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# Vietnam

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Alternative dispute resolution (ADR) in Vietnam has continuously developed since the success of 2015, which saw numerous developments in trade relations between Vietnam and foreign partners, and amendments to a number of important pieces of legislation. Such development is the result of the government adopting important economic and political criteria. This has principally been demonstrated in three areas: investment dispute settlement, commercial mediation and commercial arbitration.

### Investment dispute settlement

It could be said that one of the biggest achievements of investor-state dispute settlement (ISDS) in Vietnam in 2016 was its triumph in *Recofi v Vietnam* at the Swiss Supreme Court. In this case, Recofi, a French investor, commenced an arbitration under the 1992 Vietnam–France Bilateral Investment Treaty (BIT) in 2013 to claim for outstanding payments by the government concerning the claimant’s participation in an assistance programme that provided food and basic commodities to Vietnam when the country faced food shortages in 1987.<sup>1</sup> The seated Geneva arbitral tribunal was constituted in accordance with the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules as per article 8 of the Vietnam–France BIT. However, on 28 September 2015, the arbitral tribunal rendered an award accepting the arguments of Vietnam that the tribunal had no jurisdiction because Recofi had failed to establish the existence of an ‘investment’ within the meaning of that term under article 1(1) of the BIT. Recofi requested to annul the arbitral decision but such challenge was also rejected by the Swiss Supreme Court on 20 September 2016.<sup>2</sup> Notably, this was not the first time Vietnam has succeeded in defending the claims of foreign investors in international arbitrations. In accordance with a report from the Ministry of Justice, by 1 August 2016, Vietnam was recognised as the respondent in six investment-treaty-based disputes,<sup>3</sup> three of which (*DialAsia*, *McKenzie* and *Recofi*) were resolved with the outcome in favour of the Vietnamese government.<sup>4</sup> Of the remaining three, the *Trinh Vinh Binh* case was settled via negotiation in 2007, while no information on the status of the *SML* and *Sezako* cases<sup>5</sup> has been published.

It is understandable that the increases in international investment flows are likely to lead to more occasions for investor-state disputes involving an alleged violation of a treaty provision.<sup>6</sup> In the 2015–2016 period, Vietnam signed the Trans-Pacific Partnership (TPP) Agreement, the Eurasian Economic Union–Vietnam Free Trade Agreement (FTA) and the Republic of Korea–Vietnam FTA, increasing the number of international investment agreements that Vietnam has negotiated and concluded until August 2016 up to 66 BITs and 12 FTAs.<sup>7</sup> Four other FTAs that are under negotiation, which are expected to conclude within [the] next [few] years, are the European Union–Vietnam FTA (EVFTA), the Regional Comprehensive Economic Partnership (RCEP), the Association of Southeast Asian Nations (ASEAN)–Hong Kong

FTA, and the Vietnam–Israel FTA. These agreements would create significant opportunities for the development of economic Vietnam’s economy and improvement of the legal framework.

Comparing the benefits of these international agreements, Vietnam and some other member states of the TPP, such as Japan and Australia, still hope to salvage the TPP even when the fate of the Agreement is uncertain after the newly elected president of the United States, Donald Trump, signed the presidential memorandum officially withdrawing the US from the TPP on 23 January 2017.<sup>8</sup> However, among the remaining 10 additional members of the TPP, Chile, Mexico and Canada are the only three states that Vietnam has not concluded any BIT or FTA with. Vietnam has already concluded bilateral investment agreements with its biggest foreign investors: the United States, Japan and Korea. Therefore, even if the TPP were to fail, Vietnam will not be prevented from continuing its international integration.

More crucially, even if the TPP cannot come into effect, Vietnam will still enjoy the benefits from other trade pacts such as EVFTA and especially RCEP, which currently includes the 10 member states of ASEAN plus six other countries: Australia, China, India, Japan, South Korea and New Zealand. RCEP can now be the centerpiece of 21st century free trade, a title previously bestowed on the TPP.<sup>9</sup> As an agreement initiated by ASEAN, RCEP is an inclusive agreement that takes into account the concerns of its members, including but not limited to, the dispute resolution between a foreign investor and the host state.

The latest draft of the Investment Chapter under RCEP is combined texts proposed by China, Japan and Korea as of 16 October 2015.<sup>10</sup> As Japan, an important player of RCEP, wants strong discipline enforced in the areas of investment and intellectual property, with violations subject to dispute settlement rather than case-by-case political bargaining,<sup>11</sup> the scope of investment defined in RCEP is quite extensive. It includes, among others, ‘every kind of asset that an investor owns or controls directly or indirectly and that has the characteristics of an investment including [...] the expectation of gain/s or profit/s, or the assumption of risk.’<sup>12</sup> However, an order or judgment sought or entered in any judicial, administrative or arbitral proceeding does not constitute an investment within the scope of RCEP. As a result, the foreign investor, who fails to enforce the foreign arbitral awards in Vietnam cannot commence an investment arbitration against the Vietnamese government under RCEP.

Indeed, it has to be admitted that the ISDS mechanism under RCEP is still controversial between the rule-makers such as China, Japan and Australia. However, it is expected to negatively impact regulatory standards, punish governments that limit intellectual property rights, and more generally give investors the unique standing and ability to avoid and erode the democratic institutions created to make laws and resolve disputes.<sup>13</sup> To Vietnam, as stated in the strategy for the country’s international integration through 2020 with a vision toward 2030, international integration will

build up national strength. As a result, regardless of the trend in protection of investment, Vietnam will keep its proactive position in participating in common international activities, forums, and regional and international organisations, to enhance the country's position.<sup>14</sup> In a recent statement from the Minister of Industry and Trade, Vietnam agreed to promote the negotiation of RCEP as well as the discussion to allow for integration between TPP members, even without the US.<sup>15</sup>

### Mediation in Vietnam – the sun finally rises

In last year's chapter, we said that the Decree on Commercial Mediation (No. 22/2017/ND-CP) (Decree 22/2017) would bring a new dawn to Vietnamese mediation. The Decree was finally approved by the government on 24 February 2017 and will come into force on 15 April 2017.

On one hand, there is some criticism that Decree 22/2017 does not distinguish between two notions: mediation and conciliation. Moreover, even though the Decree was drafted in line with the UNCITRAL Model Law on International Commercial Conciliation, it does not completely adopt the UNCITRAL Model Law on Conciliation. Another issue is the requirement for registration of ad hoc commercial mediators; currently, only mediators who have registered at the Department of Justice of Vietnam can serve as ad hoc mediators.

On the other hand, this is the first piece of legislation on commercial mediation in Vietnam and it will be the cornerstone for further development of commercial mediation. In particular, it can be said that one of the most essential functions of Decree 22/2017 is that it paved the way for new international commercial mediation centres to be established in Vietnam, and for the current 19 arbitration centres to extend their scope of activities to commercial mediation in accordance with article 23. The Decree further allows the establishment of a branch of foreign mediation centres<sup>16</sup> and gives opportunities for foreign mediators to explore the mediation market in Vietnam.<sup>17</sup> This may, therefore, create the opportunities for the development of the arb-med-arb (or med-arb-med) mechanism in the near future. Notably, the Vietnam International Arbitration Center (VIAC), as the most reliable arbitration institution in Vietnam, has released its Rules on Commercial Mediation (the VIAC Mediation Rules). The VIAC Mediation Rules are considered to be an effort to promote the development of commercial mediation. With 20 articles, it sets forth the procedures for mediation, including commencement of mediation proceedings, number of mediators, appointment of the mediator, submission of written statements to the mediator, role of the mediator, administrative assistance, communication between the mediator and the parties, cooperation of the parties with the mediator, settlement agreements, termination of mediation proceedings and mediation costs.<sup>18</sup> According to the 2016 annual report of the VIAC, there is one case where parties finally resolved the dispute by commercial mediation.<sup>19</sup> Even though Vietnamese parties are not currently familiar with the commercial mediation procedure, it is undeniable that mediation will become one of the favoured alternative dispute settlement methods in both domestic and international transactions.

Importantly, Chapter XXXIII of the 2015 Civil Procedure Code (the 2015 CPC), related to the procedure for recognition of out-of-court-mediation, encompasses the most fundamental provisions to ensure legal effect of the results of parties' settlement through mediation. As from the effective date of the 2015 CPC – 1 July 2016 – the enforceability of parties' settlement agreement under Decree 22/2017 could enjoy protection under the CPC.

In particular, after being recognised by the Vietnamese court, the settlement agreement of parties will be enforced as a full and final court judgment. The decision to recognise or to not recognise a successful out-of-court mediation result shall immediately take effect and shall not be appealed against according to appellate procedures.<sup>20</sup> Nevertheless, this provision is only applicable to the result of an out-of-court mediation that is conducted according to regulations on mediation in Vietnam (ie, domestic mediation).<sup>21</sup> In other words, the result of an out-of-court mediation that is reached under foreign mediation rules or laws may not be recognised by Vietnamese courts.

Vietnamese lawmakers used international standards as the reference for Chapter XXXIII, for example, the UNCITRAL Model Law on International Commercial Conciliation 2002 and good international practices from the US, France, Germany, Hong Kong and Singapore. In addition, the idea of Chapter XXXIII is inspired by the proposal on the UNCITRAL Convention on recognition and enforcement of the settlement agreements resulting from international commercial conciliation and mediation of the Working Group II in 2015.<sup>22</sup> However, because mediation is a new area in Vietnam, some provisions have been designed to be similar to the relevant provisions regarding the recognition and enforcement of the foreign arbitral awards under Vietnamese laws. For example, article 419 of the 2015 CPC allows the court to order or request the disputing parties, third parties, the mediators or mediation centres to provide opinions and evidence. Regardless of some drawbacks, Chapter XXXIII is expected to contribute to the success of commercial mediation in Vietnam.

### Continued growth of Vietnamese commercial arbitration

The growth of commercial arbitration in Vietnam, to some degree, demonstrates the positive results of the improvement in Vietnamese legislation as discussed in our 2015 chapter for this review.<sup>23</sup> Such growth is reflected in the 2016 annual report of the VIAC. Accordingly, in 2016, the VIAC enrolled 156 cases, which resulted in an increase of 6.4 per cent in comparison with 2015. The number of cases with foreign elements accounted for 40 per cent of total cases. The figures in the VIAC report also demonstrate the changes in the attitude of the court toward arbitration. In particular, among 14 requests for annulment of VIAC arbitral awards, only four were set aside. It appears that the Vietnamese courts no longer arbitrarily apply the grounds for setting aside the arbitral awards and take a more diligent approach when considering the case file.

In addition, in 2017 the VIAC released its Arbitration Rules (the 2017 VIAC Rules) that were amended in compliance with the guidance of Resolution 01/2014 of the Supreme People's Court and the provisions of the 2015 CPC. The 2017 VIAC Rules came into force on 1 March 2017, and set out two new important provisions regarding consolidation and expedited procedure. Regarding consolidation of disputes, the Rules provide two mechanisms. The first one, stated in article 6, allows claims arising out of or in connection with more than one contract to be combined to make one request for arbitration to be resolved in a single arbitration, irrespective of whether such claims are made under one or more than one arbitration agreement. In other words, it allows the claimant to consolidate multiple claims subjecting to different arbitration agreements before the commencement of the arbitral proceedings. The second mechanism in article 15 adopts the provision in article 7.4 of Resolution 01/2014 regarding consolidation of arbitral proceedings commenced at the VIAC. Regarding the expedited procedure, upon

the party-autonomy principles, article 37 of the 2017VIAC Rules conferred to the arbitral tribunal the discretion to shorten any time limit under these Rules and render the award without a hearing. This provision is affected by the new provisions of Part IV of the 2015 CPC regarding the resolution of civil cases under the expedited procedure in the courts. These new provisions will facilitate the efficiency of the arbitral proceedings. At the same time, the provisions to render the award without a hearing and confer the arbitral tribunal more power in deciding the speed of the arbitral proceedings require the improvement of professional skills and knowledge of Vietnamese arbitrators, local judges and disputing parties. Otherwise, it would lead to the potential breach of the arbitral procedure.

Regarding the recognition and enforcement of foreign arbitral awards, the General State Enforcement Agency of Vietnam reported<sup>24</sup> that from 1 January 2011 to 30 June 2015, the state enforcement agency only received 31 requests for enforcement of foreign arbitral awards, which were recognised by the courts. Such a low ratio of foreign arbitral awards recognised and enforced in Vietnam has a bad effect on the country's business environment. To improve such a result, international experts, under the sponsorship of the International Finance Corporation of the World Bank Group, have been closely working with the Supreme People's Court of Vietnam in drafting a Bench Book on Arbitration and Mediation. Another handbook on the recognition and enforcement of foreign arbitral awards in Vietnam was also drafted under the administration of the Ministry of Justice. This handbook aimed at assisting not only the local judges but also officials, lawyers and parties. These documents are expected to be useful references for Vietnamese judges to assist them in interpreting and applying the relevant provisions of the Law on Commercial Arbitration, the CPC and the 1958 New York Convention on recognition and enforcement of foreign arbitral awards in line with international standards and an arbitration-friendly approach.

## Conclusion

As always, it is the first step that counts. Therefore, regardless of outstanding challenges and drawbacks, it is undeniable that ADR in Vietnam is getting closer to international standards. Compared to the first time the notion of commercial arbitration was introduced in the Ordinance on Commercial Arbitration in 2003, it could be said that ADR in Vietnam has seen exponential growth. Thanks to the global integration, the international cooperation between Vietnam and other states is not only limited in an economic aspect but also because of legal issues. For example, some reputable regional arbitration institutions held events in Vietnam to introduce themselves and share their practice experience with Vietnamese practitioners such as the Hong Kong International Arbitration Center, the Singapore International Arbitration Center, the Korean Commercial Arbitration Board and the Bangladesh International Arbitration Center. Well-known institutions such as the Chartered Institute of Arbitrators, the Young International Council for Commercial Arbitration and UNCITRAL also provided workshop and training courses in Vietnam. However, the Ministry of Justice, the Supreme People's Court and the VIAC also invited international experts to come to Vietnam for training and to contribute opinions on important legislation such as the 2015 CPC, Decree 22/2017 and the VIAC Rules. Notably, the active participation of Vietnamese legal practitioners and enterprises in these events shows the attraction of ADR in Vietnam.

Moreover, the fact that Vietnam has to respect its commitments under relevant international investment agreements also provides the incentive to improve its legal frameworks, especially those related to dispute resolution mechanisms. Where there is demand, there will be supply. The lack of experts in ADR areas in Vietnam currently would make the country a potential market for international professionals.

With the positive and friendly attitude toward arbitration and mediation, there is high hope for the growth of ADR in Vietnam. It is undeniable that there are still defects in the legal system but, step by step, the country will learn how to correct those defects and move forward with significant reforms.

## Notes

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Mr Nguyen Manh Dzung is the managing partner of Dzungsr & Associates LLC and is recommended by *The Legal 500 Asia Pacific* 2015 edition as one of the 'Leading Dispute Resolution Lawyers' in Vietnam. He is also an internationally recognised specialist in all areas of maritime law, commercial litigation and international arbitration in Vietnam. He was a former vice president of the Pacific International Arbitration Center in Ho Chi Minh City, Vietnam and is now a member of the Research Council of the Vietnam International Arbitration Center (VIAC). He has been accredited as a Member of the Chartered Institute of Arbitrators (MCIArb).

Mr Nguyen Manh Dzung has been a key member of various committees to draft Vietnamese legislation on ADR and has also been appointed as a consultant by international organisations in projects to reform the local legal system. He has presented and lectured extensively on ADR and international commercial arbitration at the Judicial Academy of the Ministry of Justice of Vietnam and the Diplomatic Academy of the Ministry of Foreign Affairs of Vietnam. Mr Dzung has acted in both domestic and international arbitrations conducted under various rules, such as those of the ICC, SIAC, JCAA and VIAC, and in pursuing the enforcement in Vietnam of awards rendered by such institutions.



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Dzungsr & Associates LLC has extensive experience and expertise in arbitration and litigation, covering a wide range of matters of different natures. Its lawyers practise to a very high standard and are familiar with the intricacies of dispute resolution in Vietnam, and are thereby well equipped to provide innovative and cost-effective solutions to legal problems. As a testament to its capacity, *The Legal 500 Asia Pacific* 2016 recognised that 'Dzungsr & Associates LLC is "one of the best" in domestic commercial arbitration heard under VIAC rules and also is active in international arbitration'.

Dzungsr & Associates LLC has first-hand experience in the development of ADR laws and regulations in Vietnam. The firm was involved directly in the drafting of the 2010 Law on Commercial Arbitration, sections of the 2015 Civil Procedure Code on recognition and enforcement of arbitral awards and the by-laws guiding said statutes. The newly enacted 2017 Decree on Commercial Mediation, which is the first piece of legislation on commercial mediation in Vietnam, similarly saw significant contributions from the firm. In addition, the firm commented extensively on the 2017 edition of the Rules of Arbitration of the VIAC, the most prominent arbitration centre in Vietnam.

Most recently, Dzungsr & Associates LLC has cooperated with international organisations (eg, Governance for Inclusive Growth Program (GIG) and International Finance Corporation (IFC)) in an effort to educate local judges and improve the justice system of Vietnam. This includes a training workshop and bench book for the Supreme People's Court of Vietnam on matters involving arbitration and mediation.



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