion of public policy was not defined in the New York Convention and the UNCITRAL Model Law
- According to General Report of IBA on The Public Policy Exception in the New York Convention, the definitions of public policy generally refer to:
 - **In civil law countries:** the basic principles or values upon which the foundation of society rests, without precisely naming them or
 - **In common law countries:** more precisely identified, yet very broad, values, such as justice, fairness or morality.
 - Public policy is different from domestic mandatory laws



Vietnam's legal framework

Fundamental principles of Vietnamese law as a ground for setting aside a Vietnamese award:

“Arbitral award which is contrary the fundamental principles of Vietnamese laws is the arbitral award violates the principles of fundamental conduct with universal effect on the formulation and implementation of Vietnamese law.”

“Court only sets aside the arbitral award after it has shown that the arbitral award is **contrary to one or more fundamental principles of Vietnamese law** which the arbitral tribunal failed to implement when making the award and that the arbitral award seriously infringes upon the interests of the State, the legitimate rights and interests of one or more parties or a third party”

(Article 14.2.dd of Resolution 01/2014 of the Supreme People's Court)



Vietnamese Court's perspective

- **Normally accepted that the party autonomy principle and the independence & impartiality principle are fundamental principle of Vietnamese laws**

Decision No. 01/2015/DSPT-QD dated 13 January 2015 by Supreme People's Court - Allenberg vs. Son Nam (ICA award):

+ The fundamental principle: party autonomy stipulated in Art 4 Civil Code, Art 388 Civil Code, Art 11 Commercial Law

+ The sales contract containing the arbitration agreement was not signed by the award debtor → by recognizing the existence of the sales contract and the arbitration agreement, the arbitral award does not ensure the discretion, volunteerism of the parties in conclusion of the sale contract due to the unilateral compulsion from the seller, which is contrary to the fundamental principles of Vietnamese laws, harming the award debtor → the Court refused for recognition and enforcement in Vietnam.



Vietnamese Court's perspective

- The Courts often rely on this exception to review the substantive of the case

Decision No. 07/2014/QDST-KDTM dated 15 September 2014 by Hanoi Court

“The award contravenes the following fundamental principles of Vietnamese laws:

- *Fail to consider the voluntary agreement of the parties at the economic contract concluded by the parties (Violate Article 4 of the [2005] Civil Code)*
- *Fail to apply any particular legal instruments of Vietnam when making the award (Violate Article 11 of the [2005] Civil Code)”*



Vietnamese Court's perspective

- **NOT** have an uniform application, and could be interpreted and applied arbitrarily by the judges handling the case

Decision No. 04/2020/QD-PQTT dated 29 May 2020 by Hanoi Court

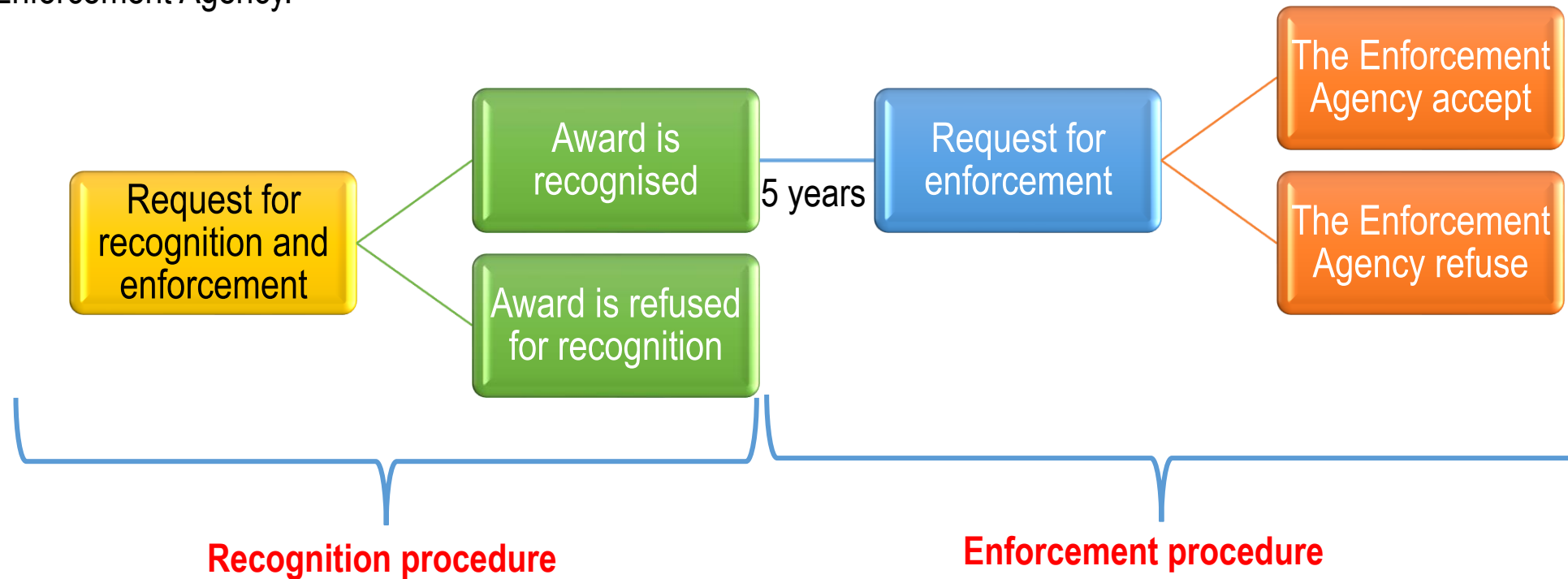
The arbitral tribunal failed to collect documents and evidence at the request of the Claimant, which is contrary to Articles 46.2, 19.2, 4.2 & 4.3 of the LCA; → contrary to fundamental principles of Vietnamese laws

Decision No. 09/2020/QD-PQTT dated 16 September 2020 by Hanoi Court *the arbitral tribunal has considered and fully commented on the above [substantive] matter in the arbitral award and this is also the merit of the case, the court shall not review the content of the case in accordance with Article 71 of the Law on Commerce.*

15. STAY OF ENFORCEMENT OF AWARD PENDING THE CHALLENGE OF AN ENFORCEMENT ORDER

Vietnam's legal framework

Under Vietnamese laws, the enforcement procedure is separated from the recognition procedure and will be conducted by the State Enforcement Agency.



16. ENFORCEMENT OF AWARD WHICH IS BEING REQUESTED FOR SETTING ASIDE, OR SET ASIDE

Legal framework

New York Convention	Vietnam's legal frame work	
	Domestic arbitration	International Arbitration
<p>Article V.1(e) of New York Convention</p> <p>1. 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 where the recognition and enforcement is sought, proof that:</p> <p>(e) 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</p>	<p>Article 66 of LCA- Right to apply for enforcement of arbitral award</p> <p>1. If on expiry of the time-limit for carrying out an arbitral award the award debtor has not voluntarily carried out the award and has not requested that the award be set aside pursuant to article 69 of this Law, the arbitral award creditor shall have the right to request the competent civil judgement enforcement agency to enforce such award.</p> <p>=> Could only be enforced if the arbitral award is not set aside</p>	<p>Article 459 of CPC 2015- Cases of non-recognition</p> <p>[...]</p> <p>e) The foreign arbitrator's award has not taken compulsory legal effect on parties;</p> <p>g) The enforcement of the foreign arbitrator's award has been canceled or terminated by a competent agency of the country where such award is made or the home country of the law that is applied.</p>

17. STAY OF ENFORCEMENT OF AWARD PENDING THE CHALLENGE OF AN ENFORCEMENT ORDER



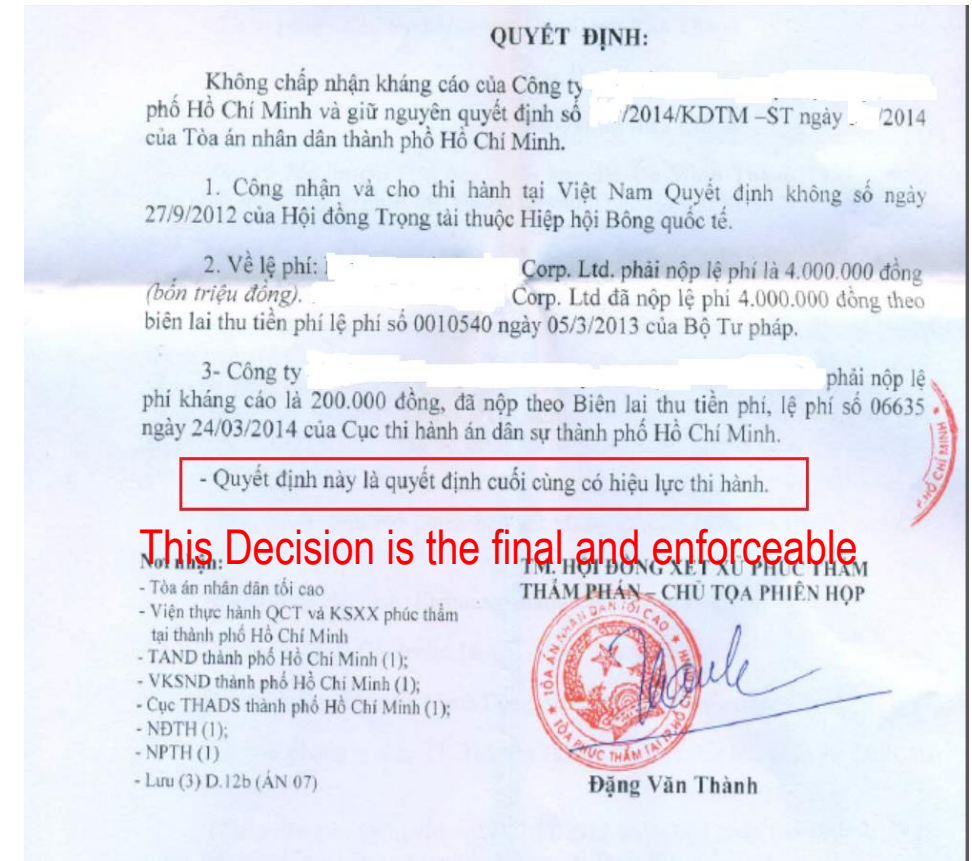
Vietnam's legal framework

Domestic arbitral awards

- The arbitral tribunal will have to issue the final award written with the phrase “For enforcement” (Art. 27 LECJ)
- Ad-hoc arbitral award: must be registered at the competent court within 1 year as from the date of issuance (Art. 62.2, Art.66.2 LCA)

Foreign arbitral awards

- The Court issued the decision to recognize and enforce the award shall send such decision to the competent enforcement agency



18. ENFORCEMENT OF AWARD WHICH IS BEING REQUESTED FOR SETTING ASIDE, OR SET ASIDE



Vietnam's legal framework

Recognition procedure

- Art 457.2 CPC *“The court shall issue the decision to adjourn the proceedings if...the foreign arbitral award is being reviewed by a competent agency of the country where the award is made”*

Enforcement procedure

- **Award is being requested for setting aside:** the Court issued the decision to recognize and enforce the award shall request the Head of Civil judgment enforcement agency to issue decision to suspend the enforcement of the award. => Head of the Civil judgment enforcement agency shall issue a decision to suspend the enforcement of the award (Art 463.1 of CPC)
- **Award is set aside or terminated:** the Court issued the decision to recognize and enforce the foreign arbitrator's award shall issue a decision to repeal such decision and send such decision to involved parties, persons with relevant interests and duties, and the civil judgment enforcement agency. => Head of the Civil judgment enforcement agency shall issue a decision to terminate the enforcement of the foreign arbitrator's award (Art 463.2 of CPC)

19. ENFORCEMENT OF AWARD WHICH IS BEING REQUESTED FOR SETTING ASIDE, OR SET ASIDE



Vietnamese Court's practice

Decision No. 04/2013/QDST-DS dated 17 June 2013 by Binh Thuan Court (the award of ICAC at the RF CCI):

The Russian court issued a decision to stay enforcement of the award until the end of the proceedings at the court of appeal → The Court temporarily suspended the consideration of the request for recognition and enforcement of the award in Vietnam.

Decision No. 01/2013/QDST-KDTM dated 18 September 2013 by Binh Thuan Court (the award of ICAC at the RF CCI):

The award is set aside by the Russian court → The Court dismissed the request for recognition and enforcement of the award in Vietnam

20. ENFORCEMENT OF AWARD WHICH IS BEING REQUESTED FOR SETTING ASIDE , OR SET ASIDE



Security pending the annulment proceedings

- There is no regulation on whether the national courts in adjourning enforcement proceedings pending the annulment proceedings, will order suitable security to be furnished by the award debtor to the award creditor
- If the arbitral award is recognized by Vietnamese court and transferred to the Enforcement Agency for coercive enforcement, Head of the civil judgment enforcement agency may take security measures that are necessary for the continuing of the enforcement of foreign arbitrator's ward (**Art 463.1.3 of CPC 2015**).
- Measures to secure judgment enforcement include (**Art 66 of LECJ**)
 - a/ Freezing accounts;
 - b/ Seizing assets and papers;
 - c/ Staying registration, transfer or change in the current state of assets.”

21. CORRECT THE MISTAKES TO ELIMINATE THE GROUNDS FOR SETTING ASIDE THE ARBITRAL AWARDS



Vietnam's legal framework

Art 71.7 of LCA-Hearing by court of petition requesting arbitral award be set aside

*The council of judges may, at the request of a party and if the council considers it appropriate, adjourn a petition to set aside an arbitral award for **a period not to exceed sixty (60) days** in order to facilitate the arbitration tribunal in rectifying what in the opinion of the arbitration tribunal were **errors in the arbitration proceedings**, thereby removing the grounds for setting aside the arbitral award. The arbitration tribunal must notify the court when it has rectified errors in the arbitration proceedings. If the arbitration tribunal does not rectify errors in the proceedings, then the council of judges shall continue to hear the petition to set aside the award.*

22. CORRECT THE MISTAKES TO ELIMINATE THE GROUNDS FOR SETTING ASIDE THE ARBITRAL AWARDS

Vietnam's legal framework

Notably, failing to consider some issues should not be a ground for setting aside or non-recognition of the arbitral award (award rendered *infra petita*)

Grounds to set aside domestic arbitral awards

- **Art. 68.2 LCA**
 2. An arbitral award shall be cancelled in any of the following cases:
 - (c) The dispute **was not within** the jurisdiction of the arbitration tribunal [...]

Grounds of non-recognition of foreign arbitral awards

- **Art. 459.2 CPC 2015**
 2. The foreign arbitrator's award shall not be recognized is the Vietnam's Court deems that:
 - d) *The foreign arbitrator's award over a dispute is **not requested** to be settled by any parties or **exceeds** the request of parties of the arbitration agreement. [...]*

23. CORRECT THE MISTAKES TO ELIMINATE THE GROUNDS FOR SETTING ASIDE THE ARBITRAL AWARDS



Vietnamese Court's practice

Decision No. 971/2017/QD-PQTT dated 02 August 2017 by Ho Chi Minh City Court:

- One of the reason for the Respondent to request for setting aside of the award is the award deals with another contract not falling within the terms of the submission to arbitration. On 10 July 2017 VIAC issued a document to correct the award and fix the mistake related to this matter.
- **Court Decision:** Accept that the arbitral tribunal might issue decision to fix the mistake related to the content of the case/award



1. Power of the tribunal to grant interest

- The LCA does not provide for any rules on the awarding of interest whether being pre-award or post-award interest.
- The arbitral tribunal can determine the interest pursuant to the applicable substantive law.
- By implication, being a substantive matter, interest should not be granted on the tribunal's own initiative but based on the request from the parties.

25. INTEREST

2. Basis to calculate interest

Pre-award interest

The court's decisions on the Recognition and Enforcement of Foreign Arbitral Awards only state the enforceability of the whole content of arbitral awards within Vietnamese territory

=> no pre-award interest rendered by the local Courts



2. Basis to calculate interest

Post-award interest

Article 357 of the 2015 Civil Code; “Liability for late performance of obligation to make payment” read together with Article 468 “Interest rates”

→ If the parties fail to agree on the interest rate, the rate shall be fixed at 10% per year.

27. RECOMMENDATIONS

- ✓ **Engaging with experienced lawyers in the place where the award shall likely be enforced from the beginning of the arbitral proceedings for precautions and minimize the risk of non-recognition;**
- ✓ **Do not commence an arbitration proceedings without a company search against the debtor (asset and legal status);**
- ✓ **Insert a communication clause in the contract and using local bailiff for service of documents in *ex-parte* proceedings;**
- ✓ **Present the case to achieve an arbitral award taking into account of enforcement risks.**
- ✓ **Preparing an affidavit/ legal opinion if necessary**
 - Regarding the capacity of the foreign party under the law applicable to them;
 - Regarding the arbitration agreement under the law applicable to the arbitration agreement/ or the law of the seat;
 - Regarding the finality and the binding effect of the arbitral award under the Arbitration Rules and the law of the seat
- ✓ **Request the arbitral institution/ or the competent authority (such as Court/ Notary Public, etc) to verify the validity or enforceability of the ad-hoc award.**

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