KEYNOTE SPEECH FOR WEBINAR ON 21 OCTOBER 2021

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I am grateful to the organisers of this webinar for inviting me to say a few words on "Challenging and Enforcing Arbitral Awards".

I propose to speak on applications to set aside awards because a tribunal erroneously applied the law of the seat or the law of an enforcing state. I shall assume for the purposes of this discussion that, where setting aside applications are concerned, the governing law of the underlying contract is the law of the seat. As far as applications for refusal of recognition and enforcement are concerned, I shall assume that the governing law of the contract is the law of the enforcing state. More particularly, I will assume in both types of case that Vietnamese law governs and the Vietnamese court is the forum in which the setting aside or non-recognition applications have been brought.[1]

Under Article 68(2)(dd) of Vietnam's 2010 Law on Commercial Arbitration (LCA), [2] an award "shall be set aside" if it is "contrary to the fundamental principles of the law of Vietnam". Under Article 459 of the Vietnamese Code of Civil Procedure (CPC), [3] the court shall not recognise or enforce a foreign arbitral award if recognition and enforcement would be "contrary to basic principles of law of the Socialist Republic of Vietnam". Where it is alleged by a debtor that a foreign arbitral award is contrary to the "fundamental" or "basic" principles of Vietnamese law and should be set aside or refused recognition for that reason, how will the court respond? To put it more

[1] For an account of Vietnam's international arbitration regime, see generally Dang Xuan Hop, "Arbitration Law and Practice in Vietnam: Fundamental Changes" in Anselmo Reyes and Weixia Gu (eds), *The Developing World of Arbitration: A Comparative Study of Arbitration Reform in the Asia-Pacific* (Hart, 2018) 205-219. See also Do Khoi Ngyuen, The International Arbitration Review: Vietnam (4 July 2021), available at https://thelawreviews.co.uk/title/the-international-arbitration-review/Vietnam.

[2] Available at https://sites.google.com/a/ecolaw.vn/luat-tieng-anh/1-bo-luat-luat/-law-on-commercial-arbitration.

[3] Available at https://wipolex-res.wipo.int/edocs/lexdocs/laws/en/vn/vn083en.ht.

directly: what exactly are the "fundamental" or "basic" principles of Vietnamese law?

One possibility is to treat all principles of Vietnamese law as "fundamental" or "basic" in nature. On this reading of LCA Articles 68(2)(dd) and CPC Article 459, if an arbitral tribunal has wrongly applied Vietnamese law, then all or that part of the tribunal's award that rests on the faulty analysis of Vietnamese law should be set aside or refused recognition. The difficulty is that such approach would not accord with international practice in the application of the UNCITRAL Model Law (ML)[4] or the 1958 New York Convention (NYC)[5].

Vietnam is a party to the NYC and an UNCITRAL Model Law jurisdiction. CPC Article 459 is supposed to reflect NYC Article V(2)(b) which states:

> Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
> ....
> (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

LCA Article 68(2)(dd) is supposed to reflect ML Article 34(2)(b) which states:

> An arbitral award may be set aside by the court ... only if:
> ....
> (b) the court finds that:
> ....
> (ii) the award is in conflict with the public policy of this State.

[4] Available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf.
[5] Available at https://www.newyorkconvention.org/11165/web/files/original/1/5/15432.pdf.

The references to an award being "contrary to" or in "conflict with" the "public policy" of a country in NYC Article V(2)(b) and ML Article 34(2)(b) are generally understood to mean the same thing. International commercial arbitration practice is that awards should not be set aside or refused recognition unless they "violate the forum state's most basic notions of morality and justice".[6] As the *Judicial Manual on Arbitration and Mediation*[7] issued by the Supreme People's Court (SPC) of Vietnam and the International Finance Corporation (IFC) of the World Bank Group explains:[8]

> Invoking the public policy exception is a safety valve to be used in those exceptional circumstances when it would be impossible for a legal system to recognize an award and enforce it without abandoning the very fundaments on which it is based.

Therefore, it should not be any mistake of Vietnamese law that leads to an award being set aside or refused recognition and enforcement by the Vietnamese court. Something more is required. If Vietnam is to be a true Model Law jurisdiction and to comply with its international obligations under the NYC, it will be necessary to construe LCA Article 68(2)(dd) and CPC Article 459 in a way that conforms with international practice in relation to ML Article 34(2)(b) and NYC Article V(2)(b).

The problem, however, is that Vietnamese law does not have a concept of "public policy". There is a concept of *ordre public* in Vietnamese law, but that pertains to matters of public order and security. The absence of a general concept of "public policy" necessitates the roundabout references to the "fundamental" or

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[6] See n7 at 240, quoting from *Parsons & Whittemore Overseas v. Société Générale de L'Industrie du Papier (RAKTA*), Court of Appeals, Second Circuit, United States of America, 508 F.2d 969, 974 (1974)..

[7] Available at https://www.ifc.org/wps/wcm/connect/e8cf7d03-4d66-4409-b1cb-dec7d55a02d9/ADR-Vietnam-ENG.pdf?MOD=AJPERES&CVID=mOa0Eur.

[8] ibid 240.

"basic" principles of Vietnamese law in the LCA and CPC. These expressions were intended to convey the sense of "public policy" or "the forum state's most basic notions of morality and justice" in the Vietnamese context. But, unsurprisingly, the use of "fundamental" or "basic" principles of Vietnamese law in the LCA and CPC has led judges to ask the question that we are currently investigating and to seek guidance from the SPC.

The SPC gave such guidance through Resolution No.01/2014/NQ-HDTP (Resolution 01)[9] issued on 20 March 2014. Article 14 of Resolution 01 observed that the "fundamental principles of the law of Vietnam" referred to "basic principles of conduct, the effects of which are most overriding in respect of the development and implementation of Vietnamese law". Resolution 01 states that a court "must determine that the arbitral award violates one or more fundamental principles of the law, and such principle(s) are relevant to the dispute resolution by arbitration". The court must identify the "fundamental principles of Vietnamese law that were not respected by the Tribunal in making the award" and specify how "the award violates the interests of the government, or the legitimate rights and interests of third party or parties". Resolution 01 offers two examples of awards that would be contrary to the fundamental principles of Vietnamese law. The first example is where the tribunal ignores a settlement voluntarily reached by the parties. The second is where an award is obtained through coercion, fraud, threat, or bribery. It was hoped that Resolution 01 would sufficiently clarify LCA Article 68(2)(dd) and CPC Article 459. But there has been academic criticism of Resolution 01 as being inadequate and of only limited assistance.[10]

[9] Available at anbanphapluat.co/resolution-no-01-2014-nq-hdtp-guiding-the-implementation-of-law-on-commercial-arbitration#:~:text=văn%20Resolution%20No.-,01%2F2014%2FNQ-HDTP%20guiding%20the%20implementation,of%20Law%20on%20Commercial%20arbitration&text=This%20Resolution%20provides%20guidelines%20for,arbitration%3B%20registration%20of%20arbitral%20awards.

[10] See, for example, Nguyen Phuong Linh, Dinh Hoang Anh and Chu Thanh Giang, "Vietnam's Recognition and Enforcement of Foreign Arbitral Awards and Preparation for EVFTA", World Trade Institute (WTI) Working Paper No. 18/2017 (December 2017),

The Vietnamese Ministry of Justice's establishment in 2020 of an online database[11] (providing statistics on the results of applications for the recognition and enforcement of arbitral awards in Vietnam) will undoubtedly help in bringing clarity on how CPC Article 459 has been and should be applied. But it would be even more useful if information on setting aside cases were also provided. If, additionally, suitably redacted extracts of the court's reasoning in allowing or refusing setting aside and recognition or enforcement cases, it would be possible for a jurisprudence to develop in due course on what are and what are not fundamental or basic principles of Vietnamese law under LCA Article 68(2)(dd) and CPC Article 459.

My personal view, for what it is worth, is that it will be difficult, if not impossible, to articulate further in words what the fundamental or basic principles of Vietnamese law are for the purposes of bringing Vietnamese arbitration practice in line with the meaning of NYC Article V(2) and ML Article 34(2)(b). There are just too many situations that may come up before a court, so that it would be challenging to attempt a simple formula of words that can deal with all permutations. It would consequently be presumptuous of me to seek to improve upon Resolution 01. All that I might venture today is to offer a possible way of dealing with one type of situation that, at least from my experience in the Singapore International Commercial Court (SICC),[12] is likely to come up with increasing frequency in other ASEAN courts, including those of Vietnam. That is the situation where a party seeks to set aside or resist enforcement on the basis that the tribunal has erred in its application of the law of the seat or of an enforcing state.

In such cases, one should bear in mind that mistakes of law come in all shapes and sizes. When parties agree to arbitration, they accept

available at https://www.wti.org/research/publications/1135/vietnams-recognition-and-enforcement-of-foreign-arbitral-awards-and-preparation-for-evfta/

[11] See https://moj.gov.vn/tttp/Pages/dlcn-va-th-tai-Viet-Nam.aspx.

[12] See, for example, *CBX and another v CBZ and others* [2020] SGHC(I) 17.

the risk that the tribunal may come to a wrong conclusion in assessing the facts or applying the law. The mere fact that a tribunal came to a wrong view on the law should not normally warrant an award being set aside on the ground of public policy or otherwise. By similar token, the mere fact that a tribunal reached a wrong conclusion on the law of an enforcing state would not justify that state in refusing to recognise the award. The mistake of law must involve something more serious, akin to a finding that certain conduct is legal when it is palpably criminal in nature under the law of the seat or (as the case may be) of the enforcing state. It is in such situation (I suggest) that the supervisory or enforcing court, as guardians of the law of their respective states, can intervene and set aside an award or refuse recognition on the public policy ground. Contrast the position where a contract is governed by the law of the seat or of an enforcing state (as the case may be) and a tribunal wrongly holds that a contract is criminal under that governing law and so unenforceable. It would not usually be appropriate for the supervisory or enforcing court to intervene in such case. Parties ought in principle to be held to their agreement to abide by the tribunal's award, even if that award is wrong as a matter of law.

Arbitrators may erroneously apply Vietnamese law in their awards. But in many international commercial cases those errors will merely involve mistakes in the application of the civil law and will not amount to findings that criminal conduct is lawful. Accordingly, on my proposed approach, one would expect that, in most Vietnamese cases where there has been a mere error in the application of civil law, the mistake should not lead to the setting aside of an award or a refusal to recognise the same under LCA Article 68(2)(dd) or CPC Article 459. It is only where something akin to criminal conduct is at stake that there would be violations of the fundamental or basic principles of Vietnamese law.

I accept that the test proposed here is limited. It will not deal (and does not purport to deal) with all circumstances that may arise before

a court. There may, for instance, be errors of law that lead to a denial of due process by a tribunal. One such situation is the first example in Resolution 01 where a tribunal ignores a settlement agreement reached by the parties. But I hope that my modest suggestion will be of some help in teasing out how, in practical terms, LCA Article 68(2)(dd) and CPC Article 459 might be applied to a paradigm situation.

Thank you.