



The Asia-Pacific Arbitration Review 2021

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The Asia-Pacific Arbitration Review 2021

A Global Arbitration Review Special Report

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Account manager Bevan Woodhouse

Production editor Kieran Redgewell

Chief subeditor Jonathan Allen

Subeditor Sarah Meaney

Head of production Adam Myers

Editorial coordinator Hannah Higgins

Publisher David Samuels

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Subscription details

To subscribe please contact:

Global Arbitration Review

Meridian House, 34-35 Farringdon Street

London, EC4A 4HL

United Kingdom

Tel: +44 20 3780 4134

Fax: +44 20 7229 6910

subscriptions@globalarbitrationreview.com

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Prefacevi

Overviews

Arbitration in mainland China's free trade zones aiming to match international standards 7

Shanghai International Economic and Trade Arbitration Commission (Shanghai International Arbitration Centre)

Disputes in construction and infrastructure projects 11

Craig Shepherd, Daniel Waldek and Mitchell Dearness
Herbert Smith Freehills

Innovation in progress – developments in Korea after the launch of KCAB INTERNATIONAL 18

Sue Hyun Lim
KCAB INTERNATIONAL

Investment Treaty Arbitration in the Asia-Pacific 24

Tony Dymond, Z J Jennifer Lim and Cameron Sim
Debevoise & Plimpton LLP

Serving the Maritime Ecosystem 35

Punit Oza
Singapore Chamber of Maritime Arbitration

Covid-19 – the economic fallout and the effect on damages claims 38

Oliver Watts
FTI Consulting

The rise of arbitration in the Asia-Pacific 43

Andre Yeap SC and Kelvin Poon
Rajah & Tann Singapore LLP

Third-party funding in the Asia-Pacific region ... 49

Gitanjali Bajaj, Ernest Yang and Queenie Chan
DLA Piper

Country chapters

Australia 55

Frank Bannon, Dale Brackin, Steve O'Reilly and Clive Luck
Clayton Utz

China 63

Zhang Shouzhi, Huang Tao and Xiong Yan
King & Wood Mallesons

Hong Kong 70

Peter Yuen, Olga Boltenko and Matthew Townsend
Fangda Partners

India 73

Naresh Thacker and Mihika Jalan
Economic Laws Practice

Japan 81

Yoshimi Ohara
Nagashima Ohno & Tsunematsu

Korea 84

Beomsu Kim, Young Suk Park and Jae Hyuk Chang
KL Partners

Malaysia 89

Andre Yeap SC and Avinash Pradhan
Rajah & Tann Singapore LLP

Singapore 96

Alvin Yeo SC, Chou Sean Yu and Lim Wei Lee
WongPartnership LLP

Vietnam 103

Nguyen Ngoc Minh, Nguyen Thi Thu Trang and Nguyen Thi Mai Anh
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Welcome to *The Asia-Pacific Arbitration Review 2021*, a *Global Arbitration Review* special report. *Global Arbitration Review* is the online home for international arbitration specialists, telling them all they need to know about everything that matters.

Throughout the year, GAR delivers pitch-perfect daily news, surveys and features, organises the liveliest events (under our GAR Live banner) and provides our readers with innovative tools and know-how products.

In addition, assisted by external contributors, we curate a range of comprehensive regional reviews – online and in print – that go deeper into developments in each region than the exigencies of journalism allow. *The Asia-Pacific Arbitration Review*, which you are reading, is part of that series. It contains insight and thought leadership inspired by recent events, from 37 pre-eminent regional practitioners.

Across 17 chapters and 112 pages, it offers an invaluable retrospective. All contributors are vetted for their standing and knowledge before being invited to take part.

Together, our contributors capture and interpret the most substantial recent international arbitration events of the year just gone, with footnotes and relevant statistics. Other articles provide valuable background so that you can get up to speed quickly on the essentials of a particular country as a seat.

This edition covers Australia, China, Hong Kong, India, Japan, Korea, Malaysia, Singapore and Vietnam. It also has overviews of construction and infrastructure disputes in the region (and how to avoid them), investment treaty arbitration (particularly its relevance to the Belt and Road Initiative), the impact of covid-19 on the art of damages calculation, and third-party funding.

Among the nuggets it contains:

- the common mistakes that contractors make when allocating risk in contracts and how to avoid them;
- a groundbreaking year for international arbitrations in Korea;
- the vogue among Asian states for including appeal mechanisms in their ISDS;
- how China's government has managed to open up the mainland market to institutions such as the ICC, without having to amend the national arbitration law;
- the end of natural-justice based challenges to awards in Singapore; and
- a handy table showing the position of third-party funding in eight Asian states.

And much, much more.

We hope you enjoy the volume. If you have any suggestions for future editions, or want to take part in this annual project, my colleagues and I would love to hear from you. Please write to insight@globalarbitrationreview.com.

David Samuels

Publisher

May 2020

Enforceability of arbitral awards in Vietnam – alarming practice

Nguyen Ngoc Minh, Nguyen Thi Thu Trang and Nguyen Thi Mai Anh

Dzungsr & Associates LLC

In summary

In 2019, Vietnam witnessed improvements not only in the quality and quantity of dispute resolution by arbitration but also in a number of initiatives to resolve existing problems within the legislative system. Nevertheless, recent court decisions on the annulment of arbitral awards indicate that when it comes to arbitral awards of high worth or those involving state-related parties, the courts can be unpredictable and conflicting reasoning is not uncommon. Decision 11/2019/QD-PQT of the Hanoi People's Court (14 November 2019) is a typical example.

Discussion points

- In 2019, 274 new cases were submitted to the Vietnam International Arbitration Centre (VIAC) – up 52 per cent compared to 2018. The number of domestic disputes is five times higher than international disputes.
- In 2019, the Korean Commercial Arbitration Board (KCAB) officially opened its overseas office in Hanoi.
- The draft resolution of the Supreme People's Court to guide the recognition and enforcement of foreign arbitral awards in Vietnam.
- In 2019, five arbitral awards were set aside, accounting for 29 per cent of applications for annulment, but over 90 per cent of the total value of the arbitral awards subject to annulment.
- Decision 11/2019/QD-PQT of the Hanoi People's Court set aside VIAC Award 24/14 because the arbitral tribunal changed the agreed place of hearing; referred to the IBA Rules on the Taking of Evidence to disregard the evidence submitted by the respondent; and did not order an inspection to determine the quantum of damages.

Referenced in this article

- Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.
- UNCITRAL Model Law on International Commercial Arbitration 1985, as amended 2006.
- Law 54/2010/QH12 on Commercial Arbitration, issued on 17 June 2010.
- Resolution 01/2014/NQ-HDTP of the Supreme People's Court, issued on 20 March 2014, guiding certain provisions of the Law on Commercial Arbitration 2010.
- Decision 11/2019/QD-PQT, 14 November 2019, on setting aside arbitral awards of the Hanoi People's Court.
- Case 24/14, 10 April 2019, of the arbitral tribunal of VIAC.

The enforceability of awards is always considered to be the most valuable characteristic of arbitration and the track record in enforcing arbitral awards is an important index to evaluate whether a country such as Vietnam could be a favourable seat for arbitration.¹

Over the past few years, there have been significant improvements in commercial arbitration in Vietnam, as evidenced in the quality and quantity of dispute resolution by arbitration, legislative changes and the support of the courts towards the enforceability of arbitral awards. The enforceability of Vietnamese arbitral awards, in particular, is much better than that of foreign arbitral awards. Based on the information provided by the Ministry of Justice and the Supreme People's Court, from 2005 to September 2017, about 35 out of 76 applications for recognition and enforcement were dismissed, accounting for 46 per cent of all applications.² The number of Vietnamese arbitral awards being set aside was much lower. Pursuant to the decisions being published in the website of the Supreme's People Court, 17 applications for the annulment of arbitral awards were submitted to the Vietnamese courts in 2019, five of which were annulled (accounting for 29 per cent of applications).³ In the 12 decisions that did not annul arbitral awards, the courts were consistent in determining that they would not revisit any substantive matters decided by arbitral tribunals. These substantive matters include statutes of limitation, interpretation of contracts, contractual remedies, valuation of assets and assessment of evidence.

Nevertheless, this is the tip of the iceberg. Recent decisions from Vietnamese courts regarding the annulment of arbitral awards raise concerns regarding the enforceability of arbitral awards in Vietnam, particularly when it comes to high-value disputes or disputes involving state-related parties. This practice, coupled with the lack of an appeal mechanism against annulment decisions, poses a significant risk for arbitral awards seated in Vietnam.

Commercial arbitration achievements in Vietnam, 2019

New records in practice

In 2019, dispute resolution by commercial arbitration in Vietnam generally reflected the increase in both the number of new cases resolved by arbitration and the portion of domestic arbitration therein. The VIAC witnessed a leap in the number of newly registered cases, with 274 new cases – a 52 per cent increase compared to 2018. Thanks to significant efforts by the government and the VIAC in promoting arbitration, the number of domestic disputes (in the sense that there was no involvement by foreign parties) in 2019 was five times higher than the number of international disputes. This indicates that domestic enterprises have become more receptive to commercial arbitration, while the main foreign parties at the VIAC are still from China, Singapore and South Korea.⁴

On 17 December 2019, the KCAB officially opened its overseas office in Hanoi, being the first foreign arbitration centre approved to open an office in Vietnam under the Law on Commercial

Arbitration 2010.⁵ South Korea has consistently been one of the top foreign investors in Vietnam in recent years and this office aims to promote the KCAB's dispute resolution services as well as the development of alternative dispute resolution (ADR) in Vietnam.

New important legislation

During 2019, important initiatives by the authorities were witnessed, with the aim of improving legislation relating to commercial arbitration in Vietnam. First, since mid-2019, the Supreme People's Court studied and circulated its draft Resolution Guiding Certain Provisions of Civil Procedure Code on Recognition and Enforcement of Foreign Arbitral Awards at First-Instance Courts to the relevant authorities and practitioners for comment.⁶ This draft resolution aims at guiding in detail the procedures necessary to apply for recognition and enforcement of foreign arbitral awards, as well as limiting the grounds for refusal of such application. The Supreme People's Court has also been working on a sister draft resolution for the recognition and enforcement of foreign court judgments and a further draft resolution on handling civil cases involving foreign elements.⁷

On 2 October 2019, the prime minister announced Decision 1268/QD-TTg to approve the plan on completing legislation regarding contracts and the resolution of contractual disputes by commercial arbitration and mediation. On 12 February 2020, the prime minister issued Decision 236/QD-TTg to establish a working group on reviewing legal documents to identify overlaps, conflicts or ambiguities in the laws. As a result, further legislative changes to resolve the current problems with Vietnam's laws on commercial arbitration are expected.

Inconsistency of the court in considering the annulment of arbitral awards

The number of arbitral awards being set aside is much lower than the number of foreign arbitral awards being refused for recognition and enforcement in Vietnam. This gives an impression that choosing Vietnam as the seat of arbitration could decrease the risk involving the enforceability of arbitration awards. Nevertheless, although only five out of the 17 arbitration awards challenged in 2019 were annulled, they were all high-value awards (if not the highest value) and accounted for more than 90 per cent of the total value of the awards subject to annulment in 2019. The reasoning in these decisions, to some extent, conflicts with the reasoning in the decisions not to annul awards of lower value. For instance, in Decision 1610/2019/QD-PQTT of the Ho Chi Minh City People's Court with regard to a 500 million Vietnamese dong award, all matters including contract termination, compensation for damage and penalty were deemed to be substantive matters and therefore not reviewable by the court. Meanwhile, in Decision 08/2019/QD-PQTT of the Hanoi People's Court regarding an award of over US\$1 million, the court revisited the tribunal's determination on the contractual obligations of the parties and compensation for damages to rule that the tribunal failed to be objective. Among others, Decision 11/2019/QD-PQTT (14 November 2019) of the Hanoi People's Court has attracted significant attention from the press and practitioners regarding annulling an award of approximately US\$93 million with controversial reasoning. These decisions, and particularly Decision 11/2019/QD-PQTT, call into question whether the courts are truly supportive of dispute resolution by arbitration or whether their support could be affected by other factors.

Decision 11/2019/QD-PQT

In 2010, Vinh Son Song Hinh Hydropower JSC (VSH) and a consortium including Hydrochina Huadong Engineering Corporation and the China Railway 18th Bureau Group concluded a contract to construct the power line and plant of the Upper Kon Tum Hydropower Project on the Dak Nghe River, Kon Tum Province in Vietnam.⁸ This power plant – with an anticipated capacity of 220 megawatts – is considered to be the largest power project of the Central Highlands, Vietnam and an important project in the whole of Vietnam, with a total investment of more than US\$300 million.⁹ At that time, VSH was a Vietnamese company whose shares were mostly held by EVNGENCO 3 (a subsidiary of the state-owned Vietnam Electricity Corporation), and the consortium was a group of Chinese companies which had won the package 'power line and plant' by offering a remarkably low price. VSH's shareholding has since changed, with REE Corporation becoming one of its largest shareholders.

During construction, there were a number of disputes over the delays and additional costs demanded by the consortium. As a result, on 14 July 2014, VSH terminated the contract with the consortium for failure to conduct the works as scheduled and called on the performance bond and the advance payment bond. On 23 August 2014, the consortium initiated arbitration against VSH at the VIAC (*Consortium v VSH*) for termination of contract. On 10 April 2019, the arbitral tribunal rendered Final Award VIAC 24/14, ruling that the VSH was liable to compensate the consortium for approximately US\$93 million. On 26 April 2019, VSH filed a request for setting aside the award at the Hanoi People's Court, claiming that the arbitration was not conducted in conformity with the parties' agreement and the laws of Vietnam, and that the award was contrary to the fundamental principles of the laws of Vietnam. On 14 November 2019, the Hanoi People's Court issued Decision 11/2019/QD-PQTT to set aside the award. This decision is final and subject to no further appeal under Vietnamese law.

The Hanoi People's Court set aside the award based on article 68.2.b of the Law on Commercial Arbitration, which stipulates that an arbitral award will be set aside if 'the arbitration proceeding was not in conformity with the parties' agreement or this Law'. The court determined that the arbitral tribunal:

- changed the place of hearing from Hanoi in Vietnam, to Singapore and later to Japan, which is contrary to the agreement of the parties;
- referred to the IBA Rules on the Taking of Evidence to disregard the evidence submitted by VSH; and
- did not order an inspection to determine the quantum of damages.

Although the arbitration proceedings in this case were not conducted flawlessly, the irregularities were still far from constituting annulment grounds, especially from an arbitration-friendly perspective and in comparison with the court decisions in other annulment proceedings.

Ground 1: arbitral tribunal did not honour parties' agreement regarding place of hearing

In this case, it is undisputed that the parties made an agreement on choosing Hanoi as the place of hearing and the arbitral tribunal also recorded in its procedural order that the hearings would take place in Hanoi, Vietnam. However, when VSH brought a civil lawsuit against the arbitral tribunal at a Vietnamese court, seeking compensation for damages resulting from the tribunal's decision regarding the application of the interim measure, the arbitral

tribunal decided to change the place of hearing to Singapore and Japan. Although the lawsuit was later dismissed by both the first-instance and appeal courts for lack of merits, at that time the tribunal was concerned about the potential bearing of the ongoing lawsuit in Vietnam on their personal security and impartiality, as this is the first case in which an arbitral tribunal has been sued in Vietnam. As a result, the arbitral tribunal invoked its discretion to change the place of hearing to Singapore and Japan despite the parties' agreement. During the annulment proceeding, the Vietnamese court was then based on article 68.2.b of the Law on Commercial Arbitration, which stipulates that an arbitral award will be set aside if 'the arbitration proceeding was not in conformity with the parties' agreement' to set aside the award.

While the arbitral tribunal's decision on the interim measure may appear controversial, it raises the question of whether the decision to change the place of hearing, regardless of the parties' agreement, amounts to a serious procedural violation that constitutes a ground for annulment under article 68.2.b.

Clearly, the Law on Commercial Arbitration and the VIAC Rules of Arbitration 2012 (the rules effective at the time of the consortium's statement of claim) all stipulate that the arbitral tribunal must honour the parties' agreement as long as it does not infringe on the prohibitions of law or social morality. More specifically, the parties' agreement on the place of hearing must be respected without exception.¹⁰ In other words, party autonomy as the underlying principle of arbitration should always be honoured. Nevertheless, there has also been some debate about whether party autonomy should be balanced by the power of arbitral tribunal on procedural matters. For instance, whether the arbitral tribunal in the exercise of its duty to resolve the dispute in an expedited manner may change a parties' agreement on an inordinary extension of time for submissions or hearings which may delay the arbitration proceedings and affect the arbitrators' entitlement to remuneration and fixed schedule.¹¹ Or whether the arbitral tribunal may change the parties' agreement during a serious epidemic in the agreed place of hearing (as has been the case during the covid-19 pandemic) and the respondent tactically insists on such place. In this case, the civil lawsuit against the arbitral tribunal at the Vietnamese court posed certain risks to the arbitrators. First, the laws of Vietnam do not accord arbitrators immunity from civil claims and this was the first lawsuit against the arbitral tribunal in Vietnam at that time. In addition, under the law, the defendants in an ongoing lawsuit (ie, the arbitrators) may theoretically be restricted from leaving Vietnam.¹² All these facts resulted in concern for the arbitrators and they ultimately decided to move the place of hearing. When determining whether to break the party autonomy principle, the arbitral tribunal is expected to carefully consider both the agreement of the parties and the duties and positions of the tribunal,¹³ which may include consideration of the possibility of the risks for arbitrators and alternatives such as conducting the hearing via teleconference.

Nevertheless, even if the arbitral tribunal's decision to change the place of hearing is a violation of the parties' agreement and arbitration law, a more relevant issue is whether this violation suffices as an annulment decision. Although not officially recognised by UNCITRAL as a model law country, the Law on Commercial Arbitration has been developed based largely on the Model Law on International Commercial Arbitration. Article 68.2.b of the Law on Commercial Arbitration is a local adaptation of article 34.2.a.iv of the Model Law, which is essentially taken from article V.1.d of the New York Convention,¹⁴ to which Vietnam is a member. Accordingly, it is widely recognised that only procedural

errors of a certain degree of seriousness, rather than all procedural errors, would be sufficient to set aside an award.¹⁵ Awards will not be annulled or refused recognition unless it can be demonstrated that the procedural violations had a material prejudice to the award debtor or a material impact on the arbitral process or the arbitral tribunal's decision.¹⁶

In the context of Vietnamese law, although the wording of article 68.2.b of the Law on Commercial Arbitration is silent as to what types of procedural irregularity should lead to the annulment of arbitral awards, Resolution 01/2014/NQ-HDTP of the Supreme People's Court guiding certain provisions of the Law on Commercial Arbitration (Resolution 01/2014) has also required that only serious violation of procedure is sufficient to annul an award.

Resolution 01/2014/NQ-HDTP of the Supreme People's Court guiding certain provisions of the Law on Commercial Arbitration

Article 14. Grounds for annulment of arbitral awards prescribed in Article 68 of LCA

2. The court shall annul the arbitral awards prescribed in Article 58 and Article 61 of LCA in one of the cases below:

b) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or this Law' means the case in which the arbitral tribunal failed to comply with the agreement of the parties on composition of the arbitral tribunal or arbitration rules, or the arbitral tribunal failed to adhere to regulations of LCA which the Court considers as serious and needs to be annulled where the arbitral tribunal fails to make rectification at the request of the court as prescribed in Clause 7 Article 71 of LCA.

The examples listed in Resolution 01/2014 also reflect an understanding that the procedural violation must prejudice the award debtor or affect the outcome of the proceeding. This requirement has also been reiterated by the Supreme People's Court in its training guidelines for local judges. Accordingly, the court is required to determine whether the arbitral tribunal made a procedural violation and whether that violation is serious.¹⁷

It is expected that to annul the award, the Hanoi People's Court would have analysed whether the arbitral tribunal's decision to change the hearing place constituted a 'serious violation', and to be specific, whether that decision prejudiced VSH or the outcome of the proceeding would have been different without such decision. Nevertheless, in Decision 11/2019/QD-PQTT, the court only determined that this change of place of hearing 'affected the ability to participate in the hearing of VSH and is a serious violation of arbitral procedures'. The decision failed to clarify how the hearings to be conducted in Singapore and Japan would prevent VSH from participating and presenting its case. This change might inevitably have caused some logistical difficulties for VSH as a Vietnamese company. However, considering the relevant facts that VSH is the employer of a multimillion-dollar project backed by the Vietnam Electricity Corporation and had actively engaged Singapore law firms since the beginning of the arbitration – including YKVN and Drew & Napier LLC¹⁸ – to conclude that a change of hearing location from Vietnam to Singapore or Japan deprived VSH of an opportunity to participate would require much more evidence to prove convincing. Moreover, in another part of Decision 11/2019/QD-PQTT, the court indicated that 'during arbitration proceedings, Respondent did not participate in the hearings which is their own fault, failure to fulfill responsibilities and disadvantage

in presenting evidence'. From the international practice, an English court held that the different location did not affect the fairness of the proceedings or prejudice that party where the arbitration was held at a location different from the agreed place of arbitration and a party had refused to participate.¹⁹ Therefore, the court's decision seems to conflict with its consideration and the friendly arbitration approach in international practice.

The decision to set aside the award merely because the arbitral tribunal changed the place of hearing would become an unwanted precedent that the future award debtors may rely on to challenge the award whenever a procedural element (eg, timeline or logistical requirements) does not adhere to the agreement of the parties, regardless of whether that irregularity has any bearing on the award debtor's presentation of their case or the substantive determination by the tribunal.

Ground 2: arbitral tribunal referred to the IBA Rules on the Taking of Evidence in International Arbitration to disregard evidence submitted by VSH

In Decision 11/2019/QĐ-PQTT, the Hanoi People's Court determined that the arbitral tribunal violated article 56.2 of the Law on Commercial Arbitration when not considering the evidence and witness statement submitted by VSH. Nevertheless, the court seems to have an incorrect reading of either the arbitral tribunal's conduct or article 56.2 of the Law on Commercial Arbitration, or indeed both.

Article 56.2 provides as follows:

Article 56. The default of the parties

2. In case the respondent who has properly been summoned to attend a hearing but fails to appear without a plausible reason or leaves the hearing without the arbitral tribunal's approval, the arbitral tribunal shall still proceed with the proceedings based on available documents and evidence.

Article 56.2 of the Law on Commercial Arbitration mirrors article 25.c of the Model Law, which aims to empower the arbitral tribunal to carry out its task when one of the parties does not participate, assuring the effectiveness of the proceedings.²⁰ This provision on the procedure of the proceedings only directs the arbitral tribunal to adjudicate the dispute by assessing the available evidence rather than directing them to accept all of the evidence regardless of whether it has any relevance to the dispute. Indeed, the Law on Commercial Arbitration and the VIAC Arbitration Rules do not set out any rules regarding the assessment of evidence. Article 35.6 of the VIAC Arbitration Rules accords each arbitral tribunal broad discretion in unregulated matters: 'In all matters not expressly provided for in these Rules, the Centre and the arbitral tribunal shall act in the spirit of these Rules and make all efforts for the dispute to be resolved in a fair and efficient manner.' Accordingly, unless otherwise agreed by the parties, the arbitral tribunal has the discretion on how to make evidentiary rulings (eg, by referring to the IBA Rules on the Taking of Evidence in International Arbitration or another set of rules).

In this case, as is usual in international arbitration practice, the arbitral tribunal took the IBA Rules as a reference when considering the validity, admissibility, relevance, materiality and weight of the witness statement and other evidence. For instance, in accordance with article 4.7 of the IBA Rules, if a witness fails to appear for testimony at an evidentiary hearing, the arbitral tribunal will disregard any witness statement by that witness unless, in exceptional circumstances, the tribunal decides otherwise. As recorded in

Decision 11/2019/QĐ-PQTT, VSH's witness did not attend the hearing and, in line with the IBA Rules, the arbitral tribunal had the discretion to not consider its witness statement. Yet, to ensure utmost fairness for VSH, the arbitral tribunal still decided to consider VSH's witness statement to some extent. However, because the VSH and its witness failed to attend the evidentiary hearing, it waived its right to explain the importance and relevance of the witness statement. As a result, there is no obligation for the tribunal to rely on VSH's witness statement when considering the case.

Disregarding the above, the Hanoi People's Court determined that the arbitral tribunal failed to consider the evidence submitted by the default party (VSH) and thus violated article 56.2 of the Law on Commercial Arbitration. Nevertheless, the court seems to have an incorrect reading of either the arbitral tribunal's conduct or article 56.2 of the Law on Commercial Arbitration, or both.

First, the court seemed to wrongfully equate the arbitral tribunal's evidentiary rulings to not rely on VSH's evidence and witness statement after assessing them with a failure to assess the evidence and therefore determined that the arbitral tribunal violated article 56.2. Meanwhile, the arbitral tribunal assessed the evidence by referring to the IBA Rules. If the arbitral tribunal had decided to simply put all evidence submitted by VSH aside, it would not have had to refer to the IBA Rules, which are designed just to assess evidence in arbitration. The arbitral tribunal's evidentiary rulings (eg, whether a specific piece of evidence is not important to determine the parties' obligation) could be reached only after making such a due assessment.

Otherwise, assuming that the court correctly understood that the arbitral tribunal assessed the evidence but still determined that the tribunal had violated article 56.2, the court seems to have a wrong reading of this provision. Following this interpretation of the Hanoi People's Court, whenever a party fails to appear at the hearing, their evidence would all have to be admitted and regarded as relevant or important to the dispute by the arbitral tribunal. In this manner, the respondent just needs to submit whatever documents they wish to the arbitral tribunal and best advocate for their application by disappearing at the hearing.

The Hanoi People's Court seems to have an incorrect reading of either the conduct of the arbitral tribunal or article 56.2 of the Law on Commercial Arbitration, or even both (ie, article 56.2 required the arbitral tribunal to accept all pieces of evidence of the defaulting party and the arbitral tribunal in this case omitted to assess any of them).

In any case, the arbitral tribunal's evidentiary ruling pertains more to a substantive matter and should not therefore be considered by the courts in annulment proceedings. It has been unanimously confirmed in case law and commentary that a court seized with an application for annulment or recognition under the Model Law or the New York Convention may not review the merits of the arbitral tribunal's decision.²¹ The Law on Commercial Arbitration and Resolution 01/2014 also make this principle very clear in their text, accordingly when examining the application for annulment, the court should not review the substance already settled by the arbitral tribunal.²² The previous Vietnamese court decisions also consistently held that among others an examination of evidence by arbitrators pertains to a substantive matter and is therefore not reviewable by courts in annulment proceedings.²³ In other words, the court would not set aside an arbitral award by relying on how the arbitral tribunal assessed the evidence. Nevertheless, the Hanoi People's Court in this case conversely annulled the award by relying on the arbitral tribunal's evidentiary rulings.

Ground 3: arbitral tribunal did not conduct an inspection to determine damages

During this construction arbitration, the parties disagreed over the damage and only the consortium submitted an expert opinion regarding the quantum of damage. The award was later based on this expert opinion. In annulment proceedings, the Hanoi People's Court found that the arbitral tribunal failed to order an inspection on the damage but only relied on the expert opinion and therefore violated article 46.3 of the Law on Commercial Arbitration. This determination of the Hanoi People's Court is totally against the wording of article 46.3, which reads:

Article 46. The power of the arbitral tribunal to collect evidence

3. Arbitral tribunal on its own motion or at the request of a party or all parties may order an inspection or appraisal of assets in the dispute to settle the dispute. The costs for inspection and appraisal shall be advanced by the party requesting for such inspection and appraisal or allocated by the arbitral tribunal.

When there is a disagreement on the quantum of damages, as with other substantive matters, it is the right and obligation of the parties to submit arguments and supporting evidence, such as an expert opinion or inspection result or to request the arbitral tribunal to order an inspection. In that case, pursuant to article 46 of the Law on Commercial Arbitration, the arbitral tribunal will have full discretion regarding whether to order an inspection. In other words, ordering an inspection is a discretion rather than an obligation of the arbitral tribunal. However, in this case, as recorded in Decision 11/2019/QĐ-PQTT, only the consortium submitted an expert opinion on the quantum of damages, VSH was assumed not to have submitted any relevant evidence for damages and not to have requested the arbitral tribunal to conduct an inspection. Pursuant to article 46.3 of the Law on Commercial Arbitration, if the arbitral tribunal had found that the expert opinion submitted by the consortium and other available evidence had already been sufficient, as it probably did, there is no requirement for the arbitral tribunal to order a separate inspection. Otherwise, in that case, if the tribunal had still ordered inspection to protect the rights of VSH, the impartiality of the arbitral tribunal would have been also called into question.

Notably, this decision to set aside the award does not sit comfortably with another Hanoi People's Court decision issued just two days earlier. In that case, during the arbitration, the award debtor also failed to submit evidence or request the arbitral tribunal to order appraisal under article 46.3. The court later ruled that the arbitral tribunal was right when not conducting an appraisal and, more importantly, the decision of the arbitral tribunal on appraisal was a substantive matter and could not be revisited by the court in annulment proceedings.²⁴

Conclusion

Overall, dispute resolution by arbitration in particular and ADR in general in Vietnam has taken important steps forward, including legislative changes, enhancement of efficiency in arbitration, and positive support from courts towards enforceability of arbitral awards. However, some decisions to set aside high-value awards in 2019 are an unfortunate step backwards for this development, containing arbitrary reasoning that clashes with other decisions to not set aside and is far from satisfactory. These annulment decisions, and notably Decision 11/2019/QĐ-PQTT of the Hanoi People's Court, have shaken the parties' confidence in Vietnam-seated arbitration, especially when

it involves state-backed enterprises or particularly high values at stake.

Under the law, when an arbitral award is set aside, the parties may re-agree to settle the dispute through arbitration. Otherwise, a party may bring a lawsuit to the competent court. Either way, unless the parties can reach an amicable settlement, the whole dispute resolution process would be rewound. In *Consortium v VSH*, it took the arbitral tribunal and the parties five years to finally resolve the case. It also took the VIAC around three years to resolve another multimillion dispute of which the award has also been set aside in 2019. They are both complex and multi-language construction disputes which, if heard at courts, could not be resolved within a shorter period or with less hassle. All of these calls for an extremely diligent examination as well as a more friendly arbitration approach by the courts, otherwise the final nature of the setting aside proceedings can be effectively abused by the award debtors to circumvent their obligations under arbitral awards.

Notes

- 1 International Arbitration Survey 2018: The Evolution of International Arbitration, Queen Mary University of London, at www.arbitration.qmul.ac.uk/research/2018/ (last accessed on 26 March 2020).
- 2 Conference on the 'Summary of 20 Years of Implementation of the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards', held by the Ministry of Justice in Hanoi on 21 November 2014; available in Vietnamese on the Ministry of Justice web portal, <http://moj.gov.vn/qt/tintuc/Pages/hoat-dong-cua-lanh-dao-bo.aspx?ItemID=2052>. See also the Report of the General Department of Civil Judgment Enforcement: 'The Training on Improving Capacity of Civil Judgment Enforcement Officials in Enforcement of Foreign Arbitral Awards', in Hanoi, December 2018.
- 3 The relevant court decisions can be found at <https://congboanan.toaan.gov.vn/> (Vietnamese only) (last accessed on 26 March 2020).
- 4 VIAC Annual Report 2019, available at www.viac.vn/en/statistics/2019-statistics-s30.html (last accessed on 26 March 2020).
- 5 'KCAB Overseas Office in Vietnam Officially Open', 20 December 2019, at www.kcabinternational.or.kr/user/Board/comm_notice_view.do?BBS_NO=533&BD_NO=169&CURRENT_MENU_CODE=MENU0025&TOP_MENU_CODE=MENU0024 (last accessed on 26 March 2020).
- 6 Draft resolutions guiding on the recognition and enforcement of foreign arbitral awards and foreign civil court judgments and decisions are available at http://vibonline.com.vn/du_thao/du-thao-nghi-quyet-huong-dan-thu-tuc-cong-nhan-va-cho-thi-hanh-tai-viet-nam-doi-voi-phan-quyet-cua-trong-tai-nuoc-ngoai-va-ban-quyet-dinh-dan-su-cua-toa-nuoc-ngoai (Vietnamese only) (last accessed on 26 March 2020).
- 7 Other draft resolutions of the Supreme People's Court are available at <https://vbpq.toaan.gov.vn/webcenter/portal/htvb/chi-tiet-vbdt?dDocName=TAND076705> (in Vietnamese only) (last accessed on 26 March 2020).
- 8 Vietnamese investor not obliged to compensate Chinese contractor: court, Vnexpress, at <https://e.vnexpress.net/news/business/companies/vietnamese-investor-not-obligated-to-compensate-chinese-contractor-court-4016345.html> (last accessed on 26 March 2020).
- 9 *ibid.*
- 10 The Law on Commercial Arbitration 2010 provides that:
 - Article 4, the principles of dispute settlement by arbitration: '1. Arbitrators must respect the parties' agreement if such

agreement neither breaches prohibitions nor contravenes social ethics.'

- Article 11, the place for dispute settlement by arbitration: '2. Unless otherwise agreed by the parties, the arbitral tribunal may hold a meeting at a venue regarded as appropriate for exchanging opinions between its members, taking witnesses' statements, consulting experts or assessing goods, assets or other documents.'

The VIAC Arbitration Rules 2012 provides that:

- Article 20, the place of arbitration: '2. Unless otherwise agreed by the parties, the arbitral tribunal may conduct hearings at any location it considers appropriate. The arbitral tribunal may hold meetings by any means and at any location it considers appropriate.'

- 11 Michael Pryles, 'Limits to Party Autonomy in Arbitral Procedure' (2007) 24 *Journal of International Arbitration*, Issue 3, pp. 327–339.
- 12 Law 47/2014/QH13 on entry, exit, transit and residence of foreigners in Vietnam, 16 June 2014, article 28.1.a; Decree 136/2007/ND-CP on exit, entry of Vietnamese citizens, 17 August 2007, article 21.3.
- 13 *Supra*, 11.
- 14 Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration, as amended in 2006.
- 15 UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, p. 156; UNCITRAL 2016 Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, pp. 198–200; Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration*, 6th Edition, para. 10.62.
- 16 UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, p. 182; Chapter 25 'Annulment of International Arbitral Awards in Gary Born', *International Commercial Arbitration*, second edition (Kluwer Law International 2014) pp. 3,163–3,393.
- 17 Supreme People's Court and World Bank Group, Guidelines on arbitration and mediation, 2017, pp. 90–92.
- 18 Chinese contractors sue Vietnam hydropower project owner, *The Saigon Times*, available at <https://english.thesaigontimes.vn/51647/chinese-contractors-sue-vietnam-hydropower-project-owner.html> (last accessed on 26 March 2020).
- 19 UNCITRAL 2016 Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, p. 199; *Tongyuan International trading Group v Uni-Clam Limited*, High Court of Justice, England and Wales, 19 January 2001, 2000 Folio 1, 143.
- 20 UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, p. 114.
- 21 UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, p. 135; UNCITRAL 2016 Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, p. 126.
- 22 The Law on Commercial Arbitration, article 71.4: 'When examining the application, the court shall rely on article 68 of this Law and enclosed documents to consider and make a decision; shall not review the substance already settled by the arbitral tribunal.' Resolution 01/2014, article 15.2: 'When considering the application, the court shall not consider the substance of the dispute and shall only examine whether the arbitral award falls into one of the cases mentioned in article 68.2 of LCA.'
- 23 Decision 1579/2019/QD-PQTT of Ho Chi Minh City People's Court, 7 November 2019, with regard to an award of over US\$40,000; Decision 147/2017/QD-PQTT of Ho Chi Minh City People's Court, 17 February 2017.
- 24 Decision 10/2019/QD-PQTT of the Hanoi People's Court, 12 November 2019.



Nguyen Ngoc Minh
Dzungsr & Associates LLC

Nguyen Ngoc Minh is a partner at Dzungsr & Associates LLC and heads the firm's alternative dispute resolution practice.

Minh is recognised as an 'Up and Coming' dispute resolution lawyer by *Chambers and Partners 2019* and is praised as 'a brilliant and articulate, and also very hard-working' lawyer who can 'provide clear and constructive advice, within very short notice if needed'. According to Benchmark Litigation, he is 'excellent in terms of the quality, responsiveness and comprehensiveness of the services', 'very professional' and 'provides quick helpful advice'. Minh is one of the first practitioners in Vietnam accredited as a Centre for Effective Dispute Resolution mediator.

Minh has represented clients in arbitrations at the Vietnam International Arbitration Centre and proceedings before the courts of Vietnam. He has also advised clients on Vietnamese law issues in International Chamber of Commerce and Singapore International Arbitration Centre arbitrations to resolve disputes involving foreign-invested companies and international corporations. Many of these cases are high-profile, covering a wide range of matters, such as construction, corporate and joint venture, sales of good, insurance and real estate.



Nguyen Thi Thu Trang
Dzungsr & Associates LLC

Nguyen Thi Thu Trang is a counsel at the Dzungsr & Associates LLC Hanoi office. She obtained her LLM in business, corporate and maritime law with a focus on international arbitration and business law at the Erasmus University Rotterdam, the Netherlands. Currently, Trang is doing PhD research in the competence of Vietnamese courts in commercial arbitration at the Graduate Academy of Social Sciences of Vietnam. She is the co-author of a number of publications, namely the Vietnam chapter in *International Handbook on Commercial Arbitration* of the International Council for Commercial Arbitration, the Vietnam chapter in *National Arbitration Laws* (Second Edition) and chapter 9 of *Opportunities and Challenges in International Investment Treaties and Arbitration Across Asia* (2018). Trang has also participated in a number of arbitrations in Vietnam and assisted clients in pursuing enforcement proceedings of foreign arbitral awards.



Nguyen Thi Mai Anh
Dzungsr & Associates LLC

Nguyen Thi Mai Anh is a junior associate of Dzungsr & Associates LLC. She graduated from the Diplomatic Academy of Vietnam and obtained an LLM in international trade and investment law at Maastricht University (the Netherlands). Having a background in international commercial, trade and investment laws with a specialisation in international dispute resolution, she has frequently been involved in arbitration and court proceedings and advised clients on a number of contentious issues arising out of sale and carriage of goods.



DZUNGSRT & ASSOCIATES LLC
A Boutique Shipping & ADR Law Firm

Unit 6, 11th Floor, Harec Building
4A Lang Ha Street
Ba Dinh District
Hanoi
Vietnam
Tel: +84 24 3772 6970

Unit 1605, 16th Floor, Saigon Riverside
Office Center
2A-4A Ton Duc Thang Street
Ben Nghe Ward, District 1
Ho Chi Minh City
Vietnam
Tel: +84 28 3822 0076

Nguyen Ngoc Minh
minh.nguyen@dzungsrt.com

Nguyen Thi Thu Trang
trang.nguyen@dzungsrt.com

Nguyen Thi Mai Anh
maianh.nguyen@dzungsrt.com

www.dzungsrt.com

Dzungsr & Associates LLC has extensive experience and expertise in arbitration and litigation, covering a wide range of matters of different natures. The firm has been involved in various arbitrations and court proceedings to resolve high-profile cases in sale of goods, construction, insurance, banking and finance, share purchase, joint venture, real estate, among others. A number of such matters are in connection with foreign investors' treaty claims and against companies backed by regional state authorities, thereby making them highly contentious. The firm has often been sought out by both international counsel and corporations mainly in banking, shipping, construction, insurance, and retailer industries.

Dzungsr & Associates LLC has a vast pool of talented lawyers who have been well-trained abroad, practise to a very high standard and are familiar with the intricacies of dispute resolution in Vietnam. The firm has also been involved directly in the legislative process of the Vietnamese laws and guiding by-laws regulating arbitration thereby well-equipped to provide practical and efficient solutions to legal problems.

As a testament to its capacity, Dzungsr & Associates LLC has consistently been accredited as a top-tier law firm in both dispute resolution and shipping practices by *The Legal 500 Asia Pacific* and is recognised as 'one of the best' in domestic commercial arbitration heard under Vietnam International Arbitration Centre rules and also is active in international arbitration.

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