



The Asia-Pacific Arbitration Review 2022

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The Asia-Pacific Arbitration Review 2022

A Global Arbitration Review Special Report

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Prefacevi

Overviews

Choosing an arbitration model – why flexibility is key 1

Damien Glenn Yeo

Singapore Chamber of Maritime Arbitration

Disputes in Asia-Pacific construction and infrastructure projects 7

Craig Shepherd, Daniel Waldek and Mitchell Dearness

Herbert Smith Freehills

Innovating the future: recent changes and developments in global and regional arbitral institutions..... 12

Sangyub (Sean) Lee and Ji Yoon (June) Park

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International commercial arbitration in the time of covid-19..... 18

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

Investment treaty arbitration in the Asia-Pacific: the impact of the CPTPP and the RCEP 21

Tony Dymond, Cameron Sim and Benjamin Teo

Debevoise & Plimpton LLP

The rise of arbitration in the Asia-Pacific 29

Andre Yeap SC, Kelvin Poon and Alessa Pang

Rajah & Tann Singapore LLP

Tashkent International Arbitration Centre – Uzbekistan's new arbitral institution 35

Diana Bayzakova, Yan Kalish, Charles Tay and Nodir Malikov

Tashkent International Arbitration Centre

Country chapters

Australia 42

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

Clayton Utz

Hong Kong..... 50

Peter Yuen, Olga Boltenko and Zi Wei Wong

Fangda Partners

India..... 53

Vijayendra Pratap Singh, Abhijnan Jha and Arnab Ray

AZB & Partners

Japan 59

Yoshimi Ohara, Kei Kajiwara and Annia Hsu

Nagashima Ohno & Tsunematsu

Malaysia..... 63

Andre Yeap SC and Avinash Pradhan

Rajah & Tann Singapore LLP

Singapore 72

Alvin Yeo SC, Sean Yu Chou and Wei Lee Lim

WongPartnership LLP

Sri Lanka 78

Avindra Rodrigo

F J & G de Saram

Vietnam 83

Nguyen Ngoc Minh, Nguyen Thi Thu Trang and

Nguyen Thi Mai Anh

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Welcome to *The Asia-Pacific Arbitration Review 2022*, a *Global Arbitration Review* special report. For the uninitiated, *Global Arbitration Review* is the online home for international arbitration specialists the world over, telling them all they need to know about everything that matters.

Throughout the year, we deliver our readers pitch-perfect daily news, surveys and features; lively events (under our GAR Live and GAR Connect banners (GAR Connect for virtual)); and 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 35 pre-eminent practitioners. Across 14 chapters and 92 pages, they provide us with an invaluable retrospective on the past year. All contributors are vetted for their standing and knowledge before being invited to take part.

The contributors' chapters capture and interpret the most substantial recent international arbitration events across the Asia-Pacific region, with footnotes and relevant statistics. Elsewhere they provide valuable background on arbitral infrastructure in different locales to help readers get up to speed quickly on the essentials of a particular country as a seat.

This edition covers Australia, Hong Kong, India, Malaysia, Singapore, Sri Lanka and Vietnam and has overviews on construction and infrastructure disputes in the region (including the effect of covid-19), the state of ISDS and what to expect there, and trends in commercial arbitration, as well as contributions by four of the more dynamic local arbitral providers.

Among the nuggets this reader learned is that:

- force majeure is not necessarily the only option for project participants affected by covid-19, especially if the FIDIC suite is in the picture;
- Korea's diaspora is known as its *Hansang* and more 'international' arbitrators are now accepting KCAB appointments (the number of KCAB 'first-timers' is up by 23 per cent);
- it has become far easier for foreign counsel and arbitrators to conduct cases in Thailand;
- there have been some strongly pro-arbitration decisions from the Philippines and Vietnam of late;
- Sri Lanka's courts also seem to have turned a corner on avoiding excessive interference; and
- improvements in the arbitral environment in Vietnam are part of a concerted effort that began in 2015.

I also found answers to some other questions that had been on my mind, such as whether an increase in case numbers in the SIAC in 2020 was matched by an increase in the total value at stake there (spoiler alert: no), and a number of components I plan to consult when the need arises – including a summary of key decisions in Singapore; a long explainer on the background to the Amazon-Future dispute in India; and a fabulous chart deconstructing the arbitral furniture in Uzbekistan.

I hope you enjoy the volume and get as much from it as I did. 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 2021

Arbitration developments in Vietnam: adapting to global challenges

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

Dzungsr & Associates LLC

In summary

The covid-19 pandemic together with the rapid development of e-commerce has focused attention on online dispute resolution and virtual hearings. However, these solutions may result in legal and practical impediments in Vietnam. The Supreme People's Court set an arbitration-related precedent involving consumer disputes in 2020 and the government has issued more guidelines to prevent the emergence of high-stake investment treaty arbitrations.

Discussion points

- Legal and practical impediments to conducting virtual hearings during the covid-19 pandemic
- Parties skipping pre-arbitration steps under a multi-tiered arbitration agreement when these steps are no longer feasible (Decision No. 02/2020/QD-PQTT of the Hanoi People's Court)
- Actual knowledge versus constructive knowledge of non-compliance to waive the right to object during setting-aside proceedings (Decision No. 163/2020/QD-PQTT of the Ho Chi Minh City People's Court)
- Courts reaching inconsistent views on the discretion of arbitral tribunals in fact-finding
- Precedent No. 42/2021/AL of the Supreme People's Court, the first arbitration-related precedent involving a consumer dispute
- The government's solutions to pre-empt the surge of investment treaty arbitration

Referenced in this article

- Law No. 54/2010/QH12 on Commercial Arbitration, issued on 17 June 2010
- Law No. 59/2010/QH12 on Protection of Consumer Rights
- Precedent No. 42/2021/AL announced by the Supreme People's Court
- Decision No. 163/2020/QD-PQTT of Ho Chi Minh City People's Court dated 12 February 2020
- Decision No. 02/2020/QD-PQTT of Hanoi People's Court dated 23 April 2020
- Decision No. 04/2020/QD-PQTT of Hanoi People's Court dated 29 May 2020
- Decision No. 09/2020/QD-PQTT of Hanoi People's Court dated 16 September 2020

Introduction

Along with many other sectors, arbitration in Vietnam has suffered during the covid-19 pandemic. Together with the rapid development of e-commerce, this has focused attention on online dispute resolution (ODR) and virtual hearings in particular. However, there may be legal and practical impediments to these developments. In March 2021, the Supreme People's Court set, for the first time, a precedent pertaining to consumer arbitration, which is also the only arbitration-related precedent out of 43 precedents announced up to the present. More precedents on arbitration-related matters are expected in the future to remedy the inconsistent court decisions in setting-aside proceedings. Some proposals are also being put forward to make arbitration more accessible for consumer disputes. State authorities have also emphasised finding solutions to improve court practice in the recognition and enforcement of foreign arbitral awards. Coupled with the increase of international investment treaties, high-stake investment treaty arbitrations have also become a great concern for the government, resulting in more guidelines to prevent them.

General statistics about commercial arbitration in 2020

The Vietnam International Arbitration Centre (VIAC) experienced a decrease of 20.2 per cent in new cases compared to 2019, with 221 new cases in total, of which 175 were domestic and 46 had foreign elements.¹ The main areas of disputes resolved at the VIAC remain sale of goods (47 per cent), construction (14 per cent) and services (12 per cent), and the major nationalities of foreign parties were still China, Singapore and South Korea. The complexity of the disputes is increasing with more involvement of professional lawyers.² The VIAC is in the process of overhauling the current arbitration procedure to make its dispute resolution more efficient.

As in other jurisdictions, the covid-19 pandemic has had a big impact on alternative dispute resolution (ADR) in Vietnam. The pandemic has sparked a wide discussion on virtual hearings, whose use has been accelerated. For instance, the VIAC has organised a number of webinars to promote virtual hearings to the business community. However, parties raising objections have caused delays in some cases.

Under Decision No. 645/QD-TTg dated 15 May 2020, the government considered establishing ODR to better protect the rights of consumers in e-commerce as one of the solutions to develop e-commerce during 2021–2025. A number of scholarly works and seminars have discussed the potential benefits – and difficulties – of developing ODR in Vietnam.³ In June 2020, the Hanoi International Arbitration Centre (HIAC) established the first online dispute resolution platform in Vietnam.⁴ On 30 March 2021, the Vietnam Mediation Centre (under the auspices of the VIAC) officially launched its online mediation platform, MedUp, with the aim of introducing a more timely and

cost-effective dispute resolution method, especially for business-to-consumer disputes such as disputes arising from e-commerce transactions.⁵ An equivalent online platform for commercial arbitration by the VIAC will also be explored in the coming months.⁶

The Law on Commercial Arbitration No. 54/2010/QH12 (LCA) is now 10 years old, having taken effect on 1 January 2011. Among other things, the LCA, which was drafted based on the 1985 UNCITRAL Model Law as amended in 2006, provides a legal framework for the development of ADR in general and commercial arbitration in particular. To review the development of ADR in Vietnam over the past 10 years and promote it further, the VIAC organised the first Vietnam ADR Week in 2020, which included a series of seminars discussing not only ADR but also practical issues that enterprises might face during the covid-19 pandemic.⁷

Virtual hearings

As a result of the pandemic, physical hearings could not take place at scheduled times, especially when one of the parties or arbitrators was based outside Vietnam. The pandemic thus acted as a catalyst to switch to virtual hearings rather than strictly physical hearings, which may be postponed indefinitely. However, certain legal and practical issues need to be addressed in the context of virtual hearings in Vietnam.

The most concerning issue is whether the arbitral tribunal can proceed with the virtual hearing at its own discretion (without the parties' agreement) or even when a party objects to it. Case management and preliminary meetings that are not stipulated under the laws are regularly held in any mode that the arbitral tribunal considers appropriate. Meanwhile, regarding the mode of hearings, articles 11(2)⁸ and 54(1)⁹ of the LCA require the arbitral tribunal to determine both the time and the location of hearings. In addition, pursuant to article 56(3) of the LCA,¹⁰ the tribunal may proceed with a documents-only arbitration if this is requested by the parties. Accordingly, this can be interpreted to mean that unless otherwise agreed by the parties, the arbitral tribunal must always hold physical hearings. In other words, by inference, virtual hearings can only be held if agreed upon by the parties.

Some arbitration centres follow a similar approach to that stipulated in the LCA;¹¹ however, others (eg, the VIAC, the Global Commercial Arbitration Centre and the Financial and Commercial Centre for Arbitration) provide explicitly that virtual hearings are only possible upon the parties' agreement.¹² For example, pursuant to articles 25(1)¹³ and 27(3)¹⁴ of the 2017 VIAC Rules, physical hearings must always be conducted and virtual hearings are only possible upon the parties' agreement. If the arbitration is conducted under the expedited procedure, the arbitral tribunal shall have the discretion to conduct a hearing remotely unless a party objects. However, the prerequisite is still that the parties must agree on the application of the expedited procedure in the first place.¹⁵ The HIAC also allows the arbitral tribunal to conduct virtual hearings upon the parties' agreement, and even established a platform for virtual hearings.¹⁶

Despite the arbitration-friendly legislative guidance that has been given during setting-aside and recognition procedures, given the court practice so far, a failure to conduct a physical hearing, especially without the parties' agreement to dispense with one, might still be considered a violation of the arbitration procedure under the LCA, a violation of the fundamental principles of Vietnamese law or a deprivation of the right to present the case, which are the grounds for setting aside arbitral awards¹⁷ or refusing to recognise foreign arbitral awards.¹⁸

The current infrastructure and technology in Vietnam might also be an issue when parties are considering whether to conduct virtual hearings. Typically, a physical hearing is conducted in a U-shape hearing room, with facilities for electronic presentation of submissions and exhibits, an interpreter booth, a breakout room and dining facilities. The use of other facilities to ensure the confidentiality, equal treatment, transparency and efficiency of a virtual hearing, such as a 360-degree or wide-angle camera and a digital platform for transmission and storage of documentation, is not yet the norm in Vietnam.

Challenge of tribunal's decision on jurisdiction and arbitral award

Public information announced by the Supreme People's Court shows that seven arbitral awards were challenged and three of them were set aside by Vietnamese courts in 2020.¹⁹ Three applications to review the tribunal's decisions on jurisdiction were submitted and the courts in all three cases affirmed the tribunal's jurisdiction.²⁰ Some significant takeaways from these court decisions are as follows.

Multi-tiered arbitration agreement

In Decision No. 02/2020/QD-PQTT dated 23 April 2020, the Hanoi People's Court determined that parties may skip the mediation and dispute adjudication board (DAB) steps and go straight to arbitration if they engaged in pre-arbitration discussions to resolve the dispute (that were not successful) and mediation or DAB is no longer feasible.²¹

This case involved an engineering, procurement and construction (EPC) contract for the exploitation and processing of rock salt in Laos. Pursuant to article 20 of the EPC contract, the parties first needed to resolve the dispute via DAB or mediation. Then, if not satisfied with the dispute resolution result, each party could initiate an arbitration. When the dispute arose, the parties engaged in discussions to resolve the dispute but not officially via DAB or mediation. When the discussions failed, the contractors commenced an arbitration at the VIAC and the tribunal issued a decision to uphold its jurisdiction. On 22 January 2020, the employer requested the Hanoi People's Court to review the tribunal's decision on jurisdiction, asserting that DAB and mediation are prerequisites for the parties to commence arbitration.

The Hanoi People's Court decided that the parties had corresponded extensively for over two years, from September 2016 until January 2019, without success. The DAB and mediation options were thus no longer feasible to resolve the dispute. Therefore, the parties could skip these steps and advance to arbitration.

When the arbitral award was rendered, the employer again invoked that ground to request the award be set aside. However, the Hanoi People's Court dismissed the ground and affirmed the award in Decision No. 09/2020/QD-PQTT dated 16 September 2020.²²

Waiver of the right to object

Pursuant to Decision No. 163/2020/QD-PQTT of the Ho Chi Minh City People's Court dated 12 February 2020,²³ a party may only be deemed to have waived its right to challenge an award if it had actual knowledge of the procedural error rather than constructive knowledge of it.

In that case, the two arbitrators appointed a presiding arbitrator, but the appointment was rejected. The presiding arbitrator's replacement should have been appointed by the president of the arbitration centre pursuant to article 40(3) of the LCA and article

12(3) of the 2017 VIAC Rules. However, the two arbitrators themselves proceeded with the appointment. The award debtor asserted that this amounts to a procedural violation and requested that the arbitral award be set aside in accordance with article 68(2) (b) of the LCA. In response, the award creditor noted that as the award debtor failed to object to this procedural violation during the arbitration proceeding, it was barred from invoking this ground to set aside the award in accordance with article 13 of the LCA.

Article 13 of the LCA reads as follows:

A party who knows that there is non-compliance with the provisions of this Law or the arbitration agreement and yet proceeds with the arbitration without stating an objection to such non-compliance within the time-limit prescribed under this Law shall lose their right to object at Arbitration or Court.

Article 13 is based on article 4 of the UNCITRAL Model Law ('Waiver of right to object'). Accordingly, to invoke the waiver of right to object, the following must be established: (i) non-compliance with the provisions of the LCA; (ii) knowledge of the non-compliance; (iii) delay in making an objection; and (iv) proceeding with the arbitration.²⁴ Regarding the knowledge requirement, the legislative history of the UNCITRAL Model Law indicates that this must be actual rather than constructive knowledge and should be interpreted restrictively, excluding where a party was unaware of the error.²⁵ The knowledge is often proven by proof of circumstances where such knowledge can be deduced, and not proven directly.²⁶

In the case at hand, during the arbitration, the parties took minutes, dated 3 July 2019, which stated that: 'The parties jointly agree with the composition and jurisdiction of the Arbitral Tribunal, the order and procedure of the Case, without any objection to the arbitration procedure.' The award creditor relied on these minutes to argue that the award debtor lost the right to object. However, the Ho Chi Minh City People's Court decided that the above extract from the minutes does not demonstrate that the award debtor knew of the non-compliance regarding the appointment of the presiding arbitrator. The Court also requested the VIAC to provide the audio recording of the hearing to determine whether the award debtor knew of the appointment of the presiding arbitrator during the proceeding, but no recording was available as it had not been requested by the parties before the hearing. The award debtor asserted that they only discovered the non-compliance after receiving the award. Therefore, the award debtor was not deemed to lose its right to object. In other words, the Court also requires that the award debtor must have known about the non-compliance for it to be deemed to have waived its right to challenge an award.

Discretion of arbitral tribunal in fact-finding

As noted in our article last year, in 2019, two decisions of the same court reached two different conclusions about whether fact-finding is an obligation of arbitral tribunals or whether it is at their discretion.²⁷ In 2020, the courts continued to have conflicting views on this issue.

In Decision No. 163/2020/QD-PQTT (as discussed above), the award debtor further argued that during the arbitration, the arbitral tribunal did not verify the facts requested by it from a third party that were relevant to the case. The award debtor thus stated that the arbitral tribunal violated article 18 of the 2017 VIAC Rules as well as article 45 of the LCA. The latter reads:

'The Arbitral Tribunal may, on its own initiative or at the request of a party or the parties, conduct fact-finding from a third person in the presence of the parties or after having notified the parties.' The Ho Chi Minh City People's Court dismissed this argument and ruled that the issue is at the discretion of the arbitral tribunal and the court is not allowed to revisit the merits of the case. Similarly, in Decision No. 09/2020/QD-PQTT, the award debtor challenged the award based on the ground that the tribunal failed to examine the evidence in a comprehensive manner. The Hanoi People's Court refused to consider this ground as it pertains to the merits of the case.

Meanwhile, in another case, the award debtor requested that the arbitral tribunal collect evidence from a state authority relating to the transaction between the disputing parties. The tribunal considered that the request of the award debtor failed to describe in detail the documents or evidence that needed collecting from the state authority and thus refused the request. In Decision No. 04/2020/QD-PQTT dated 29 May 2020,²⁸ the Hanoi People's Court decided that the arbitral tribunal violated article 46(2) of the LCA and article 19(2) of the 2017 VIAC Rules on collection of evidence, although these provisions again specify that the arbitral tribunal 'may' (rather than 'must') collect evidence. The Court went on to determine that a failure to collect evidence led to the lack of impartiality and objectiveness, and thus set aside the award based on article 68(2)(dd) of the LCA (ie, the award is contrary to the fundamental principles of the law).

Recognition and enforcement of foreign arbitral awards

The high number of foreign arbitral awards that have been arbitrarily refused recognition has been an issue in Vietnam for several years. Business associations from the United States, the United Kingdom and Sweden, including the International Cotton Association, sent official letters and conducted in-person meetings with the Ministry of Justice, the Ministry of Foreign Affairs, the Ministry of Industry and Trade and the Supreme People's Court, among others, to raise their concerns about Vietnamese courts' non-compliance with the New York Convention.²⁹ The lack of recognition of foreign arbitral awards was also listed as one of the issues of Vietnam's legal system in the 2019 and 2020 Whitebooks of the European Chamber of Commerce in Vietnam.³⁰

Considering that the practice of arbitrarily refusing recognition of foreign arbitral awards may have negatively impacted Vietnam's credibility and may even escalate to high-stakes international investment disputes, the state authorities have been working on solutions to improve the situation. As a first step, the Civil Procedure Code was amended in 2015 with more arbitration-friendly provisions. As a result, the percentage of arbitral awards that were refused recognition and enforcement in Vietnam has decreased from 46 per cent to 21 per cent.³¹ Moreover, the Supreme People's Court is drafting a Resolution on the procedure for recognition and enforcement of foreign arbitral awards in Vietnam to ensure consistency in the application and interpretation of the New York Convention and the relevant provisions of the Civil Procedure Code on this matter. The Ministry of Justice requested that the lower courts review and report on their resolutions regarding applications for recognition of foreign arbitral awards from 1 January 2012 to 30 September 2019. On 25 September 2020, this information was made public on the portal of the Ministry of Justice, providing more transparency and information on how Vietnamese courts handle the requests for recognition and enforcement of foreign arbitral awards.³²

Precedent regarding consumer arbitration

After precedents were officially regarded as a source of law under the 2015 Civil Code, the Justice Council of the Supreme People's Court presented a number of judgments and decisions that will have a binding effect on the courts. In early 2021, for the first time, a decision relating to arbitration was selected as a precedent. On 12 March 2021, the Supreme People's Court announced Precedent No. 42/2021/AL based on Judgment No. 54/2018/DS-ST of the People's Court of Nha Trang dated 16 November 2018 relating to the consumer's right to choose the court to settle the dispute if the form contract contains an arbitration clause.³³

In that case, after the contract was signed, the claimant made a partial payment of the contract price. Pursuant to article 12.3 of the contract, any dispute between the parties shall be resolved by the Singapore International Arbitration Centre (SIAC) in accordance with the SIAC's arbitration rules in effect at the time of the dispute settlement. After signing the contract, the customers became aware of some unreasonable contractual terms and asked for termination of the contract, which was rejected by the company. On 8 December 2017, the customers sued the company through the People's Court of Nha Trang, asking the Court to declare the vacation contract invalid and order the company to refund the paid amount. On 16 November 2018, the People's Court of Nha Trang issued Judgment No. 54/2018/DS-ST to resolve the customers' claims. The Court found that:

Vacation ownership contract No. PBRC-S-064621 falls within the type of form contract provided by the service provider, with the pre-drafted arbitration agreement. The plaintiffs as the consumers disagree with the choice of arbitration and request the People's Court of Nha Trang to resolve [the case], which is in accordance with Article 38 of the Law on Protection of Consumer Rights, Article 17 of the Law on Commercial Arbitration and the guidance in Clause 5, Article 4 of Resolution No. 01/2014/NQ-HDTP dated 20 March 2014 of the Justice Council of the Supreme People's Court. Therefore, it is right that the People's Court of Nha Trang accept and settle disputes in accordance with Clause 3 Article 26, Clause 1 Article 35 of the Civil Procedure Code and the enrolment is still within the statute of limitations for initiating a lawsuit specified in Article 429 of Civil Code 2015 and Article 184 of Civil Procedure Code.

Accordingly, the precedent affirms the consumer's discretion in opting for litigation at court even when there was an arbitration clause in the form contract laid down under article 17 of the LCA:

Article 17. Consumer's right to select dispute resolution method
For disputes between goods or service providers and customers, though an arbitration clause has been included in general conditions on goods and service provision drafted by goods or service providers, consumers may select arbitration or a court to settle these disputes. Goods or service providers may initiate lawsuits at arbitration only if so consented by consumers.

These regulations are to protect consumers against the unequal bargaining power between consumers and enterprises given that form contracts are usually non-negotiable. Arbitration agreements made after a dispute arises are not subject to the restrictions provided by the LCA. Although this precedent simply reaffirms the enacted legislation, it indicates that the Supreme People's Court has shown more interest in arbitration-related matters and it is expected that there will be more arbitration-related precedents in the future.

Putting aside the consumer's legislative right to choose court litigation over arbitration, in practice, commercial arbitration has

not been a favourable or feasible option for resolving consumer disputes. For instance, in accordance with the data of the Ministry of Industry and Trade³⁴ and the Department of Industry and Trade of Ho Chi Minh City,³⁵ none of the form contracts that are registered with these authorities contain an arbitration clause. These form contracts often refer to the Vietnamese courts. This is due to the fact that these registration authorities are usually not well informed of and do not fully understand the consumer's right under article 17 of the LCA. These authorities consider that if the form contract contains an arbitration clause, the right of consumers to choose other dispute settlement methods would be limited and thus require the enterprises not to include the arbitration clause in the form contract.³⁶ In addition, the current regulation on commercial arbitration is not considered appropriate for resolving consumer disputes.³⁷

In the context of e-commerce transactions increasing rapidly in Vietnam, consumer disputes are expected to be on the rise in the coming year. Therefore, a number of solutions, such as the development of ODR, are being considered to establish a more efficient dispute resolution method for consumers.

Investment treaty arbitration

The year 2020 witnessed the conclusion and coming into effect of some important free trade agreements (FTAs). On 15 November 2020, Vietnam and 14 other countries (all ASEAN members, Australia, China, Japan, South Korea and New Zealand) signed the Regional Comprehensive Economic Partnership (RCEP). Unlike most of the existing international investment treaties, the RCEP does not include an investor-state dispute settlement (ISDS) mechanism. Signatories may hold discussions on this issue in future.³⁸

The European Union–Vietnam FTA took effect on 1 August 2020. The European Union–Vietnam Investment Protection Agreement (EVIPA) was ratified by the National Assembly of Vietnam under Resolution No. 103/2020/QH14 but has not been ratified by the parliaments of each EU member state, and therefore has not taken effect.³⁹ On 18 June 2020, the National Assembly of Vietnam passed Resolution No. 113/2020/QH14 to guide the recognition and enforcement of arbitral awards issued under the EVIPA. An arbitral award under the EVIPA shall be enforced by each party of the EVIPA as if it were a final judgment of a court of that party.⁴⁰ The court in Vietnam shall issue the decision for recognition and enforcement of the arbitral award upon the request of the award creditor to ensure the enforceability of the EVIPA arbitral award in Vietnam.⁴¹ However, Vietnam has a five-year transition period after the EVIPA comes into force. Accordingly, regarding an arbitral award where Vietnam is the respondent that was issued during the transition period, its recognition and enforcement shall continue to be conducted pursuant to the New York Convention.⁴² Further, in accordance with Resolution No. 113/2020/QH14, the Vietnamese court shall apply the provisions on recognition and enforcement of foreign arbitral awards under the Civil Procedure Code, which is in line with the New York Convention, to accept or refuse the recognition and enforcement of the arbitral award where Vietnam is the respondent issued during the transition period.⁴³

After the withdrawal of the United Kingdom from the European Union in 2020, on 29 December 2020, Vietnam and the United Kingdom signed the UK–Vietnam Free Trade Agreement (UKVFTA), which took effect on 31 December 2020.⁴⁴ According to Appendix I of the UKVFTA, the ISDS scheme will still be subject to the 2002 UK–Vietnam bilateral investment treaty (BIT).⁴⁵

According to currently available information, Vietnam has been reported as the respondent in eight investment treaty arbitration cases: *Shin Dong Baig v Vietnam* (2018); *ConocoPhillips and Perenco v Vietnam* (2017); *Bryan Cockrell v Vietnam* (2014); *Trinh Vinh Binh v Vietnam (II)* (2004); *Recofi v Vietnam* (2013); *Dialasie v Vietnam* (2011); *Michael McKenzie v Vietnam* (2010); and *Trinh Vinh Binh v Vietnam (I)* (2004).⁴⁶ On 10 April 2019, the tribunal rendered the final award in *Trinh Vinh Binh v Vietnam (II)*, in which Vietnam was required to pay Mr Trinh Vinh Binh a total amount of approximately US\$45 million, including damages for expropriation of property, moral damages, costs of arbitration and related legal fees.⁴⁷ On 29 October 2020, the ICSID Tribunal rendered the arbitral award to conclude *Shin Dong Baig v Vietnam*, which was initiated on 19 March 2018.⁴⁸ Meanwhile, *ConocoPhillips and Perenco v Vietnam*, which was initiated in 2017 on the basis of the 2012 UK–Vietnam BIT, is still pending.⁴⁹

With the surge of FTAs and international investment disputes against Vietnam in recent years, the government and local authorities have focused on and issued a number of directions to prevent the emergence of international investment disputes and to resolve disputes that have arisen. For instance:

- on 8 April 2020, the government issued Decision No. 14/2020/QĐ-TTg to guide cooperation among state authorities in resolving international investment disputes;
- on 10 July 2020, the government issued Directive No. 27/CT-TTg to improve state management of investments and to prevent the emergence of international investment disputes; and
- on 17 September 2020, the Ministry of Justice issued Decision No. 1939/QĐ-BTP to organise training courses on international law and international investment dispute resolution.

Conclusion

Although the current legal framework, practice and infrastructure have room for improvement, practitioners in Vietnam are still very active in their efforts to improve ADR methods in the country. Although the covid-19 pandemic has presented many challenges, it has also accelerated the application of technology in dispute resolution in Vietnam. State authorities were also more responsive to issues regarding the development of ADR in 2020, especially the enforceability of arbitral awards. Considering the great progress that Vietnam has achieved over the years, it is anticipated that the country will continue to develop to be more in line with international arbitration practices.

Notes

- 1 VIAC 2020 Annual Report.
- 2 VIAC 2020 Annual Report.
- 3 For instance, PhD Duong Quynh Hoa, Online dispute resolution in Vietnam, *Journal of Legislative Research*, Vol. 19 (419), October 2020 <<http://lapphap.vn/Pages/tintuc/tinchitiet.aspx?tintucid=210692>> accessed on 12 April 2021. On 15 March 2021, the Ministry of Justice held the seminar on 'Current laws and practical application in commercial dispute resolution by online arbitration and mediation' in Hanoi City. On 9 April 2021, the Ministry of Justice held the seminar on 'Current commercial dispute resolution by online arbitration and mediation of Vietnamese enterprises' in Ho Chi Minh City.
- 4 See <<https://www.hiac.vn/>>.
- 5 See <<https://www.vmc.org.vn/tin-tuc-su-kien/toa-dam-giai-quyet-tranh-chap-truc-tuyen-va-gioi-thieu-nen-tang-hoa-giai-truc-tuyen-n852.html>>, accessed on 12 April 2021.

- 6 VIAC 2020 Annual Report.
- 7 See <<https://www.viac.vn/tin-tuc-su-kien/vaw-2020-tuan-le-trong-tai-va-hoa-giai-thuong-mai-viet-nam-2020-n900.html>>, accessed on 12 April 2021.
- 8 LCA, article 11(2): 'Unless otherwise agreed by the parties, the arbitration tribunal may conduct hearing sessions at a location which it deems appropriate for mutual consultation between the members of the tribunal, for taking statements from witnesses, for seeking advice from experts, or for conducting evaluations of goods, assets or other materials.'
- 9 LCA, article 54(1): 'The arbitration tribunal shall make decisions on the time and location for holding dispute resolution sessions, unless otherwise agreed by the parties or otherwise stipulated by the procedural rules of the arbitration centre.'
- 10 LCA, article 56(3): 'The arbitration tribunal may, at the request of the parties, rely on the file to conduct a dispute resolution session without requiring the presence of the parties.'
- 11 For instance: HCMC Commercial Arbitration Centre (TRACENT) <<https://tracent.com.vn/quy-tac-to-tung-trong-tai/>>, Nam Viet Commercial Arbitration Centre (NVAC) <<https://trongtainamviet.com/quy-tac-to-tung/>>, Asean International Commercial Arbitration Centre (ACIAC) <<http://www.aciac.com/?page=quy-tac-to-tung>>, Thinh Tri Commercial Arbitration Centre (TTCAC) <<http://trongtaithinhtri.com/quy-tac-to-tung-trong-tai-thuong-mai.html>>.
- 12 For instance: Global Commercial Arbitration Centre (GCAC) <<https://gcac.vn/quy-tac-to-tung-trong-tai-cua-trung-tam-trong-tai-thuong-mai-toan-cau/>>, Financial and Commercial Centre for Arbitration (FCCA) <<http://fccca.vn/en/rules/>>, Southern Trade Arbitration Centre (STAC) <<https://stac.com.vn/quy-tac-tung-trong-tai/>>, Vietnam Prosperity Arbitration Centre (VNPAC) <http://vnpac.com/Quy-tac-to-tung-trong-tai_1904_news.htm#news>, Commercial Arbitration Centre (HTA) <<https://hta-arbitration.vn/quy-tac-to-tung-trong-tai/>>, Vietnam Trades Arbitration Centre (VTA) <<http://vtac.vn/rules-of-arbitration>>.
- 13 2017 VIAC Rules, article 25(1): 'The Arbitral Tribunal shall fix the time and the location of hearings unless the parties have agreed otherwise. The Arbitral Tribunal may conduct the hearings by means of teleconference, video-conference or by any other appropriate means if the parties have agreed so.'
- 14 2017 VIAC Rules, article 27(3): 'The Arbitral Tribunal may, at the request of the parties, rely on the documents and evidence readily available to proceed with a hearing without the presence of the parties.'
- 15 2017 VIAC Rules, article 37.
- 16 See <<https://hiac.vn/quy-t%E1%BA%AFc-t%E1%BB%91-t%E1%BB%A5ng-tr%E1%BB%8Dng-t%C3%A0i/quy-tac-to-tung-trong-tai-hiac-13421>>.
- 17 LCA, article 68, Grounds for setting aside arbitral award:
 2. Arbitral award is set aside in the following circumstances:
 - b. The composition of the arbitral tribunal was [or] the arbitral proceedings were inconsistent with the agreement of the parties or contrary to the provisions of this Law;
 - dd. The arbitral award is contrary to the fundamental principles of Vietnamese law.
- 18 2015 Civil Procedure Code, article 459, Refusal for recognition:
 1. The Court shall not recognise a foreign arbitrator's award when considering that the evidence provided by the award debtor to the Court for opposing the application for recognition is well-grounded and lawful and the arbitral award falls within one of the following circumstances:
 - c. The award debtors being agencies, organizations and individuals are not promptly and duly notified of the

- appointment of arbitrators, the procedures for dispute resolution at foreign arbitration, or due to other plausible reasons, cannot exercise their procedural rights;
- dd. The composition of the foreign tribunal or the procedure for dispute resolution at foreign arbitration does not conform to the arbitration agreement or to the laws of the country where the foreign arbitral award has been made, in case the arbitration agreement does not provide for such matters;
2. The foreign arbitral award shall also not be recognised if the Vietnam Court considers that:
- b) The recognition and enforcement in Vietnam of the foreign arbitral award are contrary to the fundamental principles of the laws of the Socialist Republic of Vietnam.
- 19 Web portal of the Supreme People's Court <<https://congbobanan.toaan.gov.vn/>>.
- 20 Web portal of the Supreme People's Court <<https://congbobanan.toaan.gov.vn/>>.
- 21 See <<https://congbobanan.toaan.gov.vn/2fa485230f1cvn/chi-tiet-ban-an>>.
- 22 See <<https://congbobanan.toaan.gov.vn/2fa597119f1cvn/chi-tiet-ban-an>>.
- 23 See <<https://congbobanan.toaan.gov.vn/2fa589160f1cvn/chi-tiet-ban-an>>.
- 24 Howard M Holtzmann and Joseph E Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*, Kluwer, pp. 196–200; Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, 3rd edition, Sweet & Maxwell, pp. 55–56.
- 25 The draft article 4 of the Model Law included the words 'a party knows or ought to have known'. However, constructive knowledge was perceived as vague or complicated, the words 'ought to have known' were excluded. See Howard M Holtzmann and Joseph E Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*, Kluwer, pp. 199, 206, 209; Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, 3rd edition, Sweet & Maxwell, p. 59.
- 26 Howard M Holtzmann and Joseph E Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*, Kluwer, p. 199.
- 27 In Decision No. 10/2019/QĐ-PQT dated 12 November 2019, the Hanoi People's Court decided that the decision of the arbitral tribunal on appraisal was a substantive matter and could not be revisited by the court in setting-aside proceedings. Two days later, in Decision No. 11/2019/QĐ-PQT dated 14 November 2019, the Hanoi People's Court set aside another award on the ground that the arbitral tribunal failed to order an inspection on the damage and therefore violated article 46.3 of the LCA although its text explicitly reads that the arbitral tribunal on its own motion or at the request of a part(ies) 'may' order an inspection. See <<https://globalarbitrationreview.com/review/the-asia-pacific-arbitration-review/2021/article/vietnam>>.
- 28 See <<https://congbobanan.toaan.gov.vn/2fa521364f1cvn/chi-tiet-ban-an>>.
- 29 Ministry of Justice, 'Report on assessment of and comparison between the laws of Vietnam on recognition and enforcement of arbitral award and the UNCITRAL Model Law, and recommendation on feasibility to apply the UNCITRAL Model Law on Vietnam' <http://vibonline.com.vn/du_thao/17048>.
- 30 See <<https://www.eurochamvn.org/node/17882>>; <<https://www.eurochamvn.org/Whitebook>>.
- 31 Ministry of Justice, 'Report on assessment of and comparison between the laws of Vietnam on recognition and enforcement of arbitral award and the UNCITRAL Model Law, and recommendation on feasibility to apply the UNCITRAL Model Law on Vietnam', <http://vibonline.com.vn/du_thao/17048>.
- 32 See <<https://moj.gov.vn/http/Pages/dlcn-va-th-tai-Viet-Nam.aspx>>.
- 33 See <<https://anle.toaan.gov.vn/webcenter/portal/anle/chitietanle?dDocName=TAND165080>>.
- 34 Registered form contracts are published on website of Vietnam Competition and Consumer Authority. See <<http://hdm.vcca.gov.vn/?page=hdm>>, accessed on 12 April 2021.
- 35 Registered form contracts are published on website of Department of Industry and Trade of Ho Chi Minh City. See <<http://congthuong.hochiminhcity.gov.vn/hop-dong-mau>>, accessed on 12 April 2021.
- 36 Report on the control of form contracts, general transaction conditions for the period 2012–2019 (Appendix 05 of the Proposal for making the Law on amendment and supplement of some articles of the Law on Protection of Consumer Rights) <http://vcca.gov.vn/default.aspx?page=news&do=detail&category_id=e0904ba0-4694-4595-9f66-dc2df621842a&id=96abbcfd-1050-4571-af0b-0bb91f432ada>.
- 37 Report on the control of form contracts, general transaction conditions for the period 2012–2019 (Appendix 05 of the Proposal for making the Law on amendment and supplement of some articles of the Law on Protection of Consumer Rights) <http://vcca.gov.vn/default.aspx?page=news&do=detail&category_id=e0904ba0-4694-4595-9f66-dc2df621842a&id=96abbcfd-1050-4571-af0b-0bb91f432ada>.
- 38 See <<https://rcepsec.org/>>.
- 39 See <<https://trungtamwto.vn/fta/199-viet-nam--eu/1>>.
- 40 Paragraph 2 of article 3.57 of the EVIPA; article 2(2) and 2(3) of Resolution No. 113/2020/QH14.
- 41 Article 2(2) and 2(3) of Resolution No. 113/2020/QH14.
- 42 Paragraph 3 of article 3.57 of the EVIPA.
- 43 Article 2(1) of Resolution No. 113/2020/QH14.
- 44 See <<https://moit.gov.vn/web/guest/tin-chi-tiet/-/chi-tiet/hiep-%C4%91inh-ukvfta-chinh-thuc-co-hieu-luc-tu-23-gio-ngay-31-12-2020-21284-16.html>>, accessed on 12 April 2021.
- 45 See <<https://trungtamwto.vn/chuyen-de/16830-van-kien-hiep-dinh-ukvfta>>.
- 46 See <<https://investmentpolicy.unctad.org/investment-dispute-settlement/country/229/%20viet-nam>>, accessed on 12 April 2021.
- 47 See <<https://investmentpolicy.unctad.org/investment-dispute-settlement/country/229/viet-nam>>; <<https://globalarbitrationreview.com/dutch-national-wins-moral-damages-against-vietnam>>, accessed on 12 April 2021.
- 48 See <[https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB\(AF\)/18/2](https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB(AF)/18/2)>.
- 49 See <ConocoPhillips and Perenco v. Viet Nam | Investment Dispute Settlement Navigator | UNCTAD Investment Policy Hub>.



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Nguyen Ngoc Minh is a partner at Dzungsr & Associates LLC and heads the firm's alternative dispute resolution practice. Minh has represented clients in international arbitrations conducted under the Rules of, among others, the ICC, the SIAC and the HKIAC to resolve cross-border disputes involving Vietnamese elements. He has also acted in arbitrations at the Vietnam International Arbitration Centre (VIAC) and in recognition and enforcement proceedings before the Vietnamese courts. Matters in which Minh has acted are often high-profile, covering a wide range of legal and factual questions related to oil and gas, construction and real estate, corporate and joint ventures, sales of goods, and insurance, among others. Many of his cases at the VIAC are also the first of their kind in Vietnam. Minh is recognised as an 'up and coming' dispute resolution lawyer by *Chambers and Partners 2020* and is praised as a 'very responsive, always available' lawyer who provides 'very practical and spot-on advice'. 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.



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Nguyen Thi Thu Trang is a special arbitration counsel at Dzungsr & Associates LLC. 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. Trang has extensive experience in many arbitrations arising from construction and infrastructure projects, the energy sector, retailers and from international trade conducted at the ICC, the SIAC, the HKIAC and the VIAC. She is also involved in the recognition and enforcement of various institutional and ad hoc foreign arbitral awards in Vietnam with a total value of millions of dollars. Trang has been recognised as one of the 'Next Generation Partners' in dispute resolution in Vietnam by *The Legal 500 Asia Pacific 2020*.



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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. 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 purchases, joint ventures, and real estate, among others. A number of these 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 retail 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 directly involved in the legislative process of Vietnamese laws and has provided guidance for by-laws regulating arbitration, which makes it well-equipped to provide practical and efficient solutions to legal problems.

As a testament to its success, 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 arbitrations heard under Vietnam International Arbitration Centre Rules. The firm is also active in international arbitration.



Nguyen Thi Mai Anh
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Nguyen Thi Mai Anh is an associate and the key member of the dispute resolution team at Dzungsr & Associates LLC. Her practice focuses on assisting local and international clients in disputes arising out of various fields, including construction, insurance, oil and gas, and transportation in both arbitration (VIAC, SIAC, SCMA and ICC) and litigation proceedings. Her experience also includes advising on maritime matters, including cargo and ship claims, marine collisions, oil pollution, salvage, general average, ship arrests, etc. Anh is the co-author of the Vietnam chapters in *World Arbitration Reporter* (2019) and the *Delos Guide to Arbitration Places* (2020).

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