

Vietnam Supreme Court Upholds Recognition and Enforcement of ICC Arbitral Award in Landmark Decision

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Introduction

In its landmark decision in **Decision 03/2023/KN-KDTM**, the Supreme People's Court of Vietnam ("**Supreme Court**"), the country's apex court, recognised and enforced an arbitral award issued under the 2017 Rules of Arbitration of the International Chamber of Commerce ("**ICC Rules**").

The proceedings before the Supreme Court concerned interesting, and important, questions on the interaction between the ICC Rules and the 2010 Law on Commercial Arbitration ("**LCA**"), the relevant legislation governing arbitration in Vietnam. Article 61 of the LCA requires an arbitral award to be issued within 30 days after the end of the last hearing date. However, is this deadline mandatory or is it subject to modification by the timelines in the ICC Rules?

In a decision reflecting the pro-arbitration stance of the Vietnamese courts, the Supreme Court held that the ICC Rules takes precedence. This decision has provided much needed clarity and certainty on the recognition and enforcement of ICC awards in Vietnam.

The successful award creditor was represented in the ICC arbitration and the Vietnamese court proceedings by Dr Chau Huy Quang (Managing Partner), Logan Leung (Deputy Managing Partner), Quach Vu An Khoa (Senior Associate),

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Factual Background

The Claimant in the arbitration ("**Claimant**") is a Singapore construction company. It entered into a contract ("**Contract**") with a Vietnamese state-owned enterprise ("**SOE**"), to provide engineering, procurement and construction (EPC) services in relation to aviation fuelling facilities ("**Facilities**") at one of Vietnam's major international airports.

The Claimant had completed its works under the Contract, and the SOE had inspected, accepted and taken over the Facilities unconditionally. However, there remained outstanding claims by the Claimant against the SOE ("**Dispute**").

Clause 20.6 of the General Conditions of the Contract provided for the resolution of disputes by arbitration under the ICC Rules before a tribunal of three arbitrators appointed in accordance with the ICC Rules.

Arbitration

In May 2017, the Claimant filed its Request for Arbitration to the Secretariat ("**Secretariat**") of the ICC International Court of Arbitration ("**ICC Court**") to resolve the Dispute by arbitration in accordance with the ICC Rules. An arbitral tribunal of three arbitrators ("**Tribunal**") was duly constituted.

In February 2018, pursuant to Article 23.2 of the ICC Rules, the Tribunal transmitted to the Secretariat the "Terms of Reference". The Terms of Reference was unconditionally agreed and signed by the Claimant, the SOE and the Tribunal, and provided that:

"Pursuant to Article 19 of the [ICC] Rules, the proceedings shall be governed by the [ICC] Rules and, where the [ICC] Rules are silent, by any rules which the Parties or, failing them, the Tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration."

A hearing was subsequently scheduled on 5 and 6 August 2019 in Ho Chi Minh City. Ultimately, however, the parties executed a Settlement Agreement on 6 August 2019. The Settlement Agreement provided that the SOE would pay the Claimant certain sums in full settlement of the Dispute. Further, the Tribunal would issue a consent award pursuant to the terms set out in the Settlement Agreement, and in accordance with Article 33 of the ICC Rules and the laws of Vietnam.

On 1 October 2019, the Tribunal rendered the Consent Award. Among other matters, the Consent Award stated that:

1. the terms of the Settlement Agreement "shall have the same validity as those of a Final Award on the merits in this arbitration"; and
2. pursuant to Article 58 of the LCA, the Tribunal recognised the Settlement Agreement, and that the Tribunal's decision to recognise the Settlement Agreement "shall be final and shall have the same validity as a Final Award on the merits in this arbitration".

Enforcement of Consent Award and Setting-aside by Appellate Court

The SOE failed to make all the payments required under the Settlement Agreement. The Claimant thus filed a petition for the recognition and enforcement of the Consent Award before the People's Court of Ho Chi Minh City ("**First Instance Court**"). In May 2021, the petition was allowed ("**First Instance Decision**").

The SOE appealed to the High People's Court of Ho Chi Minh City ("**High Court**"). It argued that the Consent Award should not be recognised or enforced because:

1. the Tribunal did not have jurisdiction over the dispute; and
2. the Consent Award was not a "foreign award" for the purposes of the LCA, because the hearings took place in Ho Chi Minh City.

Under the Appellate Decision issued in May 2022, the High Court allowed the appeal and refused recognition and enforcement of the Consent Award. The High Court's decision was premised on, amongst others, the following grounds:

1. **First Ground:** The Tribunal had not declared the proceedings formally closed at the final hearing and informed the parties and the Secretariat of the date by which the draft of the award was to be submitted, in violation of Article 27 of the ICC Rules:

"However, as soon as the final hearing regarding the necessary issues to be decided in the award, the Arbitration council [or the Arbitral Tribunal] had not declared that the proceeding was formally closed at the final hearing and had not informed the parties and the Secretariat of the date by which the draft award was expected to be submitted to the International Court of Arbitration in Paris for ratification under Article 34, which constituted a failure to comply with the due process in violation of Article 27 of the ICC Arbitration Rules."

2. **Second Ground:** The Consent Award was not issued within 30 days from the date of the final hearing, in violation of clause 3, Article 61 of the LCA:

"Clause 3, Article 61 of the Law on Commercial Arbitration stipulates: "An arbitral award shall be issued right at the hearing or within 30 days after the final hearing." The disputing parties reached a settlement agreement on 6 August 2019, but it was not until 1 October 2019, 25 days after the aforementioned time limit, that the award was issued by the Arbitral Tribunal. Therefore, the time limit and order of procedure for issuing arbitral award of this case did not comply with the time limit and procedural order as prescribed in the procedural provisions of Vietnamese law."

Proceedings Before the Supreme People's Court of Vietnam

In May 2023, the Claimant applied to the Chief Judge of the Supreme Court for a review of the Appellate Decision pursuant to the procedure for cassation. Notably, the First Instance Court also filed a request to the Chief Judge of the Supreme Court to consider the Claimant's application.

In June 2023, the Chief Judge of the Supreme Court issued a decision to request the Panel of Judges of the Supreme Court to convene a cassation hearing. The cassation hearing was convened on September 2023 without participant of the Claimant and SOE. The Supreme Court issued **Decision 03/2023/KN-KDTM**, by which it quashed the Appellate Decision and upheld the First Instance Decision, thereby recognising and allowing enforcement of the ICC award in Vietnam.

Grounds of Decision

First, the Supreme Court dismissed the SOE's argument that the Tribunal lacked jurisdiction. Clause 20.6 of the General Conditions of the Contract provided for arbitration before a tribunal of three arbitrators in accordance with the ICC Rules, thus granting the Tribunal jurisdiction over the Dispute. Further, the Settlement Agreement provided that the Tribunal would issue an award by consent in accordance with Article 33 of the ICC Rules.

Second, the Supreme Court dismissed the SOE's argument that the Consent Award was not a "foreign award". Articles 3(11) and 3(12) of the LCA provides that a "foreign arbitral award" includes an award pronounced by an arbitration conducted within Vietnamese territory, as long as the arbitration is formed under a foreign law.

Third, the Supreme Court found that Article 27 of the ICC Rules was complied with, as there was a declaration from the Tribunal that the proceedings were formally closed. Paragraph 6 of the Consent Award stated that the Tribunal declared the proceedings closed on 6 August 2019, when the Settlement Agreement was reached.

The Supreme Court also found that there was no violation of the requirement that the Tribunal inform the Secretariat of when the draft award was to be submitted. This is because the Settlement Agreement provided for an award to be issued by consent, in accordance with Article 33 of the ICC Rules.

Fourth, the Supreme Court found that the Consent Award was not issued out of time. Article 31 of the ICC Rules gives a time limit of six months for the Tribunal to issue an award. Here, the Settlement Agreement was dated 6 August 2019, and the Consent Award was dated 1 October 2019. On that basis, the Consent Award was issued on time.

Key Takeaways

The Supreme Court's decision is a clear reflection of the Vietnamese courts' increasingly pro-arbitration stance, and also provides important clarity on the operation of ICC awards in Vietnam.

First, the Court's rejection of the SOE's arguments is well founded in both fact and law. The records clearly showed the parties' consent for the dispute to be resolved by arbitration before the Tribunal. Further, the mere fact that hearings were conducted in Vietnam did not mean that the Consent Award is not a "foreign arbitral award"; Article 3(11) of the LCA clearly provides that whether an arbitral award is "foreign" does not turn on the location of the hearings.

Second, the Court's reading of Article 27 of the ICC Rules was sensible and pragmatic. It is understandably unnecessary for the Tribunal to inform the parties of the expected date of submission for the draft award, if the award was to be issued by consent under Article 33 of the ICC Rules and not through the ordinary adversarial process.

Third, by finding that Article 61(3) was not a provision of mandatory application, and instead was supplanted by the parties' agreement to Article 31 of the ICC Rules, the Supreme Court has provided an important clarification. If the 30-day timeline under Article 61(3) were mandatory, ICC arbitrations would be a much less attractive prospect for arbitration users in Vietnam. This is because for ICC arbitrations, draft awards will need to be scrutinised by the ICC Court before issuance. This process will in most cases take longer than the 30-day timeline provided for under Article 61(3). A strict adherence to Article 61(3) would place most ICC awards in violation of the 30-day timeline, making enforcement of ICC awards a much more precarious affair in Vietnam. Vietnamese experts have agreed that the 30-day time limit is a "hard" regulation, with no flexibility or different understanding allowed for the arbitral tribunal (even if the parties have agreed on a longer period for the arbitral tribunal).

It is thus clear that the Supreme Court had a keen appreciation of how ICC arbitrations operate, and of how a strict adherence to the procedural timelines under the LCA may affect the promotion of ICC arbitrations in Vietnam. To that end, the Supreme Court's decision is very much consistent with the *raison d'être* of the New York Convention, of promoting arbitration as a viable and attractive method of dispute resolution. The Supreme Court also indirectly affirmed that in some cases, failure to meet the 30-day deadline is not a serious violation of the arbitration procedure, or at least does not violate the fundamental principles of Vietnamese law.

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