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Dispute Resolution

## Decision 11/2019/QD-PQTT: The Hanoi Court's Setting Aside of a Vietnamese Arbitral Award

### Introduction

On 14 November 2019, the People's Court of Hanoi ("**Hanoi Court**") passed Decision 11/2019/QD-PQTT ("**Decision 11**") to set aside an arbitral award under Vietnam's Law on Commercial Arbitration 2010 ("**LCA**").

This decision is a departure from the court's recent strong track record in upholding the enforceability of Vietnamese awards – particularly those rendered under the Arbitration Rules of the Vietnam International Arbitration Centre ("**VIAC**").

### Background

The case concerned a contract between a consortium of Chinese contractors, Hydrochina Huadong Engineering Corporation and the China Railway 18th Bureau Group ("**Claimants**"), and a Vietnamese employer, Vinh Son Song Hinh Hydropower Joint-Stock Company ("**Respondent**"), for the construction of a hydropower plant project. On 2 July 2015, the Claimants terminated the contract for reasons of delay and cost escalation.

Following disagreement on the sums owing to the Claimants upon contract termination, on 25 August 2014, the Claimants referred their dispute against the Respondent to arbitration under the Arbitration Rules of VIAC, seeking an amount of approximately VND 2.3 trillion. The substantive applicable law was Vietnamese law, while the "location for dispute settlement" was Hanoi, Vietnam. The tribunal consisted of Yasunobu Sato (chairman), Peter Chapman (appointed by the Claimants) and Dang Quang Phuong (appointed by the Respondent and who was a former judge of the Supreme People's Court of Vietnam).

On 10 April 2019, the tribunal unanimously issued an award in favour of the Claimants. Shortly thereafter, on 26 April 2019, the Respondent filed a request to the Hanoi Court to set aside the award on three grounds:

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- (1) **First ground:** The tribunal had decided to change the hearing venue to a location outside of the parties' agreement, thereby failing to carry out the arbitration in accordance with the parties' agreement.
- (2) **Second ground:** The tribunal had failed to take into account the Respondent's witness evidence in reliance on the IBA Rules on the Taking of Evidence ("**IBA Rules**"), thereby seriously violating the arbitral procedures under the LCA.
- (3) **Third ground:** The tribunal had failed to embark on its own assessment of the quantum of damages, and instead relied solely on the expert evidence of the Claimants.

## Decision of the People's Court of Hanoi

All three grounds advanced by the Respondent were accepted by the Hanoi Court, following which Decision 11 was passed to set aside the award. Decision 11 was final – no further complaint or appeal was permitted from the parties, the arbitral tribunal, or the People's Procuracy. Below is a brief of the Hanoi Court's assessment of each of the grounds mounted by the Claimants:

### **First Ground: The tribunal's decision to change the hearing venue**

In the arbitration, an agreement was reached between the Claimants and the Respondent to select Hanoi as the place of the hearing. This agreement was recorded in the tribunal's procedural order.

However, during the course of the proceedings, in response to the tribunal's decision to apply interim relief (ordering the Respondent to pay a security deposit of funds), the Respondent filed a petition to the Hanoi Court against the arbitral tribunal and two of the foreign arbitrators (the chairman and the Claimants' party-appointed arbitrator). By this petition, the Respondent sought to hold the tribunal, and the foreign arbitrators in their personal capacity, liable for losses caused by the tribunal's decision. This would mark the first known instance of an arbitral tribunal or arbitrators being sued at a Vietnamese court for decisions made in exercise of their adjudicative tasks in an arbitration.

There are no provisions that govern arbitrator immunity under Vietnamese law. Concerned over their personal liability, the tribunal exercised its discretion to change the location of the hearing to Osaka and Singapore.

The Hanoi Court found that this was sufficient to warrant setting aside of the arbitral award, as the change of hearing venue had departed from the parties' original agreement reached during the arbitration.

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### **Second Ground: The tribunal's failure to take into account the Respondent's factual witness in reliance on the IBA Rules on the Taking of Evidence**

In the arbitration, the Respondent did not participate in the hearing. While the Respondent had filed factual witness statements, these witnesses were not present at the hearing.

As a result, and in view of the Respondent's general lack of cooperation in the arbitration (including responding to the tribunal's requests), the tribunal decided that it would not accord any weight to the Respondent's factual witness statements. In making this determination, the tribunal remarked that it was guided by the IBA Rules – though it had recognised they were not bound by these rules in the arbitration.

The Hanoi Court held that in making this determination, the tribunal had violated Article 56.2 of the LCA. This provision required the tribunal to, in the absence of the respondent's participation in a hearing, "*proceed with settling the dispute based on available documents and evidence*". The same stipulation was provided in Article 25.1 of VIAC's Rules of Arbitration. As such, the Hanoi Court held that the tribunal was required to take into account the Respondent's evidence, and that the tribunal's application of the IBA Rules had adversely affected the Respondent's interest.

### **Third Ground: The tribunal's failure to embark on its own assessment of the quantum of damages, instead relying solely on the Claimants' expert evidence**

As the arbitration concerned a disagreement on damages between the parties, in support of its claim quantum, the Claimants had tendered as evidence a report from a quantum expert. In making its decision regarding quantum in its award, the tribunal had relied solely on the evidence of the expert.

The Hanoi Court held that this had contravened Article 46.3 of the LCA, as the tribunal had failed to embark on its own exercise of properly assessing the quantum (by calling for an inspection/appraisal). Remarkably, however, we note that Article 46.3 specifies that the tribunal, by itself or at the request of a party or all parties, has the right to order an inspection or appraisal of assets in dispute to settle the dispute. Therefore, the tribunal was under no legal obligation to procure its own assessment or consult other experts if it felt it was not necessary for its adjudicative tasks.

## Comments and Key Takeaways

Decision 11 has garnered considerable attention in legal and judicial circles in view of the reasonings given by the Hanoi Court in setting aside the award.

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### Comment on the First Ground

While the events leading up to, and the tribunal's decision on, changing the hearing venue was exceptional, it does raise the question as to whether this departure from the parties' agreement was sufficiently serious so as to warrant setting aside the award. According to Resolution 01/2014/NQ-HDTP of the Supreme People's Court, a court would only set aside an award if the violation was considered "serious". There is no legal test for determining whether a violation would be considered "serious". As a result, its application has typically been left to the court's discretion.

For this purpose, while the Respondent ultimately chose not to participate in the hearing, it was arguable as to whether relocation of the hearing venue was, on its own, a serious violation – particularly if it did not bar the Respondent from joining altogether. Notably, as recognised in Decision 11, the Respondent's initial request to designate Hanoi as the hearing venue was not made because it was incapable of attending elsewhere, but because VIAC did not have a branch in other countries. Nevertheless, the Hanoi Court concluded, without further reasoning, that the tribunal's decision "*had affected [the Respondent's] ability to participate in the hearing*" and as result, "*was a serious violation of the arbitral proceedings*".

As such, Decision 11 suggests there may be a low threshold in determining whether a violation is "serious". If such a threshold is taken, it does not bode well for future awards, as it may open the floodgates for parties to request the court to set aside an award on any procedural irregularity – irrespective of whether a party's interests in the arbitration were prejudiced.

### Comment on the Second Ground

In reaching a conclusion on the second ground, the Hanoi Court appeared to conflate two distinct matters: (1) the tribunal's obligation to settle the dispute "*based on available documents and evidence*" if the respondent does not participate in the hearing and (2) the tribunal's decision as to the weight that it accords to such documents and evidence. As a result, the Hanoi Court's finding in Decision 11 suggests that under Article 56.2 of the LCA, a tribunal is required to take into account (accord evidentiary weight to) the respondent's evidence (including factual witness statements) irrespective of their participation in the hearing. This finding effectively erodes the purpose of an evidentiary hearing.

Of further concern was the Hanoi Court's willingness to step into the tribunal's substantive decisions on the case regarding the assessment of evidence. This is despite Article 71.4 of the LCA which expressly prevents a court from reviewing the substance of a dispute that has been settled by the tribunal.

For parties, an important takeaway is the application of "soft laws" (such as the IBA Rules) to their arbitrations. While these soft laws have generally been developed with international best practices in mind, care needs to be taken to ensure that their application (even with the parties' mutual consent)

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would not run counter to Vietnam's arbitration law lest they face the risk of the award being set aside. In reaching Decision 11, the Hanoi Court had closely scrutinised the tribunal's decision to apply the IBA Rules in its evidentiary decision – even when the tribunal had recognised that they were not binding.

### **Comment on the Third Ground**

In the third ground, the Hanoi Court held that it was improper for the tribunal to rely on evidence of a party-appointed expert without having engaged its own expert. Based on the Hanoi Court's reasoning (relying on Article 46.3 of the LCA), it would seem that the same conclusion would be reached even if the Respondent (not just the Claimants) had filed an expert report.

More broadly, Decision 11 suggests that a tribunal's power under Article 46.3 of the LCA to call for an inspection/appraisal of matters in dispute (i.e. via a tribunal-appointed expert) is not discretionary, but mandatory. The finding appears to contradict the express language of the LCA provision.

Decision 11 effectively constrains the evidentiary weight that a tribunal can provide to party-appointed experts. This is particularly concerning for construction disputes (which make up a sizable proportion of VIAC-administered cases), where it is not uncommon for parties to tender expert evidence to aid the tribunal on technical matters.

## **Conclusion**

Over the past years, Vietnam has made considerable advances towards improving its arbitration landscape – partly witnessed through the improvement of the court's track record in recognising foreign awards or denying setting aside applications for Vietnamese awards. Therefore, it is no surprise that Decision 11 was perceived by many as a "step backwards" against these achievements.

It is worth noting that at the material time, the Respondent was a state-linked company – a subsidiary of EVNGENCO 3 (which itself was a subsidiary of the state-owned Vietnam Electricity Group). Quantum-wise, the arbitration was also among one of the largest ever administered by VIAC. Whether this had any bearing on the Hanoi Court's decision has remained questionable by the business community.

It remains to be seen whether Decision 11 would have future persuasive value to other Vietnamese courts (especially in Hanoi) or whether it would be treated as an outlier.

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