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Global Legal Group

# The International Comparative Legal Guide to: International Arbitration 2011

## A practical cross-border insight into international arbitration work

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# The International Comparative Legal Guide to: International Arbitration 2011

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# Vietnam

Michael Lee



Doan Ngoc Tran



Tilleke & Gibbins

## 1 Arbitration Agreements

### 1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of Vietnam?

The current Law on Commercial Arbitration of Vietnam of 2010 requires that an arbitration agreement must meet the following requirements:

- (a) it must be in writing;
- (b) it must only be applied for disputes under the competence of the arbitration tribunals;
- (c) it must be entered into by a competent person who has full capacity for civil acts;
- (d) the parties are not deceived, threatened, or coerced into entering such arbitration agreement; and
- (e) such arbitration agreement does not violate a prohibition as stipulated by law.

### 1.2 What other elements ought to be incorporated in an arbitration agreement?

Besides the legal requirements as stated in question 1.1, the following elements ought to be incorporated into an arbitration agreement:

- (a) language to be used in the arbitral proceedings;
- (b) location for dispute resolutions; and/or
- (c) number of arbitrators.

### 1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

Where the parties already have a legally binding arbitration agreement but one party initiates court proceedings, the court shall refuse jurisdiction, unless the arbitration agreement is void or unenforceable.

## 2 Governing Legislation

### 2.1 What legislation governs the enforcement of arbitration proceedings in Vietnam? Were there any significant changes made to that arbitration legislation in the past year?

The main pieces of legislation governing arbitration in Vietnam include the following:

- (a) Law No. 54/2010/QH12, dated 17 June 2010, of the Vietnamese National Assembly on Commercial Arbitration (Law on Commercial Arbitration). This law took full effect on 1 January 2011; and
- (b) Resolution No. 05/2003/NQ-HDTP, dated 31 July 2003, of the Supreme Court's Judges Committee, providing guidelines for the implementation of a number of provisions of Ordinance on Commercial Arbitration (Resolution No. 05).

The major change in the legislation on arbitration in Vietnam last year was the adoption of the Law on Commercial Arbitration.

### 2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

Yes, the Law on Commercial Arbitration governs both domestic and international arbitration proceedings.

### 2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

Yes, the UNCITRAL Model Law is one of the significant sources of reference on which the Law on Commercial Arbitration is based. Specifically, several provisions of the Law on Commercial Arbitration are from UNCITRAL, such as the jurisdiction of the arbitration tribunal to collect evidence, summon witnesses, order interim relief, or instances for setting aside arbitral awards.

### 2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in Vietnam?

The Law on Commercial Arbitration allows the parties' independence in selecting the forum for dispute settlement by arbitration. Additionally, the following mandatory rules must be complied with in domestic/international arbitration proceedings:

- (a) arbitrators must respect the agreement of the parties if such agreements do not violate any laws or are not contrary to "social morals";
- (b) arbitrators must be independent, objective, and impartial, and comply with the applicable law;
- (c) parties in dispute shall have equal rights and obligations and arbitration tribunals shall be responsible in facilitating the parties' rights to exercise and discharge their obligations;
- (d) arbitration proceedings shall be conducted in private; and
- (e) an arbitral award shall be final and binding.

### 3 Jurisdiction

#### 3.1 Are there any subject matters that may not be referred to arbitration under the governing law of Vietnam? What is the general approach used in determining whether or not a dispute is “arbitrable”?

Article 2 of the Law on Commercial Arbitration limits an arbitral tribunal’s jurisdiction to the following disputes:

- (a) disputes between parties arising from commercial activities;
- (b) disputes arising between parties where at least one party is engaged in commercial activities; and
- (c) other disputes between parties which the law stipulates shall/may be resolved by arbitration.

Under governing law, commercial activities are defined as activities for profit-making purposes.

#### 3.2 Is an arbitrator permitted to rule on the question of his or her own jurisdiction?

Generally, yes. However, it is subject to the mandatory rules mentioned in question 2.4(a) and 2.4(b).

#### 3.3 What is the approach of the national courts in Vietnam towards a party who commences court proceedings in apparent breach of an arbitration agreement?

The court must refuse the handling of a case on the grounds that it is beyond the court’s jurisdiction, unless the arbitration agreement is void or unenforceable.

#### 3.4 Under what circumstances can a court address the issue of the jurisdiction and competence of the national arbitral tribunal? What is the standard of review in respect of a tribunal’s decision as to its own jurisdiction?

When a claimant sends the statement of claim to a court, and such court discovers that the matter in dispute is under the arbitral tribunal’s jurisdiction, the court shall refuse to accept the case.

Section 1.1 of Resolution No. 05 states that a court shall take the following steps:

First, questioning the claimant regarding whether there was an arbitration agreement between the parties prior to or after the dispute arising.

Second and simultaneously, verifying that all the materials attached indeed affirm that an arbitration agreement was in place between the parties.

In cases where, only after having accepted jurisdiction, a court discovers an arbitration agreement was entered into between the parties, based on the provisions of the Civil Proceedings Code of 2004, such a court shall suspend resolution of the case and remand the case to the concerned parties.

A court may only accept jurisdiction in cases where the arbitration agreement is invalid or unenforceable. According to Article 18 of the Law on Commercial Arbitration, an arbitration agreement is deemed invalid in the following situations:

- (a) the dispute arises in a sector outside the competence for arbitration prescribed in Article 2 of this Law;
- (b) the person who entered into the arbitration agreement lacked authority as stipulated by law;
- (c) the person who entered into the arbitration agreement lacked legal capacity pursuant to the Civil Code of 2005;

- (d) the form of the arbitration agreement does not comply with Article 16 of this Law;
- (e) one of the parties was deceived, threatened, or coerced during the process of formulation of the arbitration agreement and requests a declaration that the arbitration agreement is null and void; and
- (f) the arbitration agreement breaches a prohibition prescribed by law.

Unfortunately, the Law on Commercial Arbitration fails to provide what constitutes an unenforceable arbitration agreement.

#### 3.5 Under what, if any, circumstances does the national law of Vietnam allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

The laws of Vietnam do not allow for assumption of jurisdiction by arbitrators, unless specifically agreed to by non-parties.

#### 3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in Vietnam and what is the typical length of such periods? Do the national courts of Vietnam consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

The limitation periods for the commencement of arbitrations in Vietnam are governed by the Law on Commercial Arbitration. Such periods, unless otherwise stipulated by special law, shall last for two years from the date on which a party’s lawful rights and interests are considered violated.

#### 3.7 What is the effect in Vietnam of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

According to Article 27 of the Law on Bankruptcy of 2004, once a court opens bankruptcy proceedings, claims against the bankrupt entity shall not be accepted by either the relevant court or arbitration centre (as the case may be). Creditors must send their demand letters to the liquidators for settlement in accordance with the bankruptcy process. If the bankrupt entity is a creditor, then the liquidators shall send the demand notice to its debtors for payment. There is no statutory process for the liquidators to make claims against the debtors either before the court or arbitration centre.

Article 57.2 of the same Law stipulates that in cases where an entity is either the plaintiff or defendant to a civil lawsuit and then it becomes bankrupt, the court that handled the lawsuit must then suspend the case and deliver the same to the court currently in charge of the bankruptcy proceedings for settlement. The law is silent as to whether suspension would similarly apply to matters in arbitration proceedings. However, the suspension of the arbitration hearing should occur as a matter of the general application of the law.

### 4 Choice of Law Rules

#### 4.1 How is the law applicable to the substance of a dispute determined?

Choice of law rules in Vietnam are provided as follows:

- (a) the law of Vietnam shall be applied for disputes without a foreign element;
- (b) the law as chosen by the parties shall be applied for disputes

with a foreign element;

- (c) the most appropriate law as decided by the arbitral tribunal shall be applied for disputes with a foreign element if the parties fail to agree on the applicable law; or
- (d) international customs as decided by the arbitral tribunal shall be applied where the law of Vietnam or the law as chosen by the parties does not contain specific provisions related to the matters in dispute, provided that such application and the consequences thereof are not contrary to the fundamental principles of the law of Vietnam.

A “foreign element” is defined as a relation in which at least one of the related parties is a foreign body, organisation, or individual, or is a Vietnamese residing overseas; or a transaction between the related parties being Vietnamese citizens or organisations but the basis for the establishment, modification, or termination of such transaction was the law of a foreign country; or such dispute arose in a foreign country, or the assets involved in the dispute are located in a foreign country.

#### 4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

Under the following circumstances, Vietnamese laws shall prevail:

- (a) a contract which is entered into in Vietnam and performed entirely in Vietnam must comply with the laws of Vietnam; and
- (b) a contract relating to real property located in Vietnam must comply with the laws of Vietnam.

#### 4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

Unless otherwise agreed to, the governing law is also the law governing the formation, validity, and legality of an arbitration agreement.

### 5 Selection of Arbitral Tribunal

#### 5.1 Are there any limits to the parties' autonomy to select arbitrators?

Under Article 42.1 of the Law on Commercial Arbitration, the parties cannot appoint an arbitrator who:

- (a) is a relative/representative of a party;
- (b) has an interest related to the dispute;
- (c) is not impartial/objective based on clear grounds; or
- (d) was a mediator, representative, or lawyer for either of the parties prior to the dispute being brought to arbitration resolution, unless the parties provide written consent.

#### 5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

Either party, *sua sponte*, shall have the right to request a competent court or the chairman of an arbitration centre to appoint an arbitrator.

#### 5.3 Can a court intervene in the selection of arbitrators? If so, how?

Yes, courts may intervene in the selection of arbitrators. Regarding

disputes settled by an *ad hoc* arbitral tribunal, at the request of the parties, a court may help appoint an arbitrator as follows:

- (a) the claimant shall have the right to request a competent court to appoint an arbitrator for the respondent where, upon expiry of 30 days from the date of receipt of the statement of claim from the claimant, the respondent fails to notify the claimant of the name of the selected arbitrator and the parties do not have another agreement on the appointment of an arbitrator;
- (b) for disputes involving multiple respondents, either one or all parties shall have the right to request a competent court to appoint an arbitrator for the respondents where, upon expiry of 30 days from the date of receipt of the statement of claim from the claimant, the respondents fail to reach agreement on the selection of an arbitrator and fail to notify the claimant of such arbitrator and the parties do not have another agreement on the appointment of an arbitrator; or
- (c) with regard to disputes resolved by one arbitrator as agreed by the parties, either one or all parties shall have the right to request a competent court to appoint the sole arbitrator where, upon expiry of 30 days from the date on which the respondent received the statement of claim, the parties fail to select an arbitrator and the parties do not have an agreement requesting the arbitration tribunal to appoint an arbitrator.

#### 5.4 What are the requirements (if any) as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators imposed by law or issued by arbitration institutions within Vietnam?

Please see questions 5.1 and 6.4 for the requirements of an arbitrator under the laws of Vietnam.

### 6 Procedural Rules

#### 6.1 Are there laws or rules governing the procedure of arbitration in Vietnam? If so, do those laws or rules apply to all arbitral proceedings sited in Vietnam?

The procedures for arbitration are stipulated in the Law on Commercial Arbitration. Additionally, arbitration centres in Vietnam may issue other arbitration rules.

#### 6.2 In arbitration proceedings conducted in Vietnam, are there any particular procedural steps that are required by law?

The steps required by law in Vietnam are as follows:

First, the claimant must send the statement of claim and attached materials to the arbitration centre where the dispute is resolved and, where the dispute is settled by *ad hoc* arbitration, to the respondent.

Second, where the dispute is settled by an arbitration centre, the claimant shall pay in advance the provisional arbitration fees. Within ten days from the date of receipt of the statement of claim and attached materials and a receipt for the payment of the provisional fees, the arbitration centre shall send a copy of the statement of claim together with other relevant materials to the respondent.

Third, an actual tribunal or *ad hoc* tribunal is established at the arbitration centre.

Fourth, within 30 days from the date of receipt of the statement of claim, the respondent must send its answer (i.e. the respondent's initial reply to the statement of claim) to the arbitration centre

where the dispute shall be settled or, where the dispute is resolved by *ad hoc* arbitration, to the claimant and the arbitrator.

Fifth and simultaneously with its answer, the respondent may submit a counterclaim against the claimant. Such counterclaim must be submitted together with the answer to the arbitration centre where the dispute shall be resolved or, where the dispute is settled by *ad hoc* arbitration, to both the claimant and the arbitration tribunal.

Sixth, as the arbitration tribunal prepares and sets a date to hear the parties' arguments, at least 30 days before the date of such hearing, a summons to attend the hearing shall be forwarded to the parties.

After closing arguments, the tribunal shall issue a final decision.

### 6.3 Are there any rules that govern the conduct of an arbitration hearing?

An arbitration hearing is governed by the procedural rules of each arbitration centre or in an *ad hoc* arbitration, as agreed by the parties, provided that such rules are consistent with the provisions of the Law on Commercial Arbitration.

### 6.4 What powers and duties does the national law of Vietnam impose upon arbitrators?

An arbitrator's power and duties are as follows:

- (a) to accept or refuse to resolve a dispute;
- (b) to remain independent during dispute resolution;
- (c) to refuse to provide information about a dispute;
- (d) to receive remuneration;
- (e) to maintain strict confidentiality of the contents of the dispute, unless such information must, by law, be provided to a State authority;
- (f) to ensure resolution of a dispute impartially, speedily, and promptly; and
- (g) to comply with the professional rules of ethics.

### 6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in Vietnam and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in Vietnam?

Law No. 65/2006/QH11 on Lawyers dated 29 June 2006 of the National Assembly of Vietnam and its guiding legislation prohibits/restricts lawyers from other jurisdictions (i.e. foreign lawyers) from acting/representing clients in Vietnamese Courts (civil/criminal litigation) and from providing legal advice on Vietnamese laws. Such prohibitions/restrictions do not apply to arbitration proceedings.

### 6.6 To what extent are there laws or rules in Vietnam providing for arbitrator immunity?

Currently, the laws of Vietnam are silent on this issue.

### 6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

Yes, Vietnamese courts have jurisdiction on arbitration procedures. For example: the right to appoint an arbitrator or the chairman of an arbitration tribunal where, upon expiry of fifteen days from the date of completion of the selection of arbitrators, such selected

arbitrators fail to select one among them to act as chairman of the arbitral tribunal; to make a decision on replacement of an arbitrator in the case of an *ad hoc* arbitration; to review some decisions of the arbitration tribunal (i.e. whether an arbitration agreement is void or unenforceable or whether the arbitration tribunal has jurisdiction) at the request of the parties; to require bodies, organisations, or individuals to provide the documents relevant to the dispute at the request of the arbitration tribunal or the parties; to make a decision on summoning witnesses to attend the arbitration tribunal; to order interim relief; and other procedural matters.

### 6.8 What is the approach of the national courts in Vietnam towards *ex parte* procedures in the context of international arbitration?

Currently, the laws of Vietnam are silent on this issue.

## 7 Preliminary Relief and Interim Measures

### 7.1 Is an arbitrator in Vietnam permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitrator seek the assistance of a court to do so?

An arbitration tribunal (or a competent court) is permitted to order certain preliminary or interim relief, such as: the prohibition of any change in the status of the assets in dispute; prohibition of acts by ordering one or more specific acts to be taken by a party in the dispute, aimed at preventing conduct adverse to the process of the proceedings; attachment of the assets in dispute, or requirement of preservation, storage, sale or disposal of any of the assets in dispute; requirement of interim payment of money as between the parties; or prohibition of transfer of asset rights of the disputed assets.

However, such arbitration tribunals must seek the assistance of a competent court regarding interim relief measures that are outside the tribunals' jurisdiction, as stipulated by law, such as freezing bank accounts, freezing property at places of bailment, or freezing property of the obligor.

### 7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

Yes, Vietnamese courts may grant preliminary/interim relief in arbitration proceedings. The circumstances are when the parties request such relief or at the request of the arbitration tribunal, with regard to interim relief measures that are outside the tribunal's jurisdiction, such as freezing bank accounts or freezing property.

The parties are allowed to request either the arbitration tribunal or a competent court to order interim relief. If a request is made to a competent court, then the arbitration tribunal must refuse the request of such parties to order interim relief and allow the court to decide such relief.

### 7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

The procedures for a court to order interim relief are codified in the Civil Proceedings Code of 2004 as follows:

- the applicant shall lodge a petition to the competent court; then

- depending on the specific case, such court may require the applicant to provide evidence to substantiate interim relief requests; finally
- depending on each specific case as stipulated by the Civil Proceedings Code of 2004, within three days or 48 hours from the date of receipt of the petition, the judge shall make a decision on the request for interim relief.

#### 7.4 Under what circumstances will a national court of Vietnam issue an anti-suit injunction in aid of an arbitration?

Vietnamese courts do not issue anti-suit injunctions *per se*. Rather, the courts have an obligation to refuse to accept a case before it if the dispute is within the jurisdiction of arbitration.

Please see question 3.4 for more details.

#### 7.5 Does the national law allow for the national court and/or arbitral tribunal to order security for costs?

Yes, courts/tribunals may order security for costs. The applicant for interim relief must, pursuant to a decision of the arbitration tribunal, deposit money, precious metals, precious stones, or valuable papers as fixed by the arbitration tribunal corresponding to the amount of loss that may arise due to unjustified interim relief being ordered, in order to protect the interests of the party against whom the interim relief is sought. Such money, precious metals, precious stones, or valuable papers shall be deposited in an escrow account nominated by the court/arbitration tribunal.

## 8 Evidentiary Matters

### 8.1 What rules of evidence (if any) apply to arbitral proceedings in Vietnam?

The applicable rules of evidence are as follows:

- (a) the parties have powers and duties to provide evidence to the arbitration tribunal;
- (b) the tribunal has the right to request witnesses to provide evidence at the request of the parties;
- (c) the arbitration tribunal has the right to seek an assessment or evaluation of the assets in dispute *sua sponte* or at the request of the parties;
- (d) the tribunal has the right to seek expert advice *sua sponte* or at the request the parties; and
- (e) the arbitration tribunal has the right to request a competent court to collect evidence where the tribunal fails to do so.

What constitutes “evidence” in Vietnam includes the following: (i) readable, audible, or visible materials; (ii) physical evidence; (iii) testimony of the concerned parties; (iv) testimony of witnesses; (v) results of examination by experts; (vi) records of on-the-spot assessments; (vii) customs; (viii) results of asset valuations; or (ix) other sources as stipulated by law.

### 8.2 Are there limits on the scope of an arbitrator's authority to order the disclosure of documents and other disclosure (including third party disclosure)?

The law only provides that the arbitration tribunal has the right to request the parties to disclose/provide documents as evidence to prove facts relevant to the issues in dispute.

Additionally, the tribunal may, *sua sponte* or at the request of the parties, hold fact-finding hearings with third parties in the presence

of the parties in dispute or after having notified such parties. No detailed regulation on disclosure/discovery is currently available.

### 8.3 Under what circumstances, if any, is a court able to intervene in matters of disclosure/discovery?

If the arbitration tribunal or the parties, by themselves, have taken necessary measures to collect evidence but without success, then a petition may be made to a competent court to require others to provide necessary materials/information.

### 8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal? Is cross-examination allowed?

Generally, a witness must commit to his statement being accurate and true. Otherwise, as stipulated in Article 66 of the Civil Proceedings Code of 2004, witnesses are subjected to fines for any damage and held liable for untruthful testimony that causes damage to the concerned persons; and as stipulated at Article 55.4(b) of the Criminal Proceedings Code of 2003, such witnesses are subject to criminal prosecution for making false statements or obstruction of justice for refusing to provide testimony. Cross-examination is allowed in arbitration proceedings in Vietnam.

### 8.5 Under what circumstances does the law of Vietnam treat documents in an arbitral proceeding as being subject to privilege? In what circumstances is privilege deemed to have been waived?

Currently, the laws of Vietnam are silent on the issues of privilege.

## 9 Making an Award

### 9.1 What, if any, are the legal requirements of an arbitral award?

An arbitral award is required to satisfy the following:

- (a) an arbitral award shall immediately be issued after the hearing but no later than 30 days from the conclusion of the hearing;
- (b) for arbitration hearings conducted by more than one arbitrator, an arbitral award shall be issued on the basis of majority vote; where the majority vote is not satisfied, the tribunal's chairman shall decide; and
- (c) an arbitration award must be in writing and must contain the following:
  - (i) date, month, year, and location of issuance of the award;
  - (ii) names and addresses of the claimant and respondent;
  - (iii) full names and addresses of the arbitrators;
  - (iv) summary of the statement of claim and matters in dispute;
  - (v) bases for issuance of the award, unless the parties agree that specifying such bases for the award is unnecessary;
  - (vi) result of dispute resolution;
  - (vii) time-limit for enforcement of the award;
  - (viii) allocation of arbitration fee and other relevant fees; and
  - (ix) signatures of the arbitrators.



## 10 Appeal of an Award

### 10.1 On what bases, if any, are parties entitled to appeal an arbitral award?

Since an arbitral award is final, the parties are not entitled to appeal such arbitral award. The parties' only recourse is to request the courts to set aside such awards in certain cases as stipulated in the Law on Commercial Arbitration.

### 10.2 Can parties agree to exclude any basis of appeal or challenge against an arbitral award that would otherwise apply as a matter of law?

Not applicable; see question 10.1.

### 10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

Not applicable; see question 10.1.

### 10.4 What is the procedure for appealing an arbitral award in Vietnam?

Not applicable; see question 10.1.

## 11 Enforcement of an Award

### 11.1 Has Vietnam signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Vietnam signed and ratified the New York Convention on 8 July 1995, with reservation that such awards must be issued by a member territory or country to this Convention.

Regarding awards issued outside the territory or country of non-members, the Convention shall be applied in Vietnam only on a reciprocal basis.

The relevant national legislation is Decision No. 453/QD-CTN, dated 28 July 1995, of the President of Vietnam.

### 11.2 Has Vietnam signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

Currently, Vietnam has not signed/ratified any regional conventions/agreements of this kind.

### 11.3 What is the approach of the national courts in Vietnam towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

Pursuant to the Civil Proceedings Code of Vietnam of 2003, the parties are required to take the following steps:

- (a) the person seeking enforcement shall lodge a petition for recognition and enforcement to the Ministry of Justice, together with a legalised copy of the award by the foreign arbitrators, a legalised copy of the arbitration agreement, and

other relevant papers and documents;

- (b) the petitioner must, at the request of the competent court, explain any unclear points in the file;
- (c) the person against whom enforcement is sought or his/her legal representative must attend a court hearing to consider the petition; and
- (d) the parties or their legal representatives shall be entitled to appeal the court's decision.

### 11.4 What is the effect of an arbitration award in terms of *res judicata* in Vietnam? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

The principles of *res judicata* have not been officially adopted within the Vietnamese legal system. However, once a claim is resolved by arbitration it is not appealable in Vietnamese courts, unless the court sets aside the award.

### 11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

According to the Civil Proceedings Code of 2004, a foreign arbitral award may not be recognised if rendering the award would be "against the fundamental principles of Vietnamese law". However, there is no direct legislation on standards to be applied. Nevertheless, the Civil Code of 2005 has a clause which defines what constitutes "prohibitory provisions of law" and "social ethics" which may be relevant to this issue. In particular, Article 128 of the said code states that: "Prohibitory provisions of law mean the provisions of law which do not permit subjects to perform certain acts ... Social ethics are common standards of conduct among people in social life, which are recognised and respected by the community". It is worthwhile to note that the term "public policy" is expressed in the laws of Vietnam in at least three expressions, namely "public policy", "the fundamental principles of Vietnamese law", or "prohibitory provisions of law and social ethics".

## 12 Confidentiality

### 12.1 Are arbitral proceedings sited in Vietnam confidential? What, if any, law governs confidentiality?

As provided for under the Law on Commercial Arbitration, dispute resolution by arbitration shall be conducted in private and remain confidential, unless otherwise agreed by the parties.

### 12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

Information in past arbitrations may not be used in subsequent proceedings. Subsequent proceedings shall make *de novo* findings.

### 12.3 In what circumstances, if any, are proceedings not protected by confidentiality?

Currently, Vietnamese laws are silent on this issue.

### 13 Remedies / Interests / Costs

#### 13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

Under the Law on Commerce of 2005, damages for losses only include the value of the actual and direct loss borne by the aggrieved party due to the defaulting party as well as direct profits which the aggrieved party would have earned in the absence of such breach. Punitive damages are not currently available under Vietnamese laws.

#### 13.2 What, if any, interest is available, and how is the rate of interest determined?

Under Article 306 of the Law on Commerce of 2005, if the defaulting party delays payment, then the aggrieved party has the right to demand interest on such delayed payment at the average market interest rate applicable to overdue debts at the time such payment is due, unless otherwise agreed to by the parties or provided by law.

#### 13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

The losing party must pay the arbitration fees, unless the parties agree otherwise or as stipulated by the procedural rules of the arbitration centre, or unless the arbitration tribunal allows for other fee allocations.

#### 13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

Currently, an award is not subject to any taxation.

### 14 Investor State Arbitrations

#### 14.1 Has Vietnam signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965)?

Vietnam has not signed this convention.

#### 14.2 Is Vietnam party to a significant number of Bilateral Investment Treaties (BITs) or Multilateral Investment treaties (such as the Energy Charter Treaty) that allow for recourse to arbitration under the auspices of the International Centre for the Settlement of Investment Disputes ('ICSID')?

Vietnam is party to the bilateral trade agreement with the United States. Reference to ICSID is mentioned at Article 1 of Section IV of the agreement.

#### 14.3 Does Vietnam have standard terms or model language that it uses in its investment treaties and, if so, what is the intended significance of that language?

Vietnam does not have standard terms for its investment treaties. However, Vietnam is creating a framework for such standard terms/model language in its bilateral trade agreements with Congo, Mozambique, Namibia, Nigeria, South Africa, and Zimbabwe.

#### 14.4 What is the approach of the national courts in Vietnam towards the defence of state immunity regarding jurisdiction and execution?

Currently, the state immunity defence is not grounds for the courts to set aside a foreign arbitral award.

### 15 General

#### 15.1 Are there noteworthy trends in the use of arbitration or arbitration institutions in Vietnam? Are certain disputes commonly being referred to arbitration?

Arbitration is becoming a preferred form of Alternative Dispute Resolution (ADR) for business enterprises in Vietnam to settle disputes rather than recourse through the court system.

Vietnam recently issued a new Law on International Arbitration (i.e. the Law on Commercial Arbitration) that came into effect on 1 January 2011. This Law is mostly consistent with international standards. Additionally, the arbitral tribunal's jurisdiction is expanded, enforcement of an award is more predictable, and foreign arbitration centres are allowed to operate in Vietnam through branches/representative offices.

#### 15.2 Are there any other noteworthy current issues affecting the use of arbitration in Vietnam, such as pending or proposed legislation that may substantially change the law applicable to arbitration?

The Law on Commercial Arbitration came into effect on 1 January 2011, and it is expected that Vietnam will issue further guiding legislation in the months to come.

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