

RAJAH & TANN LCT LAWYERS

Vietnam

The current state of commercial and investment arbitration in Vietnam

Commercial and investment arbitration have become increasingly popular in Vietnam, spurred by the increased flow of FDI into the country. This article will cover the current state of play for both commercial arbitration and investor-state arbitration in Vietnam.

Commercial Arbitration

Vietnam's commercial arbitration regime has come a long way, since Vietnam ratified the *New York Convention* in 1995 and enacted the early Ordinance on Commercial Arbitration (2003). Today, the regime is underpinned by the Law on Commercial Arbitration (2010) (**LCA**), through which we have seen the use of commercial arbitration flourish.

Since then, multiple arbitral institutions have been established. However, for 25 years, the Vietnam International Arbitration Center (**VIAC**) has maintained position as, by far, the country's most popular and prominent institution. Since the **LCA's** effectiveness, VIAC's caseload grew considerably and in 2016, it administered 155 cases, of which most involved foreign elements. According to VIAC, as much as 40% of foreign-invested enterprises in Vietnam have taken to commercial arbitration to resolve disputes.

VIAC's increased popularity has been attributed to multiple reasons, including its expediency and cost-effectiveness. For the former, it is not uncommon for an arbitration through VIAC to conclude in less than 12 months (or even 6 months, for less complex disputes).

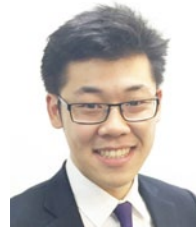
Some foreign investors still prefer non-Vietnamese institutions, such as ICC, SIAC, KLRCA and HKIAC. Vietnamese state-linked entities have generally been receptive towards such preference, catering to requests for a more "international" forum for dispute resolution.

Regarding recognition and enforcement, the judiciary's attitudes have gradually shifted in favour of arbitration. The **LCA** permits non-foreign awards to be fast-tracked to enforcement without going through the award recognition procedures. To the extent such awards are challenged, the courts have maintained a strong track-record of upholding the award's enforcement.

However, there remain concerns for foreign arbitral awards (e.g., of foreign-seated arbitrations), which are subject to recognition by Vietnamese court, before they may be enforced. Despite Vietnam's having ratified the *New York Convention*, it has not necessarily given comfort



Chau Huy Quang
Managing Partner
E: quang.chau@
rajahtannlct.com



Logan Leung
Senior Foreign
Counsel
E: logan.leung@
rajahtannlct.com

to the less-than-ideal track-record of the court for recognising foreign awards. While there are no recent published statistics, it is estimated that only half of foreign awards have been successfully recognised. Foreign investors are typically also burdened by the lengthy recognition procedures, which can take well over 12 months.

Problems also lie in the non-uniform approach by the courts across Vietnam. While the courts of major cities, like HCMC and Hanoi, may have familiarised themselves with handling arbitral awards, the same may not hold true for other provincial courts that may lack the same level of experience. This inexperience has often created roadblocks in the recognition procedures, as the provincial court takes a conservative view and shows reluctance to recognise the award.

Nevertheless, despite these set-backs, Vietnam has been active in creating an arbitration-friendly environment. To address these existing concerns, it is working with the judiciary to create internal guidance for dealing with arbitral awards. In due course, we anticipate greater receptiveness by the courts towards foreign arbitrations, as they gain the benefit of such guidance and more experience in the field.

Investor-State Arbitration

Vietnam is not a stranger to investor-state arbitration, being a party to over 60 BITs and several key multilateral instruments (e.g., the ASEAN Comprehensive Investment Agreement and the CPTPP). These arbitrations have been pursued under the UNCITRAL Arbitration Rules, the ICSID Additional Facility Rules or the ICC Rules, as Vietnam has not ratified the ICSID Convention.

As of today, unofficial statistics show that

approximately 25 investment arbitrations have been pursued against Vietnam, of which 3 were settled in the State's favour. There are 2 known ongoing cases: *Trinh Vinh Binh v. Vietnam* (filed by a Dutch investor under the ICC Rules) and *Shin Dong Baig v. Vietnam* (filed by a Korean investor in 2018 under the ICSID Additional Facility Rules).

Despite having been named as respondent to multiple arbitrations over the years, Vietnam has prevailed in all of its cases or has settled them amicably. Absent an international commitment for direct enforcement of an investment award (such as the mechanism under the ICSID Convention), it remains to be seen how the State would recognise such awards.

As of today, there is no known specific plan for Vietnam's ratification of the ICSID Convention – although, some commentators have suggested that Vietnam would accede within the next 5 years. Multiple high-level dialogue, as well as open working sessions, have been arranged with the relevant ministries in Vietnam, with the view towards discussing whether ratification would be worthwhile (or whether it is content with the current status quo).

Therefore, for investor-state arbitrations, it is a matter of "watch this space", as the business community awaits information on Vietnam's membership to the ICSID Convention. For the legal community, eyes are on the ongoing cases to gauge Vietnam's reaction to the disputes. This is considering previous investment arbitrations were carried out in privacy with limited (if any) information disclosure, before the UNCITRAL Rules on Transparency came into effect.

Rajah & Tann LCT Lawyers

Ho Chi Minh City Office

Saigon Centre, Level 13, Unit 2&3

65 Le Loi Blvd., Dist. 1

HCMC, Vietnam

T: +84 28 3821 2382

F: +84 28 3520 8206

Hanoi Office

Lotte Center Hanoi – East Tower, Level 30

Unit 3003, 54 Lieu Giai St., Ba Dinh Dist.

Hanoi, Vietnam

T: +84 24 3267 6127

F: +84 24 3267 6128

E: connect@rajahtannlct.com

W: www.rajahtannlct.com