

# Settling disputes through arbitration

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A key consideration for foreign investors in Vietnam is choosing an effective mechanism for dispute resolution. There are several options available including: mediation, litigation and arbitration. Mediation is generally limited to less serious disputes or used as a first step resolution attempt; if not successful the dispute goes to arbitration or litigation.

Generally, foreign investors are reluctant to resort to the Vietnamese court system which is yet to instill confidence and have instead to look towards the possibility of arbitration.

The current legal framework for arbitral proceedings in Vietnam is the 2003 Ordinance on Commercial Arbitration (the Ordinance). The Ordinance provides that all disputes arising from commercial activity may be referred to arbitration by a tribunal or an arbitrator acting as an independent third party.

Two types of arbitration are available to foreign investors: (i) foreign arbitration, carried out offshore by foreign arbitrators; and (ii) arbitration in Vietnam. Within Vietnam there are seven commercial arbitration centres; the Vietnam International Arbitration

Center (VIAC) at the Vietnam Chamber of Commerce and Industry is considered the most prominent and professional.

## Foreign awards

The Ordinance allows parties to a dispute with a “foreign element” to: (i) appoint foreigners as arbitrators provided that they are qualified to act as an arbitrator in their own country; (ii) agree on the choice of foreign law or international commercial practices for dispute resolution; (iii) agree on a location for the dispute resolution in or outside Vietnam; and (iv) agree on the language to be used during the arbitration proceedings.

“Foreign element”, under the Ordinance means: (i) one or more of the disputing parties is a foreigner or a foreign legal entity; or (ii) the grounds for establishing, altering or terminating the relationship which is the subject to dispute arose abroad; or (iii) assets relating to the dispute are located abroad.

Foreign arbitration is often preferred due to its tried and tested nature but it is a challenge to have a foreign arbitral award enforced as it

must first be considered by a Vietnamese court according to two main principles:

i) Does the arbitral award originate from a country with which Vietnam has signed and/or acceded to an international agreement on this matter (such as the New York Convention or bilateral judicial assistance treaties)?

ii) If not, recognition and enforcement can be considered on the basis of reciprocity.

Further, recognition and enforcement shall only be considered in respect of foreign arbitral awards dealing with disputes arising from business, commercial or labor relationships. As a result of such an arduous enforcement process, domestic arbitration is becoming ever increasingly popular, especially using VIAC.

## Arbitration prerequisites

Only disputes that arise within commercial relationships are subject to arbitration. Some disputes may not be arbitrable, such as disputes between shareholders or partners in a company or disputes pertaining to the purchase and sale of securities.



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Gide Loyrette Nouel has been present in Vietnam since 1994 and was the first French law firm to be permitted to set up a formal branch office in the country.



Participants at a seminar on antidumping and countervailing duty cases in Vietnam. \_\_\_Photo: Tran Viet/VNA

#### *Arbitration agreement*

If the parties to an agreement wish to settle disputes through arbitration the Ordinance requires that an arbitration agreement in writing clearly express the will of the parties to refer their dispute to arbitration. An arbitration agreement is irrevocable and excludes, for the dispute to which it refers, the competence of any State court.

#### *VIAC*

VIAC was established by Prime Minister Decision 204/TTg dated April 28, 1993, in which two established arbitration organizations were merged: the Vietnam Foreign Trade Arbitration Council and the Maritime Arbitration Council. Both bodies were established at the Vietnam Chamber of Commerce and Industry in 1963 and 1964, respectively. VIAC currently has 123

arbitrators and has resolved 187 commercial disputes out of the 280 cases accepted by the seven Vietnamese arbitration centres (from 2004 - June 2009). VIAC has jurisdiction over both domestic and foreign disputes that arise in commercial relationships.

VIAC arbitration proceedings are carried out in accordance with its own arbitration rules, effective since July 2004 but which are based on the Ordinance. Foreign investors should carefully consider all dispute resolution options prior to selecting VIAC.

#### *Advantages of VIAC*

Dispute resolution at VIAC is dynamic, versatile and flexible. It is easier to adapt to than judicial litigation where the courts strictly comply with

regulations relating to process, procedure and the order provided by the Civil Proceedings Code and other guiding legislation. In practice, arbitration at VIAC generally lasts for a maximum of six months, while judicial litigation can last for a couple of years. A good example is a contractual dispute between two mining companies that had lasted for more than five years: three hearings at first instance, four hearings at appellate level and two judicial reviews.

#### *No territorial restrictions*

No territorial restrictions exist, unlike the Vietnamese court system which imposes a mandatory condition that a judicial hearing takes place in the province or city in which the defendant resides or works.

*Choice of arbitrator*

The arbitral tribunal or sole arbitrator appointed to resolve a dispute is chosen by the parties or appointed by the chairman of VIAC. Parties are free to pick an arbitrator based on the nature of the dispute and based upon qualification, capacity and knowledge of each arbitrator on specific disputed issues.

Arbitrators participate in the entire resolution process in order to grasp and thoroughly understand the particulars of a dispute, saving time and costs. In the two-tier court system, continuity is difficult to guarantee as judges in the appellate level will look at a matter anew after a decision is already made and forwarded by the lower level.

*Private hearing*

VIAC meetings are carried out in camera, allowing parties to keep their business secrets confidential as well as protecting their reputation and prestige. A public court hearing cannot guarantee such privacy.

*Finality*

A VIAC award is final and effective from the date of announcement; no review or recognition by a court is required in order to be enforceable (as is required for the enforcement of a foreign arbitral award or foreign litigious decision) and parties do not have the right to appeal. Once an arbitral award is granted the tribunal has fulfilled its duties and the matter is closed.

**Shortcomings of VIAC***Preliminary injunctive relief*

Parties who want to petition for preliminary injunctive relief once VIAC has already accepted their case must do so through the court. There is no guarantee that the application will be swiftly processed, consequent delay could potentially jeopardize party interests.

*Choice of arbitrator*

Pursuant to the arbitration rules of VIAC, each party has the right to choose an arbitrator named in VIAC's list of arbitrators or request the chairman of VIAC to appoint an arbitrator. In practice, whether the arbitral tribunal is chosen by the parties or appointed by the chairman of VIAC, dispute resolution shall depend on the objective perception, capability and viewpoint of the selected arbitrators. It is of critical importance that the arbitrators are objective and adopt a fair view. However, as arbitration awards are not released to the public it may be difficult to gauge an arbitrator's previous experience or ability to impartially analyze information. The selection of an arbitrator heavily relies on the small amount of information provided by VIAC.

*Enforceability of award*

Arbitral awards rendered in Vietnam are supposed to be final, conclusive and binding with no possible appeal within VIAC, and do not require any approval from any Vietnamese judicial body in order to be enforceable.

Following the arbitral proceedings, if the unsuccessful party fails to voluntarily satisfy the relevant arbitral award, the successful party is entitled to bring the arbitral award to the relevant enforcement agency and request enforcement. The enforcement agency will issue an enforcement decision and inform the parties. If, within 15 days after receiving the notice of enforcement, the losing party fails to voluntarily comply with the award in question, coercive measures shall be applied to ascertain its enforcement.

However, parties have a right of recourse against any arbitral awards (including a VIAC award); within 30 days after receiving an arbitral award, any party who protests an award has the right to apply to a competent

provincial court for the award to be set aside.

When the award of an arbitral tribunal is set aside, it is for the parties to agree on the resolution by arbitration or refer the case to the court.

Thus, the effective enforcement of a VIAC arbitral award is low and does not share the same reliability or ease of enforceability of a domestic litigious judgment.

*Disclosure obligations*

When participating in arbitral proceedings at VIAC, parties should be aware of the lack of disclosure obligations placed on the parties to provide evidence. There are no regulations regarding minimum time limits to provide evidence, leaving room for a party to act in bad faith or intentionally apply trifling skills in order to put the other party in a difficult situation, for example, providing a large amount of undisclosed documents immediately prior to a scheduled dispute resolution meeting. In such a situation, the other party may request an adjournment in order to have sufficient time to consider the arguments and documents which have been supplied to them at the last minute.

**Conclusion**

Development of arbitration is an important step in the positive evolution of the Vietnamese dispute resolution system, however imperfections exist. From previous experience, arbitrators may stray from the law and not abide by the contract between the parties in dispute.

The National Assembly is currently drafting a Law on Commercial Arbitration in order to rectify current shortcomings. We expect that when the new law is issued and comes into force, changes will be made to arbitral proceedings at Vietnamese arbitration centers and the quantity of cases referred for arbitration will increase.