



The Asia-Pacific Arbitration Review

2024

Arbitrability of land-related disputes in Vietnam: divergence in setting-aside and recognition procedures

The Asia-Pacific Arbitration Review

2024

The *Asia-Pacific Arbitration Review 2024* contains insight and thought leadership from 58 pre-eminent practitioners from the region. It provides an invaluable retrospective on what has been happening in some of Asia-Pacific's more interesting seats.

This edition also contains think pieces on complex financial instruments, private equity and investor–state arbitration, and several on new frontiers in energy disputes.

All articles come complete with footnotes and relevant statistics.

Generated: May 10, 2024

The information contained in this report is indicative only. Law Business Research is not responsible for any actions (or lack thereof) taken as a result of relying on or in any way using information contained in this report and in no event shall be liable for any damages resulting from reliance on or use of this information. Copyright 2006 - 2024 Law Business Research

Arbitrability of land-related disputes in Vietnam: divergence in setting-aside and recognition procedures

Nguyen Ngoc Minh and **Nguyen Thi Thu Trang**

Dzungsr & Associates

Summary

IN SUMMARY

DISCUSSION POINTS

REFERENCED IN THIS ARTICLE

COMMERCIAL ARBITRATION IN 2022

ARBITRABILITY OF DISPUTES RELATED TO REAL ESTATE

RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

INVESTOR-STATE ARBITRATION

ENDNOTES

IN SUMMARY

This article provides an overview of the key developments in commercial and investor–state arbitration in Vietnam. It explores some recent decisions of the courts in setting-aside and recognition procedures. Given current court practice, investor–state arbitration claims against Vietnam deriving from denial of justice by the courts in such procedures are not outside the realm of possibility.

DISCUSSION POINTS

- Arbitrability of commercial disputes relating to land in Vietnam
 - Recognition and enforcement of foreign arbitral awards
 - Investor–state arbitration deriving from denial of justice by the courts in setting-aside and recognition procedures
-

REFERENCED IN THIS ARTICLE

- Law on Commercial Arbitration 2010
 - Civil Procedure Code 2015
 - Land Law 2013
 - Criminal Procedure Code 2015
 - Decision No. 1015/2022/QĐ-PQTT dated 7 July 2022 of the People’s Court of Ho Chi Minh City
 - Decision No. 09/2023/QĐ-PT dated 17 January 2023 of the High People’s Court in Hanoi
-

COMMERCIAL ARBITRATION IN 2022

In 2022, the legal framework for commercial arbitration in Vietnam largely remained unchanged. In terms of practice, the arbitration centres continued to make more changes to their approach to international arbitration practice.

For instance, on 1 June 2022, the Vietnam International Arbitration Centre (VIAC) issued a new format for the arbitrator statement that adopts the International Bar Association’s Guidelines on Conflicts of Interest in International Arbitration.^[1] In November 2022, the VIAC issued its Guide of Arbitration Process as a reference source to support arbitrators during arbitration proceedings. This guide, which is circulated among arbitrators only, adopts international arbitration practices for case management, such as case management conferences, terms of reference and Procedural Order No. 1. In September 2022, the VIAC amended its statute to change the term of the VIAC’s listed arbitrators from a permanent to a five-year term, ensuring that the performance of arbitrators shall be reviewed every five years. This amendment is expected to act as a catalyst for the VIAC’s listed arbitrators to constantly improve their knowledge and skills.

In terms of statistics, in 2022, the VIAC reportedly recorded 280 new cases (an increase of around 4 per cent compared with 2021), of which the highest disputed value was US\$200 million.^[2]

After the 2021 agreement between the Permanent Court of Arbitration and the Ministry of Foreign Affairs of Vietnam on the establishment of a staffed Permanent Court of Arbitration office in Hanoi, which we reported in the 2023 edition of this publication,^[3] on 24 November 2022, the Hanoi office was officially opened.^[4]

According to statistics from the database of the Supreme People's Court (SPC) published as at 17 March 2023, in 2022, 17 arbitral awards were challenged and four were set aside.^[5] Below, we summarise some of the significant decisions released since our previous article.

ARBITRABILITY OF DISPUTES RELATED TO REAL ESTATE

Under article 470.1(a) of the Civil Procedure Code 2015,^[6] the Vietnamese courts shall have exclusive jurisdiction in disputes that have foreign elements and relate to rights over real estate in Vietnam.

There has not been any official guidance on the scope of the disputes mentioned in article 470.1(a), leading to a long-standing controversy surrounding whether such disputes:

- are only limited to those that relate to the land use right and the ownership of other real estate,^[7] or
- cover all types of disputes that are generally related to real estate.

In the above cases, such disputes cannot be arbitrated. In Decision No. 1015/2022/QĐ-PQTT dated 7 July 2022, the People's Court of Ho Chi Minh City ruled that, if the disputed matter is not about who has the right to use the land, such a dispute can be resolved by arbitration. In this case, the parties entered into a contract for transfer of ownership over a residential project, in which the claimant was the project owner and transferor, and the respondent was the transferee. Alleging that the respondent breached its obligation, the claimant commenced arbitration at the VIAC, seeking annulment of the investment certificate issued for the respondent and return of the land, which was accepted by the arbitral tribunal. The respondent then requested to set aside the award based on, among other things, the reason that the arbitral tribunal did not have the jurisdiction to resolve land disputes.

The People's Court of Ho Chi Minh City noted that, according to article 3.24 of the Land Law 2013,^[8] 'land disputes are disputes on rights and obligations of the land users between two or more parties in the land relationship'. The parties both confirmed that there was no dispute on the rights and obligations of the land user in the land relationship and there was no dispute surrounding who had the right to use the land; the parties only disputed the rights and obligations of the parties arising from the project transfer contract. Therefore, there were no grounds to consider that this was a land dispute or that the arbitral tribunal did not have the jurisdiction to resolve it. On the other hand, as the dispute arose from commercial activity, it would be arbitrable pursuant to article 2.1 of the Law on Commercial Arbitration 2010.^[9]

In the current draft of the new Land Law (the Draft Land Law), the disputes arising from commercial activities and relating to land shall be resolved through litigation at court or commercial arbitration.^[10] Article 225 of the Draft Land Law reads as follows:

- 1.

Disputes on land, and disputes on land and land-attached properties shall be resolved by the People's Courts in accordance with the law on civil procedure. The People's Committees of all levels are responsible for providing dossiers and documents relating to the management and use of land to serve as the basis for the People's Court to resolve in accordance with their jurisdiction when so requested.

2. Disputes between the parties that arise out of commercial activities and relate to land shall be resolved by the People's Courts in accordance with the law on civil procedure or by Commercial Arbitration in accordance with the law on commercial arbitration.

Pursuant to the above, disputes on land and land-attached properties (ie, disputes on rights and obligations of land users between two or more parties to a land relationship) would fall exclusively within the jurisdiction of the courts. Various other disputes that arise from commercial activities and relate to land may be resolved by arbitration. This new provision in the Draft Land Law, if passed, may help to resolve the current uncertainty surrounding the arbitrability of disputes relating to land.

RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

As reported in our previous article, state authorities have been working on improving the practice of recognising foreign arbitral awards. That said, very few court decisions regarding the recognition of foreign arbitral awards are published on the SPC's website,^[11] making it difficult to precisely evaluate current practice.

A recent decision from the High People's Court in Hanoi that refused to recognise a high-value foreign arbitral award raises grave concerns about the application of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) and the Civil Procedure Code 2015 by the courts in practice.^[12] In this case, the underlying dispute arose from a share sale and purchase agreement (SPA) between the claimants (the Korean investors) as the buyers and the respondent (a Vietnamese company) as the seller. Accordingly, the respondent sold all of its shares in a Vietnamese company (the target company) to the claimants.

After the completion of the deal, the Vietnamese investigative authorities discovered that several chief officers of the target company were involved in a large and organised illegal online gambling ring – one of the biggest criminal cases in Vietnam involving many high-profile state officers. In the first instance Criminal Judgment^[13] the People's Court of Phu Tho Province ruled against the chief officers of the target company. The target company was also included in the criminal judgment as a related party and was required to return illicit profits to the state budget. The foregoing convictions and findings were upheld by the High People's Court in Hanoi.^[14]

Following the above events, the claimants considered that the respondent had breached various warranties and covenants under the SPA concerning the operation of the target company. After unsuccessful attempts to resolve these claims amicably, the claimants commenced arbitration at the Singapore International Arbitration Centre (SIAC), in accordance with the arbitration agreement under the SPA, to recover their loss and damages due to the respondent's breaches of the covenants and warranties under the SPA as well as its misrepresentations before the conclusion of the SPA. The substantive laws applied to the dispute were the laws of Singapore in accordance with clause 14.1 of the SPA. On 14

October 2021, the tribunal rendered the final award in favour of the claimants and ordered the respondent to pay damages of around US\$20 million plus interest.

The respondent resisted the recognition of the award in Vietnam based on eight grounds, four of which were accepted by both the first instance People's Court and the appellate High People's Court in Hanoi. The High People's Court in Hanoi added another ground (Ground 5, below) to refuse the recognition, although it had not been raised by the respondent. The reasonings of the courts in refusing the recognition of the award are far from compelling.

Alarming Practice

Ground 1: During the arbitration, the Respondent requested the SPC to protest against the criminal judgments in the cassation procedure. Based on that, the Respondent requested for adjournment of the arbitration hearing to wait for the response of the SPC, which was not accepted by the Tribunal. The Respondent alleged and the Courts accepted that the Tribunal should have adjourned the hearing at the Respondent's request because the response of the SPC was important for the resolution of the arbitration case and the SPC's response in fact showed that the criminal judgments that the Tribunal relied on contained some errors.

Relating to Ground 1, some facts were recorded in the appeal decision. At first, the hearing was scheduled to be held between 27 and 29 May 2020, and was adjourned to between 26 and 28 August 2020. On 24 July 2020, the respondent informed the tribunal of its request to the SPC for cassation of the criminal judgments and requested another adjournment of the hearing. The hearing was then adjourned to between 24 and 26 February 2021. When the rescheduled hearing was about to take place, the respondent requested another adjournment to wait for the SPC's response. However, no further adjournment was granted. The hearing took place between 24 and 26 February 2021 and the award was rendered on 14 October 2021. While the hearing was ongoing, the SPC in Vietnam issued its response on 25 February 2021. Until the date of the appeal decision, there had not been any decision to open the cassation procedure to review the criminal judgments as requested by the respondent.

First, according to the above facts, the tribunal did not entirely dismiss the respondent's request for adjournment. Instead, the tribunal adjourned the hearing for six months and rescheduled it to wait for the SPC's response. The tribunal only refused when the respondent requested another adjournment. It should be noted that, in accordance with the SIAC Rules,^[15] the tribunal has the obligations to resolve disputes fairly, and to resolve disputes in an expeditious and economical manner to ensure the rights of all parties. Therefore, to request another adjournment of the hearing, the respondent should have valid reasons. Otherwise, if the tribunal had granted another adjournment although the hearing had already been adjourned for six months on the same grounds, the tribunal may have violated both the principle of equal treatment towards the claimants and the principle of expeditious and economical dispute resolution. Unfortunately, as the appeal decision did not clarify this matter, the basis for the respondent to continue to request another adjournment of the hearing to wait for the SPC's response remain unclear.

Second, under the United Nations Commission on International Trade Law's Model Law on International Commercial Arbitration, which Singapore has adopted, the provision of evidence is an obligation of the disputing parties. If the parties fail to provide evidence to the tribunal for consideration, the tribunal shall resolve the case and issue the award based on the evidence available before it.^[16] Therefore, to decide whether the respondent

may rely on the SPC's response to challenge the award, it is crucial to determine whether the respondent fulfilled its obligation to provide the SPC's response during arbitration for the tribunal's consideration. In this case, according to the above facts, the SPC's response was issued while the hearing was ongoing and the award was not rendered. Nearly eight months passed between the conclusion of the hearing and the issuance of the award. If the respondent had received the SPC's response during this time but deliberately hid it from the tribunal and used it to resist the award in the recognition proceedings, this would be behaviour conducted in extremely bad faith and should not be favoured by the courts. Unfortunately, the appeal decision did not clarify whether the respondent had submitted the SPC's response to the tribunal in due time or whether the High People's Court in Hanoi had considered this issue.

Third, according to the Criminal Procedure Code 2015,^[17] if the SPC agrees with the respondent's request and protests against the criminal judgments through the cassation procedure, such a decision shall be submitted to the competent court of cassation^[18] and be reviewed by the cassation review panel in the cassation trial.^[19] After the trial, the cassation review panel shall decide whether to accept the protest or to reject the protest and uphold the judgments.^[20] Accordingly, the decision to protest is only the first step of the cassation procedure, expressing the opinion of the SPC when requesting the competent court of cassation to review the judgments. Whether the protest is accurate would be subject to the assessment of the cassation review panel at the cassation trial. Therefore, although in its response the SPC commented that there were some errors in the criminal judgments, such comments do not have any legal effect and must be considered by the cassation review panel at the cassation trial. As noted, such comments may even turn out to be incorrect and the cassation protest may be rejected.

In this case, until the date of the appeal decision (and even until now), there had not been any decision to open the cassation procedure to review the criminal judgments. By implication, although finding that the criminal judgments contained some errors, the SPC still refused to protest through the cassation procedure. As a result, the SPC's comments were never examined to verify their accuracy.

From the above, even if the SPC's response had been considered by the tribunal, it is questionable whether that response could have had any impact on the tribunal's ruling. As recorded in the appeal decision, the High People's Procuracy in Hanoi also noted that, as there had not been any cassation protest against the criminal judgments, the tribunal was right in relying on these judgments. However, the High People's Court in Hanoi appears not to have taken these issues into consideration but accepted the comments of the SPC and ruled that the tribunal should have waited for the SPC's response.

Procedural Irregularities

Ground 2: During the arbitration, the Tribunal did not send the login details for the hearing to the expert witness of the Respondent, which violated the Hearing Protocol and constituted a procedural irregularity.

In accordance with the New York Convention and the Civil Procedure Code 2015, when considering grounds relating to procedural irregularities as evident in Ground 2, the courts are required to determine whether the party resisting the award had raised those procedural irregularities in a timely manner in the arbitration and whether those irregularities were

serious, or significantly prejudiced its rights or affected the contents of the award. If these conditions are not satisfied, the award should not be refused recognition.

In this case, it was recorded in the appeal decision that there had not been any objection from the respondent to the failure to provide login details during the arbitration and, presumably, the expert witness also attended the hearing. Consequently:

- the respondent may be considered as having waived its right to object, given that it did not object in the arbitration; and
- the failure to provide login details (if any) might not be serious, given that the expert witness still attended the hearing.

Unfortunately, in the appeal decision, the High People's Court in Hanoi appears to not have taken these facts into consideration.

Revisiting The Merits

Ground 3: The misrepresentation claim of the Claimants is a non-contractual claim. In the SPA, the parties did not have any agreement on the applicable law to non-contractual claims. Meanwhile, Schedule 5 of the SPA states that the Claimants shall have the rights and obligations relating to the shares in accordance with Vietnamese law. In addition, as the SPA was signed and performed in Vietnam, Chapter XX of the 2015 Civil Law of Vietnam should have been applied. However, the Tribunal applied Singaporean law to resolve the non-contractual claim, which was contrary to the fundamental principles of Vietnamese law pursuant to Article 459.2(b) of the Civil Procedure Code 2015.

First, article 458.4 of the Civil Procedure Code 2015 expressly prohibits the courts from revisiting merits of the case that have been resolved by the arbitral tribunal. However, the High People's Court in Hanoi still reviewed the nature of the claim and the contractual documents to determine the applicable law, which falls squarely into the merits of the case. This ruling, therefore, seriously violates the New York Convention and the Civil Procedure Code 2015.

Second, as recorded in the appeal decision, the respondent did not invoke Schedule 5 of the SPA to argue for the application of Vietnamese law. By implication, this fact seems to have been raised by the High People's Court in Hanoi when reviewing the SPA, which goes against the pro-arbitration approach that state authorities are promoting.

Third, the plain text of Schedule 5 of the SPA, as quoted in the appeal decision, appears to indicate that the rights and obligations of the claimants as the owners of the shares in the target company shall be in accordance with the laws of Vietnam. In other words, after the SPA is completed and the claimants become the shareholders of the Vietnamese target company, they shall have the rights and obligations of shareholders under Vietnamese law. This does not seem to relate to the rights and obligations of the claimants as buyers arising from the share sale and purchase transaction with the respondent, as the court interpreted.

Hearing Protocol

Ground 4: During the arbitration hearing, the Claimants used physical curtains as the backgrounds for the rooms of the counsel and the expert witness. Meanwhile, the Hearing Protocol prohibited the use of virtual backgrounds and required that the hearing room must be visible. Therefore, such use of physical curtains was not in compliance with the Hearing Protocol and constituted a procedural irregularity.

First, as recorded in the appeal decision, the Hearing Protocol prohibits virtual backgrounds. What the claimants used was recorded to be physical curtains, so it is unclear whether the court mistook the tool used.

Second, as recorded in the appeal decision, during the hearing and at the request of the presiding arbitrator, the claimants' counsel lifted the physical curtains so that the room could be examined. It is unclear whether the respondent subsequently raised any further objection or agreed with the claimants' use of the curtains after this examination. The High People's Court in Hanoi seems to have not considered this issue although, as noted above, it is crucial to determine whether the respondent knew of and objected to procedural irregularities in due time.

Third, in the appeal decision, the High People's Court in Hanoi also did not address whether the use of the curtains was serious, or significantly prejudiced the rights of the respondent or affected the contents of the award.

Exclusive Jurisdiction

Ground 5: If recognised, the Award would then be enforced against the assets of the Respondent in Vietnam, including both movable and immovable assets. Meanwhile, pursuant to Article 470 of the Civil Procedure Code 2015, the Vietnamese Courts shall have exclusive jurisdiction on disputes relating to rights over immovable assets in the territory of Vietnam.

First, as noted above, the High People's Court in Hanoi seems to have raised Ground 5 to refuse recognition, which goes against the state's pro-arbitration approach.

Second, importantly, the logic and connection between the practical enforcement of the award and the arbitrability of the underlying dispute that the court relied on to refuse recognition lack grounds and are not convincing. Ground 5 is not a basis under the New York Convention or the Civil Procedure Code 2015 upon which refusing recognition is permitted. Even if the award were to be recognised, the award may not always be enforced against the immovable assets of the respondent. Instead, as a matter of practice, the parties may reach an agreement to settle the awarded amount or the respondent may use other movable assets to pay. If the award were not enforced against the respondent's immovable assets, it should not have any bearing on the recognition procedure at the courts because recognition and enforcement are two separate procedures. If this reasoning from the High People's Court in Hanoi were to be followed, any disputes where the award debtor has immovable assets in Vietnam would fall within the exclusive jurisdiction of Vietnamese courts and, therefore, be non-arbitrable. This approach lacks grounds and diverges from the approach in Decision No. 1015/2022/QĐ-PQTT dated 7 July 2022 of the People's Court of Ho Chi Minh City and the Draft Land Law, in which commercial disputes relating to land would be arbitrable.

Remarks

This appeal decision again calls into question whether the courts are truly supportive of dispute resolution by arbitration or whether their support could be affected by other factors. Also, this appeal decision might have a negative impact on the credibility of Vietnam's market and legal system. If the recognition of foreign arbitral awards continues to be resolved in this manner, more international investment disputes resulting from denials of justice are not outside the realm of possibility.

INVESTOR–STATE ARBITRATION

In 2022, two new claims were reportedly filed against the Vietnamese state. The first case was by investors from Germany and Portugal under International Chamber of Commerce Rules, reportedly arising from an investment in covid-19 vaccines and tests in Vietnam during the pandemic.^[21] The second case was by two Chinese investors, PowerChina HuaDong Engineering Corporation and China Railway 18th Bureau Group Company Ltd, under the International Centre for Settlement of Investment Disputes mechanism.^[22] Notably, this case is reportedly derived from Decision No. 11/2019/QD-PQTT dated 14 November 2019 of the People's Court in Hanoi. As discussed in our 2021 edition of this article,^[23] in that decision, the VIAC arbitral award in favour of the Chinese investors was set aside by the court based on controversial reasoning. This was reportedly the first investor–state claim against Vietnam that derived from a denial of justice by the courts. Given current court practice, these types of claims are expected to become more common.

*

The authors would like to thank Nguyen Thi Mai Anh for her contribution to the preparation of this article.

Endnotes

- 1 The [Arbitrator Statement](#) is available on the VIAC's website (accessed 29 March 2023).-
^ [Back to section](#)
- 2 Vu Thi Hang, *Arbitration at Vietnam International Arbitration Centre – Effective Dispute Resolution Method for Businesses*, 27 February 2023. ^ [Back to section](#)
- 3 [Our previous article](#) is available on GAR's website. ^ [Back to section](#)
- 4 Permanent Court of Arbitration, '[Permanent Court of Arbitration officially opens office in Ha Noi](#)', 1 December 2022 (accessed 29 March 2023). ^ [Back to section](#)
- 5 More information on the SPC is available on its [website](#) (accessed 17 March 2023). ^ [Back to section](#)
- 6 Law No. 92/2015/QH13. Article 470.1(a) states: ^ [Back to section](#)
- 7 In Vietnam, land is collectively owned by the nation and administered by the government. Therefore, people can only have the right to use, rather than own, land, as well as the right to own property attached to land. ^ [Back to section](#)
- 8 Law No. 45/2013/QH13. ^ [Back to section](#)
- 9 Law No. 54/2010/QH12. ^ [Back to section](#)
- 10 The [second version of the Draft Land Law](#) is available on the Vietnamese government's website (accessed 29 March 2023). ^ [Back to section](#)

- 11 As at 31 March 2023, only two decisions from 2022, three decisions from 2021 and two decisions from 2020 have been published on the SPC's website. [^ Back to section](#)
- 12 Appeal Decision No. 09/2023/QD-PT dated 17 January 2023. [^ Back to section](#)
- 13 No. 55/2018/HS-ST dated 30 November 20. [^ Back to section](#)
- 14 Under Appeal Criminal Judgment No. 110/2019/HS-PT dated 12 March 2019. [^ Back to section](#)
- 15 SIAC Rules (2016), article 19.1: 'the Tribunal shall conduct the arbitration in such manner as it considers appropriate, after consulting with the parties, to ensure the fair, expeditious, economical and final resolution of the dispute'; and article 41.2: [^ Back to section](#)
- 16 Model Law on International Commercial Arbitration, article 23.1: 'The Parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or evidence they will submit'; article 25(c): 'any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.' [^ Back to section](#)
- 17 Law No. 101/2015/QH13. [^ Back to section](#)
- 18 Criminal Procedure Code 2015, articles 378 and 380. [^ Back to section](#)
- 19 Criminal Procedure Code 2015, article 385. [^ Back to section](#)
- 20 Criminal Procedure Code 2015, articles 389, 394 and 395. [^ Back to section](#)
- 21 Lisa Bohmer, ['\[Updated\] EU Investors Lodge High-Stakes ICC Arbitration Against Vietnam and Vietnamese State-Owned Banks'](#), 27 February 2023 (accessed 30 March 2023). [^ Back to section](#)
- 22 [PowerChina HuaDong Engineering Corporation and China Railway 18th Bureau Group Company Ltd v Socialist Republic of Vietnam](#) (International Centre for Settlement of Investment Disputes Case No. ARB(AF)/22/7) (accessed 30 March 2023). [^ Back to section](#)
- 23 [Our article for the 2021 edition](#) of this publication is available on GAR's website. [^ Back to section](#)



Nguyen Ngoc Minh
Nguyen Thi Thu Trang

minh.nguyen@dzungsrt.com
trang.nguyen@dzungsrt.com

<https://dzungsrt.com/>

[Read more from this firm on GAR](#)