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Preface

Welcome to *The Asia-Pacific Arbitration Review 2023*, 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 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.

This review contains insight and thought leadership inspired by recent events from 53 pre-eminent practitioners. Across 20 chapters and 315 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, China, Hong Kong, India, Japan, Malaysia, Singapore, Sri Lanka and Vietnam and has overviews on topics including economic damages; energy disputes; private equity; construction and infrastructure disputes and the impact of sanctions; and hospitality disputes.

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 2022

Arbitration in Vietnam in 2021: examining the limitation period

Nguyen Ngoc Minh and Nguyen Thi Mai Anh
Dzungsr & Associates LLC

IN SUMMARY

This chapter provides an overview of the key developments on commercial and investor-state arbitration in Vietnam. It explores some recent decisions of the Vietnamese courts during the setting-aside procedure, giving broad effect to arbitration agreements but having diverse views on whether to revisit the matter of the limitation period, which was decided by the arbitral tribunal. The available statistics show that the rejection ratio during the recognition and enforcement procedures of foreign arbitral awards has significantly decreased.

DISCUSSION POINTS

- The binding effect of an arbitration clause exchanged during the negotiation of a contract that has eventually not been concluded
- Setting aside of arbitral awards based on the grounds relating to the limitation period
- Recognition and enforcement of foreign arbitral awards, including investor-state arbitral awards

REFERENCED IN THIS ARTICLE

- 2010 Law on Commercial Arbitration (Law No. 54/2010/QH12)
- 2015 Civil Procedure Code (Law No. 92/2015/QH13)
- Decision No. 03/2020/QD-GQKN dated 28 May 2020 of the Hanoi People's Court
- Decision No. 1063/2021/QD-PQTT dated 25 October 2021 of the HCMC People's Court
- Decision No. 1156/2021/QD-PQTT dated 23 November 2021 of the HCMC People's Court
- Decision No. 141/2021/QD-PQTT dated 27 January 2021 of the HCMC People's Court
- Decision No. 533/2021/QD-PQTT dated 20 April 2021 of the HCMC People's Court
- Decision No. 11/2018/QD-PQTT dated 12 October 2018 of the Hanoi People's Court

Commercial arbitration in 2021

In 2021, the Vietnam International Arbitration Centre (VIAC) recorded 270 new cases (an increase of 21 per cent compared with 2020), of which 42.7 per cent were domestic and 57.3 per cent had foreign elements.¹ While the main subjects of disputes resolved at the VIAC were still sale of goods (44.4 per cent), construction (18.9 per cent) and services (27.8 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

Due to the covid-19 pandemic, virtual hearings continue to be frequently suggested by the arbitral tribunals to promptly resolve disputes.³ In addition, the rapid development of e-commerce in Vietnam over the past few years, coupled with the pandemic, has called attention to online dispute resolution.

Remarkably, in 2021, the Vietnam International Chamber of Commerce was launched by the Vietnam Chamber of Commerce and Industry (VCCI).⁴ The Vietnam International Chamber of Commerce is endorsed by the International Chamber of Commerce (ICC) as its official representation in Vietnam with the aim of assisting Vietnamese enterprises to, inter alia, access dispute resolution services, including ICC arbitrations. On 27 October 2021, the Permanent Court of Arbitration (PCA) and the Ministry of Foreign Affairs of Vietnam announced an agreement under which the PCA will establish a staffed office in Hanoi to administer PCA hearings and meetings.⁵ The Hanoi office will be the PCA's fourth office outside its Hague headquarters. The establishment of a PCA representative office demonstrates Vietnam's strong commitment to the peaceful settlement of international disputes and assists in making the PCA's services more accessible in Vietnam and the region.

Challenge of tribunal's decisions on jurisdiction and arbitral awards

According to statistics from the database of the Supreme People's Court (SPC) published on 29 March 2022, in 2020, 26 arbitral awards were challenged and seven of them were set aside, accounting for under 27 per cent.⁶ In 2021, 16 arbitral awards

1 VIAC 2021 Annual Report.

2 VIAC 2021 Annual Report.

3 VIAC 2021 Annual Report.

4 More information is available at <https://icc-vietnam.org/> and <https://icc-vietnam.org/gioi-thieu>.

5 More information is available at <https://docs.pca-cpa.org/2021/10/2021/10/63fff1ec-pca-vietnam-signing-ceremony-press-release.pdf>.

6 Web portal of the SPC <<https://congbobanan.toaan.gov.vn/>>.

were challenged and three of them were set aside, accounting for under 19 per cent.⁷ In 2020, three applications to review the tribunal's decisions on jurisdiction were submitted and the courts in all three cases affirmed the tribunal's jurisdiction.⁸ We summarise below some of the significant decisions released since our last chapter.

Binding effect of arbitration clause exchanged during negotiation of the contract

In Decision No. 03/2020/QĐ-GQKN dated 28 May 2020, the Hanoi People's Court found that an arbitration clause contained in the exchange of draft contracts would have binding effect even though no contract was eventually concluded.⁹

In that case, after the claimant was announced as the bid winner, the claimant (the bidder) and the respondent (the bid solicitor) started negotiating the terms of the contract. During the negotiation process, the claimant provided a draft contract, containing an arbitration clause (clause 19.2), which states: 'If the Dispute is not resolved in accordance with Clause 19.1 above within thirty (30) days of a Party notifying the other Party in writing of the Dispute (or such longer period as may be agreed by the Parties), a Party may, by written notice to the other Party, refer the Dispute to arbitration at the Vietnam International Arbitration Centre at the Vietnam Chamber of Commerce and Industry.' Meanwhile, clause 19.1 covers the disputes 'between the parties in relation to or arising out of the Contract'. During the subsequent meetings, the parties agreed to include in clause 19.2 of the draft contract that the seat of arbitration should be Hanoi. This agreement was recorded in a meeting minutes, which state 'The parties agree to add the seat to be Hanoi, Vietnam'.

However, the negotiation failed and no contract was concluded. Considering that the claimant failed to negotiate the contract, the respondent called the bid bond. The claimant considered that the respondent was not allowed to call the bond and, thus, initiated an arbitration at the VIAC against the respondent pursuant to clause 19.2. Nevertheless, the arbitral tribunal decided that they did not have the jurisdiction to hear the case because the arbitration agreement had not existed. The claimant then challenged the arbitral tribunal's decision on jurisdiction at the Hanoi People's Court.

⁷ Web portal of the SPC <<https://congbobanan.toaan.gov.vn/>>.

⁸ Web portal of the SPC <<https://congbobanan.toaan.gov.vn/>>.

⁹ See <<https://congbobanan.toaan.gov.vn/2ta494397t1cvn/chi-tiet-ban-an>>.

The Hanoi People's Court affirmed that although the contract containing the arbitration clause had never been concluded, the arbitral tribunal had jurisdiction to resolve the dispute. The Court emphasised the following facts:

- the issuance of a bid bond was a prerequisite for the claimant to participate in the bid process and the negotiation of the contract with the respondent;
- the claimant was in the process of negotiating the terms of the contract; and
- the arbitration clause was provided in the draft contract and later agreed by the parties in the meeting minutes.

Based on those facts, the Court concluded that the dispute relating to the bid bond must be considered as a dispute relating to the contract and must fall within the scope of the arbitration agreement.

In that case, the Court did not provide much reasoning in reaching that conclusion, such as how an arbitration clause of a draft contract that has never been concluded could bind the parties thereto. The Court seems to strictly follow the separability principle, which is laid down in article 19 of the 2010 Law on Commercial Arbitration (LCA).

Article 19 of the LCA reads as follows: 'An arbitration agreement is entirely independent from the contract. Any modification, extension, cancellation, invalidation or inoperability of the contract shall not invalidate the arbitration agreement.'

Accordingly, the fact that the underlying contract never came into existence does not affect the fact that the parties exchanged and agreed on an arbitration agreement, which was recorded in the meeting minutes.

Limitation period as a substantive or a procedural matter

Pursuant to article 71.4 of the LCA,¹⁰ when considering the applications for setting aside arbitral awards, the court shall not revisit the substantive matters of the dispute that have already been resolved by the arbitral tribunal. However, it remains unsettled among the courts on whether the limitation period is a procedural or substantive matter. As a result, when faced with a request to set aside an arbitral award based on

¹⁰ Article 71. Examination by courts of requests for setting aside of arbitral awards

4. When examining the request, the council shall rely on Article 68 of this Law and enclosed documents to consider and make a decision: it shall not revisit the dispute already settled by the arbitral tribunal. After examining the request and enclosed documents and hearing opinions of the summoned persons, if any, and after the procurator presents the procuracy's opinions, the council shall discuss and make a decision by majority vote.

the ground that the arbitral tribunal's ruling on the limitation period was incorrect, while some courts considered the limitation period as a substantive matter and thus refused to revisit the arbitral tribunal's ruling in this regard, other courts decided to consider the matter afresh.

As discussed in our previous chapters,¹¹ in 2018 and 2019, the Hanoi People's Court seemed to consistently determine that they would not revisit any substantive matters that were decided by arbitral tribunals, including the matter of the limitation period.¹² Meanwhile, in 2021, the Ho Chi Minh City (HCMC) People's Court took an opposite position and decided to determine the limitation period on its own.

To illustrate, in Decision No. 1063/2021/QĐ-PQTT dated 25 October 2021, the HCMC People's Court ruled that the limitation period must be determined pursuant to the procedural law.¹³ After considering that the arbitral tribunal failed to comply with the provisions of the procedural law (ie, the LCA) on the limitation period, the Court set aside the arbitral award on the ground that there was a violation of the LCA.

This case revolves around the limitation period applicable to a dispute arising out of a construction contract. When the dispute arose, the claimant (the contractor) initiated a lawsuit at the local courts against the respondent (the employer). The first-instance and appeal courts both refused jurisdiction to resolve the dispute given the existence of the arbitration agreement between the parties. Then, the claimant initiated an arbitration against the respondent at the HCMC Commercial Arbitration Centre (TRACENT). The arbitral tribunal considered that as the Construction Law, the *lex specialis*, was silent on the limitation period issue, the 2015 Civil Code, the *lex generalis*, applied. Accordingly, the arbitral tribunal applied the three-year limitation period in the 2015 Civil Code and concluded that the claim was not time-barred.

The HCMC People's Court adopted a different view. According to the Court, as the Construction Law as the *lex specialis* did not govern the limitation period, the arbitral tribunal should have applied the procedural law to determine the limitation period. Accordingly, the limitation period should have been two years as regulated under article 33 of the LCA and article 11 of the TRACENT arbitration rules.

11 Vietnam chapters, *The Asia-Pacific Arbitration Review*, 2020 and 2021, Global Arbitration Review.

12 For example: Decision No. 01/2018/QĐ-PQTT dated 4 January 2018 of the Hanoi People's Court <<https://congbobanan.toaan.gov.vn/2ta69455t1cvn/chi-tiet-ban-an>>; Decision No. 11/2018/QĐ-PQTT dated 12 October 2018 <<http://congbobanan.toaan.gov.vn/2ta278925t1cvn/chi-tiet-ban-an>>; Decision No. 04/2019/QĐ-PQTT dated 21 May 2019 of the Hanoi People's Court <<http://congbobanan.toaan.gov.vn/2ta322250t1cvn/chi-tiet-ban-an>>.

13 Available at <<https://congbobanan.toaan.gov.vn/2ta833008t1cvn/chi-tiet-ban-an>>.

Article 33 of the LCA reads as follows: ‘Unless otherwise stipulated by specialised law, the limitation period for initiating arbitral proceedings shall be two years, from the time the lawful rights and interests are infringed.’ The Court ruled that as the limitation period was two years, the claimant was time-barred from initiating the arbitration against the respondent.

In addition, the Court considered that as the claimant wrongly initiated the lawsuits at the local courts, the court litigation shall not be considered as a force majeure event or an objective hindrance to exempt the time spent in court litigation from the limitation period pursuant to article 156.1 of the 2015 Civil Code.

From the above, the Court concluded that the arbitral tribunal’s ruling on the limitation period violated article 33 of the LCA and article 11 of the TRACENT arbitration rules and therefore set aside the arbitral award based on the ground that there was a violation of the LCA pursuant to article 68.2.b of the LCA.¹⁴

In 2021, the limitation period was invoked as a ground to challenge three other arbitral awards. In those cases, the HCMC People’s Court also revisited the limitation period issue but concluded that the claims were brought within the limitation period.¹⁵

As demonstrated, while the Hanoi People’s Court seemed to consistently not revisit the matter of limitation period, the HCMC People’s Court would likely consider the matter afresh on its own. These inconsistent approaches of the courts during the setting-aside procedures probably derive from the different schools of thought on whether to treat the limitation period as a substantive or a procedural matter. Indeed, the limitation period has been prescribed under various different Vietnamese laws, both substantive (eg, the Civil Code and the Commercial Law) and procedural (eg, the Civil Procedure Code (CPC) and the LCA). This means that, even during normal litigation proceedings (ie, in addition to the setting-aside procedures), the courts still arrived at different conclusions on the applicable law to determine the limitation period. While some courts considered that the limitation period, being a substantive

14 ‘The arbitral tribunal’s composition is, or the arbitral proceedings are, not in compliance with the parties’ agreement or this Law.’

15 Decision No. 1156/2021/QĐ-PQTT dated 23 November 2021 of the HCMC People’s Court <<http://congbobanan.toaan.gov.vn/2ta849143t1cvn/chi-tiet-ban-an>>; Decision No. 141/2021/QĐ-PQTT dated 27 January 2021 of the HCMC People’s Court <<http://congbobanan.toaan.gov.vn/2ta833636t1cvn/chi-tiet-ban-an>>; Decision No. 533/2021/QĐ-PQTT dated 20 April 2021 of the HCMC People’s Court <<http://congbobanan.toaan.gov.vn/2ta803682t1cvn/chi-tiet-ban-an>>.

matter, should be determined pursuant to the laws effective when the contract was made,¹⁶ others opined that the limitation period, being a procedural matter, should be determined pursuant to the laws effective at the time the lawsuit is initiated.

The SPC is considering whether to establish a precedent regarding this matter. In Decision No. 11/2018/QĐ-PQTT dated 12 October 2018,¹⁷ when being requested to set aside an arbitral award on the ground that the limitation period had expired, the Hanoi People's Court ruled that 'In this case, it must determine that limitation period is a substantive matter that has already been settled by the tribunal and hence, reject the request for setting aside'. This ruling may become a precedent in the field of arbitration, which would harmonise the inconsistent approaches of local courts and limit the grounds to set aside arbitral awards.

Recognition and enforcement of foreign arbitral awards

Acknowledging that the practice of recognising foreign arbitral awards might have an impact on the credibility of Vietnam's market and even result in high-stakes international investment disputes, the state authorities have been working to improve the situation. As a first step, the CPC was amended in 2015 with more arbitration-friendly provisions. Owing to this improvement, the percentage of foreign arbitral awards being refused recognition in Vietnam has remarkably decreased. On 25 September 2020, the Ministry of Justice announced a database summarising the court decisions regarding the recognition of foreign arbitral awards during the period from 1 January 2012 to 30 September 2019.¹⁸ According to this database, among 63 applications for recognition and enforcement of foreign arbitral awards handled in accordance with the 2004 CPC, 27 applications were refused by the local courts, equivalent to 42.8 per cent of the applications. However, among 19 applications handled in accordance with the 2015 CPC, only three applications were refused for recognition, equivalent to 15.7 per cent of the applications. A draft resolution guiding the procedure for recognition and enforcement of foreign arbitral awards in Vietnam to avoid inconsistencies in the application and interpretation of the New York Convention and the relevant provisions of the CPC is also in progress.

16 Exceptions are when (1) the laws effective when the contract was made did not have provisions on the limitation period or (2) the current laws have retroactive effect.

17 See <<https://anle.toaan.gov.vn/webcenter/portal/anle/chitietanleduthao?dDocName=TAND093376>>.

18 See <<https://moj.gov.vn/tttp/Pages/dlcn-va-th-tai-Viet-Nam.aspx>>.

Considering the current Vietnamese law and that there is no test case, there is a risk that Vietnamese courts may not treat investor-state arbitral awards rendered under the ICSID Additional Facility Rules or the UNCITRAL Arbitration Rules (as regulated in most existing bilateral investment treaties involving Vietnam) as foreign arbitral awards qualified for recognition and enforcement under the New York Convention and domestic law. However, in accordance with the database of the Ministry of Justice, there has been at least one request for recognition and enforcement of an investor-state arbitral award against the Vietnamese government, which was accepted by the Vietnamese courts. The underlying arbitration was *Michael McKenzie v Vietnam (2010)*, which was conducted by the PCA under the UNCITRAL Arbitration Rules to resolve the disputes relating to the 2000 US–Vietnam bilateral trade agreement. The final award was issued on 11 December 2013 and was accepted for recognition and enforcement in Vietnam by the Binh Thuan People’s Court in Decision No. 02/2016/QDST-KDTM dated 11 November 2016. This test case is important in affirming the enforceability of investor-state arbitral awards against the Vietnamese government and Vietnam’s compliance with the commitments in the investment treaties.

The authors wish to acknowledge the contributions of Le Huong Dzung, associate at Dzungsr & Associates LLC, in the preparation of this chapter.



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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* 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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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 the Vietnam International Arbitration Centre Rules. The firm is also active in international arbitration.

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