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The Recognition and Enforcement of Foreign Arbitral Awards in Vietnam

(Provincial Court of Ho Chi Minh City, Photo by Diep Duc Minh)

The Recognition and Enforcement of Foreign Arbitral Awards in Vietnam

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Introduction

A. Development of arbitration in Vietnam

Although arbitration, construed as a type of alternative dispute resolution, was used in the feudal period of Vietnam,[1] the clear historical evidence of it only started to be recorded at the end of the 19th century, while Vietnam was under the colonisation of France.[2] In a dispute relating to land, two Vietnamese citizens brought their dispute before a French person in order to have this person resolve it. The decision of the French person was recognised by the Appellate Court of Saigon.

In the period of the Vietnam War, there were two different and independent systems of arbitration in the two areas of Vietnam. In the North of Vietnam, two arbitration centres were established – the Foreign Trade Arbitration Council and the Maritime Arbitration Council. The vital function of these two arbitration centres was adjudicating and resolving commercial disputes arising out of contracts between Vietnamese state companies and the state companies of countries belonging to the Socialist Bloc. Although there is no evidence in the South of Vietnam that mentions the existence of a certain arbitration centre, the Civil Procedure Code of 1972 provided for some articles on arbitration.

After reunification and ten years of a planned economy, Vietnam conducted a great 'Renovation' (*Doi moi*) and gradually integrated into the global economy. In order to attract foreign companies to come and invest,[3] Vietnam joined several international treaties. One of the most important treaties was the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).

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[1] Quoc Thuc Vu, *History of legal institutions in Vietnam (Pháp chế sử Việt Nam)* (Saigon Law University 1974) 406.
[2] Van Dai Do and Hoang Hai Tran, *Vietnamese Law on Commercial Arbitration (Pháp luật Việt Nam về trọng tài thương mại)* (National Political Publisher – The Truth 2011) 28.
[3] Pip Nicholson and Thi Minh Nguyen, 'Commercial Disputes and Arbitration in Vietnam' (2000) Volume 17(5) Journal of International Arbitration 2.

Vietnam's participation in the New York Convention was a necessary guarantee for foreign companies and investors, because where a Vietnamese company loses in an arbitral procedure outside of Vietnam, it means that the prevailing foreign company or investor can then conveniently bring the arbitral award before a Vietnamese court for recognition and enforcement.

Starting from Vietnam signing the New York Convention, the Vietnamese National Assembly issued three legal instruments concerning the recognition and enforcement of foreign arbitral awards in Vietnam: the Ordinance of 1995, the Civil Procedure Code of 2004 (amended in 2011) and the Civil Procedure Code of 2015. While the Ordinance was a verbatim copy of the New York Convention, the Civil Procedure Code of 2004 (amended in 2011) was the product of a legal transplant that transferred the regulations of the New York Convention into the national legal framework. Unfortunately, this legal transplant led to several challenges and contradictions, making the Civil Procedure Code of 2004 (amended in 2011) somewhat different from the original spirit of the New York Convention.[4]

In addition to having to deal with inadequate legal provisions, the Vietnamese provincial courts[5] have suffered from a lack of experience in adjudicating petitions for the recognition and enforcement of foreign arbitral awards.[6] In several cases, the courts have misunderstood the relevant provisions and the philosophy of the pro–recognition and enforcement of foreign awards set out in the New York Convention. This has led to circumstances whereby several foreign arbitral awards were not recognised and enforced unpersuasively and arbitrarily.

[4] Nguyen Gia Thien Le, 'Recognition and enforcement of foreign arbitral awards (Công nhận và cho thi hành phán quyết của trọng tài nước ngoài)' (2016) Volume 24 Legislative Studies Journal 46 – 51.

[5] The official name used in Vietnamese legal instruments is "the people's court of province or city under central authority"; in this dissertation, the term is written as "the provincial court" for the sake of brevity

[6] Duy Luong Tuong, Commentaries on the Civil Procedure Code, Arbitration Law and adjudicating practice (Bình Luận Bộ Luật Tố Tụng Dân Sự, Luật Trọng Tài Thương Mại Và Thực Tiễn Xét Xử) (Justice Publisher 2016) 12.

To resolve this uncertain situation, the Supreme Court[7] enacted legal notices to warn and instruct the courts when they were faced with a request for recognition and enforcement.[8] Finally, the challenges and drawbacks were mostly resolved through the promulgation of the Civil Procedure Code of 2015, which, all in all successfully, governs the features of the whole procedure of the recognition and enforcement of foreign arbitral awards in Vietnam. This legal instrument has received much support from both academics and practitioners in Vietnam.

Although there have been articles published in Vietnam, as well as other countries, dealing with some of the issues connected with the recognition and enforcement of foreign arbitral awards in Vietnam, an in–depth study discussing both the achievements and the shortcomings of Vietnamese law has not yet been undertaken. This is the purpose of this dissertation, which seeks to contribute to the Vietnamese discussion and to introduce readers who do not read Vietnamese to the legal situation in Vietnam.

At the same time, the law of Vietnam will be compared with the arbitration law of a western country, in order to check whether the experiences made there can be useful for further discussion within the Vietnamese legal community.

Germany, as a modern and friendly jurisdiction with both domestic and international arbitration, does not specifically provide for regulations on the recognition and enforcement of foreign arbitral awards. Article 1061 of German Civil Procedure Code, while mentioning the recognition and enforcement of foreign arbitral awards, merely refers to the New York Convention. The judicial experience of German courts shows that they strictly follow the provisions of the New York Convention. Overall, the interpretation and application of the New York Convention by German courts seems persuasive, reasonable and appropriate. This

[7] The official name used in Vietnamese legal instruments is "the People's Supreme Court", in this dissertation, the term is written as "the Supreme Court" for the sake of brevity.
[8] Resolution No 01/2014/NQ–HĐTP of 20 March 2014 on Guidelines for the law on Commercial Arbitration.

is the reason why this dissertation compares the situation in Vietnam with the German law and case law on the recognition and enforcement of foreign arbitral awards.

B. Research context and analyses

The dissertation seeks to draw a general picture of arbitration law in Vietnam, and in particular presents and analyses the legislation and judicial practice of Vietnamese courts. Some major works of legal scholarship will accompany this analysis, in particular articles published in academic journals, handbooks, textbooks and dissertations, as well as the results of ministerial study projects.

Overall, the works published in Vietnam contain useful insights into the background of the recognition and enforcement of foreign arbitration in Vietnam. Some materials written by officers or organs of Vietnamese authorities, including the Supreme Court[9] and the Ministry of Justice,[10] supply trusted and workable information on the statistics of cases held by Vietnamese courts. Case law in some books[11] and articles[12] have been presented and

[9] Vietnamese Supreme Court, Presentation of the Supreme Court at the Conference on summarising 20 years after acceding to the New York Convention, held by the Ministry of Justice on 21 November 2014.

[10] Xuan Nhu Bui, 'Study on solutions to prevent legal risks in international commercial activities of Vietnamese enterprises (Nghiên cứu giải pháp tránh rủi ro pháp lý trong hoạt động thương mại quốc tế của doanh nghiệp Việt Nam)' (Ministerial Study Project, Ministry of Justice 2009); Thi Minh Ha Tran, 'The report proposes a mechanism for coordination and monitoring between related agencies to ensure the recognition and enforcement of foreign arbitral awards in accordance with the provisions of the New York Convention on the Recognition and Execution of Foreign Arbitration Awards, Part II: Practicing coordination and monitoring of the implementation of the New York Convention (Báo cáo đề xuất cơ chế phối hợp, theo dõi giữa các cơ quan liên quan nhằm đảm bảo việc công nhận và cho thi hành phán quyết trọng tài nước ngoài được thực hiện theo quy định của Công ước New York về Công nhận và Cho thi hành Phán quyết trọng tài nước ngoài, Phần II: Thực tiễn phối hợp và theo dõi thực hiện Công ước New York)'.

[11] Van Dai Do and Hoang Hai Tran, Vietnamese Law on Commercial Arbitration (Pháp luật Việt Nam về trọng tài thương mại) (National Political Publisher – The Truth 2011) 28; Duy Luong Tuong, Commentaries on the Civil Procedure Code, Arbitration Law and adjudicating practice (Bình Luận Bộ Luật Tố Tụng Dân Sự, Luật Trọng Tài Thương Mại Và Thực Tiễn Xét Xử) (Justice Publisher 2016); Van Dai Do, Law on Vietnam Commercial Arbitration: Cases and Commentaries, Volume 2 (Hong Duc Publishers – Vietnam Lawyer Association 2018).

[12] Nguyen Gia Thien Le, 'Recognition and enforcement of foreign arbitral awards (Công nhận và cho thi hành phán quyết của trọng tài nước ngoài)' (2016) Volume 24 Legislative Studies Journal; Hai Ha Do, 'Discourse on the definition of an award of foreign arbitration under the Civil Procedure Code 2004
(Bàn về khái niệm quyết định của trọng tài nước ngoài theo Bộ luật tố tụng dân sự 2004)' (2007) Volume 5 Legal Science Journal.

criticised. Additionally, some materials refer to books and articles published in foreign countries, as well as analysis of case law rendered by foreign courts.

However, it is also true to say that those works have certain shortcomings, such as:

(i) most of the works depict the matter of the recognition and enforcement of foreign arbitration in Vietnam based on former legal instruments such as the Ordinance of 1995 and the Civil Procedure Code of 2004 (amended in 2011);[13]

(ii) several works only present the law, without analysing or even criticising the case law, especially the current case law after the introduction of the Civil Procedure Code of 2015;[14]

(iii) some of the works demonstrate Vietnamese law and compare the matters of the recognition and enforcement of foreign arbitration between Vietnamese and foreign countries' courts.[15]

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[13] Trung Tin Nguyen, Recognition and Enforcement of commercial arbitral awards in Vietnam (Công nhận và cho thi hành các quyết định của trọng tài thương mại tại Việt Nam) (Justice Publisher 2005); Hai Ha Do, 'Discourse on the definition of an award of foreign arbitration under the Civil Procedure Code 2004 (Bàn về khái niệm quyết định của trọng tài nước ngoài theo Bộ luật tố tụng dân sự 2004)' (2007) Volume 5 Legal Science Journal; Van Dai Do and Hoang Hai Tran, Vietnamese Law on Commercial Arbitration (Pháp luật Việt Nam về trọng tài thương mại) (National Political Publisher – The Truth 2011); Cong Binh Nguyen, Textbook on Civil Procedure Law (Giáo trình luật tố tụng dân sự) (Justice Publisher 2006); Thi Anh Thu Nguyen, 'The New York Convention on the Recognition and Enforcement of Foreign Arbitral Award and its application in Vietnam (Công ước New York 1958 về công nhận và cho thi hành phán quyết của trọng tài nước ngoài và việc thực hiện tại Việt Nam)' (LL.M Thesis, Law Faculty of Vietnam National University, 2002); Thong Anh Phan, 'The relationship between the court and the arbitration in arbitral procedure (Mối quan hệ giữa tòa án và trọng tài trong quá trình tố tụng trọng tài)' (LL.M Thesis, Ho Chi Minh City University of Law 2006).

[14] Trung Tin Nguyen, 'On the conditions to recognise and enforce arbitral awards in Vietnam (Về các điều kiện công nhận và cho thi hành tại Việt Nam quyết định của trọng tài)' (2000) 6 State and Law Journal; Hai Ha Do, 'Discourse on the definition of an award of foreign arbitration under the Civil Procedure Code 2004 (Bàn về khái niệm quyết định của trọng tài nước ngoài theo Bộ luật tố tụng dân sự 2004)' (2007) Volume 5 Legal Science Journal; Thi Anh Thu Nguyen, 'The New York Convention on the Recognition and Enforcement of Foreign Arbitral Award and its application in Vietnam (Công ước New York 1958 về công nhận và cho thi hành phán quyết của trọng tài nước ngoài và việc thực hiện tại Việt Nam)' (LL.M Thesis, Law Faculty of Vietnam National University, 2002); Thong Anh Phan, 'The relationship between the court and the arbitration in arbitral procedure (Mối quan hệ giữa tòa án và trọng tài trong quá trình tố tụng trọng tài)' (LL.M Thesis, Ho Chi Minh City University of Law 2006); Xuan Nhu Bui, 'Study on solutions to prevent legal risks in international commercial activities of Vietnamese enterprises (Nghiên cứu giải pháp tránh rủi ro pháp lý trong hoạt động thương mại quốc tế của doanh nghiệp Việt Nam)' (Ministerial Study Project, Ministry of Justice 2009).

[15] Van Dai Do and Hoang Hai Tran, Vietnamese Law on Commercial Arbitration (Pháp luật Việt Nam về trọng tài thương mại) (National Political Publisher – The Truth 2011); Van Dai Do, Law on Vietnam Commercial Arbitration: Cases and Commentaries, Volume 2 (Hong Duc Publishers – Vietnam Lawyer Association 2018); Nguyen Gia Thien Le, 'Recognition and enforcement of foreign arbitral awards (Công nhận và cho thi hành phán quyết của trọng tài nước ngoài)' (2016) Volume 24 Legislative Studies Journal; Hai Ha Do, 'Discourse on the

(iv) the most pivotal disadvantage of works published in Vietnam is that there has been no academic project that studies the whole procedure of the recognition and enforcement of foreign arbitral awards in Vietnam based on the new Civil Procedure Code of 2015. In particular, no project that elaborately compares Vietnamese and German statutes and case law has ever been conducted.

C. Contributions of the dissertation

The dissertation comprises two chapters. The first one briefly introduces a general picture of arbitration law in Vietnam, while the second one, which is also the most significant part of the dissertation, seeks to present and analyse the legal instruments and the case law of Vietnam with a comparative viewpoint with German law and judicial practices.

The dissertation precisely analyses and compares the text of Vietnamese legal instruments in relation with the recognition and enforcement of foreign arbitral awards in Vietnam, including the Ordinance of 1995, the Civil Procedure Code of 2004 (amended in 2011) and the current Civil Procedure Code of 2015. Particular features of the definition of a foreign arbitral award, the time limit, the document service, the role of procuracy and the grounds for refusal are discussed carefully. In the comparative perspective with the German experience, the challenges and disadvantages of Vietnamese statutes and case laws are discussed. Further, based on those discussions, the dissertation also raises some propositions on how to innovate and amend Vietnamese laws.

The dissertation makes some specific contributions, such as:

(i) the dissertation draws a general picture of arbitration law in Vietnam.

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definition of an award of foreign arbitration under the Civil Procedure Code 2004 (Bàn về khái niệm quyết định của trọng tài nước ngoài theo Bộ luật tố tụng dân sự 2004)' (2007) Volume 5 Legal Science Journal.

(ii) the dissertation is the first project that focuses closely on the comparison between Vietnamese and German law in the course of the recognition and enforcement of foreign arbitral awards worldwide.

(iii) the dissertation is the first one that raises the suggestion that the term "award of foreign arbitration (phán quyết của trọng tài nước ngoài)" should be amended to the more precise and common term "foreign arbitral award (phán quyết trọng tài nước ngoài)".

(iv) the dissertation explores the contradictions in the treaties on legal assistance between Vietnam and other parties in the specific matters of document service and the role of the Ministry of Justice.

(v) the dissertation presents suggestions for the recognition and enforcement of partial awards and awards on costs.

(vi) the dissertation proposes suggestions for Vietnamese courts to recognise foreign arbitral awards without enforcement.

(vii) the dissertation raises suggestions for Vietnamese courts not to recognise *lodo irrituales* (informal awards) and to not apply the double exequatur.

(viii) the dissertation carefully analyses the matter of the burden of proof.

(ix) the most important part that is presented and analysed are the reasons for the refusals of the recognition and enforcement of foreign arbitral awards.

(x) the dissertation raises suggestions for Vietnamese courts to apply the New York Convention directly.

D. Methodology

The classical doctrine of legal interpretation is applied throughout the dissertation. The application of this method is presented through four smaller sub–methods – grammatical, systematical, historical and teleological interpretations. Firstly, in the grammatical interpretation, the wording of sentences of legal instruments including the New York

Convention, Vietnamese laws such as the arbitration law and the civil procedure codes, and German laws such as the German Civil Procedure Code are analysed based on the language usage and sentence structure of the provisions. Secondly, the systematical interpretation is applied to interpret the legal instruments consisting of the New York Convention and Vietnamese laws based on the combination and collaboration amongst definitions, terminologies and even articles or chapters in a certain legal instrument. Thirdly, the historical interpretation concentrates on the notion, perception and purpose of the legislators from the drafting to the issuing of the legal instruments. It is obvious that the legislators of the New York Convention proposed this legal document in order to unify and establish a common and basic legal standard for the recognition and enforcement of foreign arbitration awards across the world. Therefore, the criteria set in the New York Convention are only the minimum requirements, with the member countries being in charge of regulating the procedure for the recognition and enforcement of foreign arbitral awards using their own laws. However, national laws should not, or even cannot, create more onerous and stricter features for the recognition and enforcement of foreign awards in comparison with the provisions of the New York Convention. Finally, the teleological interpretation tries to figure out the philosophy or spirit of the legal documents; this can be seen as a further and more profound sub–method than the grammatical, systematical and historical interpretations. The core philosophy of the New York Convention is *favorem validitatis* and pro–recognition and enforcement. This means that the courts in a recognising country will be in favour of the validity of the pathological arbitration agreement, and those courts will have the tendency to encourage the recognition and enforcement of foreign arbitral awards.

All cases resolved before Vietnamese courts are discussed and analysed carefully. A few cases, due to their simplicity, are mentioned briefly, while most of the cases cover several legal issues that can be used throughout the dissertation. For instance, Decision No 03/2007/ST–KDTM of 10 August 2007 of the Provincial Court of Hung Yen contains several legal issues and the court's reasoning including: (i) the creditor and the debtor were foreign

companies, but the debtor's asset was in Vietnam; (ii) the Ministry of Justice did not check the operative information of the creditor when it handled the application and attached documents served by the creditor; (iii) the court sent a request to collect the creditor's operative information to the Vietnamese Embassy in Indonesia; (iv) the Provincial Procuracy in Hung Yen[16] suggested that the court postpone the procedure of recognition and enforcement of the foreign award, but the court refused to comply with this suggestion; (v) the court and the procuracy tended towards the non–recognition and enforcement of foreign arbitral award in Vietnam.

The legal comparative method is at the heart of all the legal methods used in the dissertation. Without the comparison between German legal and judicial experiences and Vietnamese practices, it would be extremely difficult to point out and analyse the disadvantages and drawbacks of both the Vietnamese law and the Vietnamese courts' adjudicating experience. When comparing the statutes of Germany and Vietnam, it is submitted that German law chooses to apply the New York Convention directly, while Vietnam is inclined to transpose the regulations of the New York Convention into its national jurisdiction. The legal transposition has led to several contradictions and divergences far from the core rules governed in the New York Convention.

In addition to the comparison between the written laws of Vietnam and Germany, the comparison between the case laws of the two countries is also carefully conducted. German case law, issued by the Federal Court of Justice and the higher regional courts, and Vietnamese case law, held by the Supreme Court and the provincial courts, are referred to throughout the dissertation.

[16] The official name provided for in Vietnamese legal instruments is "the people's procuracy of province or city under central authority", in this dissertation this term is written as "the provincial procuracy" for the sake of brevity.

Adjudicating legal opinions and the legal application by the German courts are valuable and useful for Vietnamese courts, so that the courts in Vietnam can learn directly and conveniently. Part G of the dissertation's Chapter III applies this type of comparison extensively, while carefully presenting the grounds for a refusal of a petition for the recognition and enforcement of a foreign arbitral award in Vietnam. Specifically, the term "public policy", commonly used in the New York Convention and German law, has never existed in Vietnamese legal instruments. Instead of regulating this term, Vietnamese law follows a specific path and applies the term "fundamental principles of laws". The misuse and even abuse of this term, due to its unclear and vast scope, has unfortunately led to several decisions that wrongly refused the recognition and enforcement of foreign arbitral awards in Vietnam.

The method of legal history is used to present the historical changes, progress or even regress in a certain matter. The dissertation uses this method to present the changes and advancement of Vietnamese legal instruments by figuring out the differences between the Decree 116/CP, the Ordinance of 2003 and the Arbitration Law of 2010. Additionally, this method is employed extensively when aspects of the recognition and enforcement of foreign arbitral awards procedure mentioned in the Ordinance of 1995, the Civil Procedure Code of 2004 (amended in 2011) and the Civil Procedure Code of 2015 are studied.

With more diversified experience in dealing with petitions for the recognition and enforcement of foreign arbitral awards, German courts have witnessed several cases that have never been brought before Vietnamese courts. Such practices of resolving a petition for the partial recognition and enforcement, a petition for recognition without enforcement, the recognition and enforcement of *lodo irrituale* and the application of double exequatur are definitely able to be brought before Vietnamese courts. The experiences of German courts, and especially the reasoning of German judges in those cases, can be referral solutions for Vietnamese courts.

In order to draw a practical picture of arbitration in Vietnam, the numbers of arbitration centres and arbitrators are described meticulously. In addition, the number of petitions for the recognition and enforcement of foreign arbitral awards brought before the Vietnamese courts are depicted elaborately.

Chapter I. Arbitration law in Vietnam: a general picture

A. Arbitration in feudal and France–ruled periods

Arbitration has existed since the dawn of commerce[17] and has had a long history dating back thousands of years. Although arbitration has experienced several ups and downs based on the historical events occurring around the world, it has been used as an efficient and workable mechanism of resolving disputes arising between parties across the world.[18]

During the feudal periods, the indigenous citizens preferred neither arbitration nor litigation to settle their disputes. Instead, they were in favour of conciliation.[19] Conciliation arose from the political and social situations run under Confucian thoughts and disciplines, which conveyed that people should seek harmonised resolutions.[20] Notwithstanding, in the event that the parties of the dispute could not meet consistent solutions after the conciliations, they could suggest mandarins in certain local areas to help them adjudicate the disputes. Those mandarins were not judges. In contrast to Western perceptions, they served as bureaucratic officials, handling matters as both judicial and administrative authorities in those certain territories. Evidence that could be tracked to before the year 1145 shows that citizens could bring their disputes relating to land before royal princes. However, Emperor Ly Anh Tong prohibited this situation in a royal proclamation issued in 1145.[21] By the end of the 19th century, along with the colonisation of France in Vietnam, Western jurisprudence as well as legal norms were promoted and promulgated broadly in the colonised regions of Tonkin,

[17] Michael Lord Mustill, 'Arbitration: History and Background' (1989) Volume 6(2) Journal of International Arbitration 43 – 56.

[18] Francesco Zappalá, 'Historical record of arbitration (Memória histórica da arbitragem)' (2011) Volume 6 Meritum 372 – 373.

[19] Philip J. McConnaughay, International Commercial Arbitration in Asia (JurisNet 2004) para. 11–1, 11–20.

[20] Philip J. McConnaughay, International Commercial Arbitration in Asia (JurisNet 2004) para. 11–2.

[21] Quoc Thuc Vu, *History of legal institutions in Vietnam (Pháp chế sử Việt Nam)* (Saigon Law University 1974) 406.

Tourane and Annam.[22] The legal documents of this time period showed that the mechanism of arbitration, as a method of private dispute resolution, was accepted in Vietnam. In a land dispute between Vo van Thu and Duong thi Lanh et al, the Appellate Court of Saigon affirmed that the arbitral award rendered by a French legalist was valid under Vietnamese law.[23]

B. Arbitration in the term before the reunification and during the renovation period

There were two arbitration centres, one titled the Foreign Trade Arbitration Council and the other the Maritime Arbitration Council, both established by the Government in 1963 and 1964 respectively.[24] The purpose of the two arbitration centres was to resolve the disputes arising out of contracts between the state enterprises in the planned economy, as well as foreign trade disputes between Vietnamese state enterprises and companies from countries in the Socialist Bloc.[25] These centres played the role of both judicial courts holding economic cases, and subsidiary organs of the Vietnam Commercial Chamber. In the 1970s, a hierarchy of economic arbitration councils, from the central–authority to the local level, was established under Decree No 20/TTg[26] to resolve disputes arising out of the economic contracts between

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[22] Thi Phung Vu, *Textbook on History of Vietnamese States and Laws (Giáo trình lịch sử nhà nước và pháp luật Việt Nam)* (Vietnam National University Hanoi 1997) 147–194.

[23] D. Penant, 'The Tribunal of Colonies and Protectorates: Journal of Jurisprudence of Colonial and Maritime Doctrine and Legislation (La Tribune des Colonies et Protectorats: Journal de Jurisprudence de Doctrine et de Législation Coloniales et Maritimes)' (1899) Volume VIII, Article 1278. The names Duong–Thi–Lanh and Vo–van–Thu were described in French writing style, however names of those parties could be guessed as Dương Thị Lành and Võ Văn Thụ, which were absolutely popular name in Vietnam at that time. See also Van Dai Do and Hoang Hai Tran, *Vietnamese Law on Commercial Arbitration (Pháp luật Việt Nam về trọng tài thương mại)* (National Political Publisher – The Truth 2011)

[24] Those centres were established under Decree No 59/CP of 30 April 1963 and Decree No 153/CP of 5 October 1964 of the Vietnamese Government, see: Central Committee for Legal Education and Promulgation, Specific Issue on Legal Promulgation: Commercial Arbitration and Law on Commercial Arbitration (Hội đồng phổ biến, giáo dục pháp luật Trung ương, Đặc san tuyên truyền pháp luật: Chủ đề trọng tài thương mại và pháp luật về trọng tài thương mại) (2013) 12.

[25] Van Hau Duong, 'Vietnam International Arbitration Centre: one year after the validity of the Ordinance on commercial arbitration (Trung tâm trọng tài quốc tế Việt Nam: Một năm sau ngày Pháp lệnh trọng tài thương mại có hiệu lực)' (2004) Volume 12 Democracy and Law Journal 39.

[26] Decree of 14 January 1960 of the Vietnamese Government.

state enterprises and cooperatives.[27] Afterwards, the names of the councils were changed to 'state economic arbitrations' under Decree No 24/HĐBT.[28] In 1990, Decree No 20/TTg was upgraded to the Ordinance on Economic Arbitration,[29] but the functions of the arbitration mechanisms remained the same. These so–called "economic arbitrations", in their essence, were administrative organisations and could not fully perform the functions of realistic arbitrations. Furthermore, several laws and amendments on the organisation of the courts[30] provided that the courts in Vietnam only had jurisdiction over criminal, civil and labour cases, while cases concerning economic matters would be solved by these two arbitration centres and the system of state economic arbitration.

In order to meet the urgent requirements of economic renovation, and to integrate into the global economy after many years of war, Vietnam had to reorganise its legal system in order to harmonise the international treaties and conventions to which Vietnam was a signatory member. The new economic sphere witnessed several cases in which the parties to economic contracts, including both Vietnamese and foreign enterprises, chose arbitration as the method to resolve the disputes arising amongst them. The model of the two economic arbitration centres revealed disadvantages in the new stage. Their '*historical roles*' ceased[31] and were to be replaced by a new mechanism that could comply with the international standards. According to a decision of the Prime Minister of Vietnam in 1993,[32] the Foreign Trade Arbitration Council and the Maritime Arbitration Council were merged into a unified centre called the Vietnam International Arbitration Centre. The Vietnam International Arbitration

[27] Tri Uc Dao, 'Fundamental matters of Law on commercial arbitration (Những vấn đề cơ bản của Luật trọng tài thương mại)' (2009) Volume 1 State and Law Journal 7.

[28] Decree of 10 August 1981 of the Vietnam Council of Ministers (former name of Vietnamese Government).

[29] Ordinance of 10 January 1990 of the National Assembly.

[30] From 1960 to 1993, legal instruments of Vietnamese laws providing the organisation of courts issued by Vietnamese National Assembly included Order No 19/LCT of 26 July 1960 of the State President; Law No 3–LCT/HĐNN on 3 July 1981 of the State President; Law No 2/L–CTN on 6 October 1992 of the State President did not describe the jurisdictional possibilities of courts to commercial disputes.

[31] Trung Tin Nguyen, *Recognition and Enforcement of commercial arbitral awards in Vietnam (Công nhận và cho thi hành các quyết định của trọng tài thương mại tại Việt Nam)* (Justice Publisher 2005) 163–170.

[32] Decision No 204/TTg of 28 April 1993 of the Prime Minister.

Centre operates as a non–governmental and non–profit organisation by supplying the service of commercial dispute resolution like many other arbitration centres in the world. In addition to the establishment of the Vietnam International Arbitration Centre, the Vietnamese Government went one step further in setting up arbitration centres like the Vietnam International Arbitration Centre by enacting Decree 116/CP.[33] It is notable that during this term, Vietnamese law and Vietnamese practice only accepted the institutional arbitration, while ad hoc arbitration had not yet been introduced.[34]

The genesis of these new economic arbitration centres marked progress for both Vietnamese law and the practice of arbitration. The role of the arbitration centres was no longer to resolve economic cases as judicial courts. Instead, the essence of these centres has been a purely private mechanism. The Law on the Organisation of the Courts (amended in 1993)[35] ruled that the courts, from first instance courts to the Supreme Court, had jurisdiction over economic disputes. Due to their simple organisation, the first instance courts would hear economic cases directly. Meanwhile, due to their more complex organisation, the higher courts in provinces and cities under the central authorities, e.g. Hanoi, Ho Chi Minh City and so on, would exercise the hearing of economic cases via their departments, named Economic Courts.

The Vietnamese Supreme Court had jurisdiction over cassation and the re–opening of judgments relating to economic cases rendered by the provincial courts in advance. Along with the effectiveness of this law, the role of economic arbitration, which was the vestige of the state–run economy, officially ceased.[36]

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[33] Decree No 116/CP of 5 September 1994 of the Vietnamese Government, see also: Nang Doan, 'Some commentaries on the practice and improvement direction of the economic arbitration (Một số ý kiến về thực trạng và phương hướng hoàn thiện pháp luật về trọng tài kinh tế)' (1998) Volume 1 Jurisprudence Journal 14, 21.

[34] Huu Huynh Tran, 'Forms of arbitration and the drafting of the Ordinance on Commercial Arbitration (Các hình thức tổ chức trọng tài với việc soạn thảo Pháp lệnh trọng tài)' (2001) Volume 2 State and Law Journal 59.

[35] Law on the Organisation of the Courts (amended 1993) of 28 December 1993 of the National Assembly.

[36] Research Institution for Legal Science of Ministry of Justice, 'Economic Dispute Resolution in our country and optional trends (Các phương thức giải quyết tranh chấp kinh tế ở nước ta và xu thế lựa chọn)' (Ministerial Study Project, Ministry of Justice 1998) 5.

C. Arbitration in modern time

1. Decree 116/CP

Although the model of the economic arbitration centres under Decree 116/CP served an important role in concluding the old system of economic arbitration, there was much inadequacy[37] that needed to be amended and upgraded. The uncertain points of arbitration under Decree 116/CP exposed many features that were not harmonised with the international arbitration standard, including:[38]

a) The lack of enforcement mechanism of arbitral awards

Decree 116/CP did not regulate any provisions on the recognition and enforcement of arbitral awards. On the contrary, Article 31 of this legal instrument stated that, in the event that a party fails to comply with the regulations set in the arbitral award, the other party could initiate a new civil litigation before a jurisdictional court under the rules of the commercial–case procedure. This was a strange perception, because it encouraged the losing party in the arbitration process to refuse to fulfil its obligations. Moreover, this article also disabled the validity of an arbitral award, because it allowed the parties to disrespect the arbitral award. In practice, a party initiated a new litigation by requesting the Provincial Court of Ninh Thuan to resolve a dispute that had previously been resolved by the Vietnam International Arbitration Centre.[39]

b) Unclarity of the provisions on the procedure

Pursuant to Article 31 of Decree 116/CP, the losing party in an arbitration did not need to request the setting aside of this award before a competent court. The losing party could simply

[37] Dinh Tho Tran, 'Factors affecting the genesis and development of commercial arbitration (Những yếu tố ảnh hưởng đến sự ra đời và phát triển của trọng tài thương mại)' (2005) Volume 6 Democracy and Law Journal 18.
[38] Huu Huynh Tran, 'Basic matters of drafting the Arbitration Ordinance (Các vấn đề cơ bản trong việc soạn thảo Pháp lệnh trọng tài)' (2000) Volume 2 State and Law Journal 43 – 45.
[39] Judgment No 01/DSST of 18 January 2002 of the Provincial Court of Ninh Thuan.

ignore the validity of the award. However, there was a case in which the prevailing party initiated a new civil procedure before a jurisdictional provincial court, but the court refused to handle the case because the arbitral tribunal had already resolved it. The first instance judgment was affirmed by the Appellate Court of the Supreme Court in Ho Chi Minh City[40] through the appellate procedure. Although this judgment was quite plausible, as it encouraged the arbitration mechanism and followed the basic principle of *non révision au fond*, it is obvious that this judgment contradicted the notion of Article 31 of Decree 116/CP, which allowed a party to commence a new civil case.

c) The autonomy of the parties to the dispute was not guaranteed

Theoretically, the parties to a dispute could choose the type of arbitration, including ad hoc or institutional arbitration, as well as the procedural rules that would govern the dispute once it arose. However, the practice of arbitration, under the effectiveness of Decree 116/CP, witnessed the circumstance whereby the arbitration centre would not accept the procedural rules of other centres. For instance, the Vietnam International Arbitration Centre refused to handle a case because the parties – a Vietnamese company and a Korean company – had chosen the Arbitration Rules of the International Chamber of Commerce (ICC).[41]

d) The incompetent judicial support of courts to arbitration

Normally, in the event of a pathological clause where the parties did not mention the correct name and the type of arbitration, the court will support the arbitration by applying the doctrine of *favorem valititatis* to interpret the validity of the arbitration agreement as much as possible. Regrettably, this notion was not applied at the time. For instance, in a sales contract between a Vietnamese Company and a Korean Company, the arbitration clause stipulated that the dispute would be resolved by an arbitral tribunal of the Vietnam International Arbitration Centre at the Vietnamese Chamber of Commerce and Industry in Ho Chi Minh City. This was

[40] Judgment No 158/PTDS of 11 July 2002 of the Apellate Court of the Supreme Court in Ho Chi Minh City.

[41] Judgment No 39/KTST of 10 September 1998 of the Provincial Court of Ho Chi Minh City.

determined as a pathological clause, because the name "Vietnam International Arbitration Centre at Vietnamese Chamber of Commerce and Industry in Ho Chi Minh City" was not correct. The correct name was "Vietnam International Arbitration Centre at Vietnamese Chamber of Commerce and Industry". When the dispute arose, the Vietnamese party initiated a civil procedure before the Provincial Court of Ho Chi Minh City. This court handled the case. Before the provincial court issued its final judgment, the Vietnam International Arbitration Centre sent a practice note to it and explained that the Vietnam International Arbitration Centre had jurisdiction over the underlying sales contract. Surprisingly, the court ignored the Vietnam International Arbitration Centre's practice note and decided the case.[42]

In order to overcome the shortcomings of Decree 116/CP, there have been various proposals for amendments of its provisions. The Resolution of the National Assembly decided that a legal instrument on arbitration would be issued in the Programme of Law and Ordinance Construction in 1998.[43] After five years, during which 10 drafts were prepared and conferences were held to collect the ideas of both academics and practitioners,[44] the Standing Committee of National Assembly enacted a legal document on 25 February 2003[45] named the Ordinance on Commercial Arbitration 2003 (Ordinance of 2003).[46]

[42] Judgment No 21/KTST of 2 February 2000 of the Provincial Court of Ho Chi Minh City.

[43] Huu Huynh Tran, 'Basic matters of drafting the Arbitration Ordinance (Các vấn đề cơ bản trong việc soạn thảo Pháp lệnh trọng tài)' (2000) Volume 2 State and Law Journal 42.

[44] Thai Phuc Nguyen, 'Some ideas on the Ordinance on Commercial Arbitration (Một số ý kiến về pháp lệnh trọng tài thương mại)' (2003) Volume 17 Legal Science Journal 3.

[45] Ordinance No 08/2003/PL–UBTVQH on Commercial Arbitration of the Standing Committee of the National Assembly.

[46] In the legal hierarchy of Vietnam, an ordinance is a legal document placed at the same level of law, but with a lower legal validity than an act of law. In the event of any contradictions between a law and an ordinance, the provisions of the law will prevail. An ordinance must be enacted by the Standing Committee of National Assembly, rather than National Assembly.

2. The Ordinance of 2003

The Ordinance of 2003, partly derived from the Model Law of 1986 of UNCITRAL,[47] provided some positive improvements concerning the course of arbitration. In comparison to Decree 116/CP, the Ordinance of 2003 had many fundamental improvements shown below.[48]

a) Improvements of the Ordinance of 2003

Decree 116/CP played the role of an under–law legal instrument (an administrative document) and was enacted by the Government, while the Ordinance of 2003 was issued by the Standing Committee of National Assembly and had the validity of a law.

The arbitrability (or the ability to be arbitrated) of a dispute was broad,[49] all disputes relating to the commercial activities could be resolved by arbitration.[50] This legal notion was compatible with the spirit of Model Law of 1986,[51] while accepting a vast definition of 'commercial activities'.[52] The Vietnamese courts pointed out that a high proportion of the cases related to sales contracts. Of the 25 collected cases, 16 cases related to sales contracts.[53]

[47] Model Law has been the popular name of Model Law on International Commercial Arbitration, enacted by United Nations Committee on International Trade Law (UNCITRAL) in 1985, which was then amended in 2006.

[48] Thong Anh Phan, 'Some ideas on the implement of the Ordinance on Commercial Arbitration (Một số ý kiến về việc triển khai pháp lệnh trọng tài thương mại)' (2003) Volume 9 Democracy and Law Journal 16–18.

[49] Vietnam Lawyer Association, Summary Report on the Implementation of the Ordinance on Commercial Arbitration (Hội Luật gia Việt Nam, Báo cáo tổng kết thi hành Pháp lệnh Trọng tài thương mại) (2009) Part A(I).

[50] Article 2(3) of the Ordinance of 2003 governed that commercial activities means the performance of one or many trading acts by business people or organisations, including goods purchase and sale, service provision; distribution; trade representation and agency; consignment; renting and lease; hire purchase; construction; consultancy; technology; licensing; investment; financing; banking; insurance; exploration and exploitation; transport of goods and passengers by air, sea, rail, land, and other commercial acts as prescribed by law.

[51] Under the Model Law 1985, the term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services, distribution agreement, commercial representation or agency, factoring, leasing, construction of works, consulting, engineering, licensing, investment, financing, banking; insurance, exploitation agreement or concession, joint venture and other forms of industrial or business cooperation, carriage of goods or passengers by air, sea, rail or road.

[52] Tuyen Hong Nguyen, 'On the new points of the Ordinance on Commercial Arbitration (Về những điểm mới của pháp lệnh trọng tài thương mại)' (2003) Volume 4 State and Law Journal 49.

[53] Decision No 03/KT–QĐTT of 15 October 2004 of the Provincial Court of Hanoi; Decision No 1198/2008/QĐST–KDTM of 11 August 2008 of the Provincial Court of Ho Chi Minh City; Judgment No 11/KTPT of 14 January 2005 of the Appellate Court of the Supreme Court in Hanoi; Decision No 02/2005/XQĐTT–ST of 11 May 2005 of the Provincial Court of Hanoi; Decision No 06/TTST of 23

Other cases contained disputes in relation to process contracts,[54] loan contracts,[55] leasing contracts,[56] financial leasing contracts,[57] credit contracts,[58] joint venture contracts,[59] commercial cooperation contracts[60] and sub–contractor contracts.[61] In addition to permanent arbitration, ad hoc arbitration was officially admitted as a determinant type of arbitration for the first time.[62] The Ordinance of 2003 did prefer the term '*arbitral tribunal set up by the involved parties*' to the term '*ad hoc arbitration*'. In a case heard before the Provincial Court of Quang Nam,[63] where a dispute arose out of the contract between two Vietnamese companies (A and P), Company A served a statement of claim on Company P. This statement of claim stated that Company P had to appoint an arbitrator for itself. After 30 days from the day when Company A sent its statement of claim, Company A had not received any responses from Company P, so Company A filed a petition requesting the Provincial Court of Quang Nam to appoint an arbitrator for Company P. The jurisdictional court accepted Company A's suggestion and appointed an arbitrator, who was named in the List of Arbitrators at the Vietnam International Arbitration Centre, for Company P. Although ad hoc arbitration had rarely been used in Vietnam, a provision of the Ordinance of 2003 significantly renovated arbitration law because ad hoc arbitration supplied another dispute resolution method to the

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September 2005 of the Provincial Court of Hanoi; Decision No 04/2006/QĐ of 6 January 2006 of the Appellate Court of the Supreme Court in Hanoi; Decision No 112/2006/TTPT of 2 June 2006 of the Appellate Court of the Supreme Court in Hanoi; Decision No 03/KTST of 15 September 2006 of the Provincial Court of Hanoi; Decision No 01/QĐST–TTTM of 12 March 2007 of the Provincial Court of Hanoi; Decision No 866/2009/KDTM–QĐST of 15 April 2009 of the Provincial Court of Ho Chi Minh City; Decision No 1880/2009/KDTM–QĐST of 28 July 2009 of the Provincial Court of Ho Chi Minh City; Decision No 113/2010/KDTM–PT of 9 June 2010 of the Appellate Court of the Supreme Court in Ho Chi Minh City; Decision No 51/2011/KDTM–QĐPT of 8 April 2011 of the Appellate Court of the Supreme Court in Ho Chi Minh City; Decision No 152/2008/QĐ–PT of 26 November 2008 of the Appellate Court of the Supreme Court in Ho Chi Minh City.

[54] Decision No 390/2006/DS–ST of 27 April 2006 of the Provincial Court of Ho Chi Minh City; Decision No 363/2006/DSPT of 7 September 2006 of the Appellate Court of the Supreme Court in Ho Chi Minh City.

[55] Decision No 421/2006/KDTM–ST of 24 August 2006 of the Provincial Court of Ho Chi Minh City.

[56] Decision No 116/2007/PT–KDTM of 23 and 29 May 2007 of the Provincial Court of Ha Hoi.

[57] Decision No 2611/2009/QĐST–KDTM of 10 September 2009 of the Provincial Court of Ho Chi Minh City.

[58] Decision 121/2008/KDTM–PT of 10 October 2008 of the Appellate Court of the Supreme Court in Ho Chi Minh City.

[59] Decision No 1475/2009/KDTM–QĐ of 18 June 2009 of the Provincial Court of Ho Chi Minh City.

[60] Decision No 10/2006/PT of 10 January 2006 of the Appellate Court of the Supreme Court in Hanoi.

[61] Decision No 1745/2007/QĐVDS of 20 September 2007 of the Provincial Court of Ho Chi Minh City.

[62] Vietnam Lawyer Association, Summary Report on the Implementation of the Ordinance on Commercial Arbitration (Hội Luật gia Việt Nam, Báo cáo tổng kết thi hành Pháp lệnh Trọng tài thương mại) (2009) Part A(I).

[63] Decision No 01/2010/QĐKDTM–ST of 6 April 2010 of the Provincial Court of Quang Nam.

parties. Therefore, the parties' autonomies were guaranteed. In another case, the parties agreed in their contract that any dispute arising out of the contract would be resolved by a jurisdictional economic arbitration. Due to the non–existence of economic arbitration under the Ordinance of 2003, the Provincial Court of Hanoi held that the arbitration agreement in this case was invalid.[64] However, pursuant to the spirit of arbitration encouragement (*pro–arbitration*), this pathological clause should be interpreted as the parties choosing ad hoc arbitration.

The qualifications of the arbitrator were diminished in comparison to the provisions of Decree 116/CP. In order to become an arbitrator, a Vietnamese person needed to fulfil all of the criteria, including having full capacity to perform civil acts; having good moral quality, being honest, impartial and objective; possessing university diplomas and having worked in the branches of their study majors for five years or more. Otherwise, those who are under administrative probation, examined for criminal liability or have been convicted but not yet enjoyed remission of criminal records are prohibited from acting as arbitrators. In addition, judges, procurators, investigators, executioners and public employees working at the courts, procuracies, investigating agencies and judgment–executing agencies are not allowed to act as arbitrators.[65] Although the Ordinance of 2003 did not mention whether foreign intellectuals and practitioners could practice as arbitrators in Vietnam, the Vietnamese arbitration centres still listed foreign members on their reference list, [66] because no provisions of the Ordinance prohibited the possibility of a foreign arbitrator to resolve the case. In a practical case resolved

[64] Decision No 116/2007/PT–KDTM of 23 and 29 May 2007 of the Provincial Court of Ha Hoi.

[65] Article 12 of the Ordinance of 2003.

[66] The appointment of arbitrators was one of the hardest obstacles, when the reference list of an arbitration centre only includes Vietnamese arbitrators, it could lead to the hesitation of a foreign party to an arbitral agreement due to doubts over the ability of Vietnamese arbitrators to resolve a dispute, see: Net Le, 'Dispute resolution in international trade and the requirements of the innovation of activities of the judicial organ – experience of the dispute resolution by arbitration (Giải quyết tranh chấp trong thương mại quốc tế và yêu cầu cải cách hoạt động của các cơ quan tài phán – thực tiễn giải quyết tranh chấp bằng trọng tài)', (2005) Volume 5 Legal Science Journal 25.

by the Appellate Court of the Supreme Court in Ho Chi Minh City,[67] a dispute arising out of the contract between a Russian company and a Vietnamese company was resolved by an arbitral tribunal with a foreign chairman of the Vietnam International Arbitration Centre.

Under the essence of Decree 116/CP, an award made by an arbitral tribunal was not final and enforceable. The parties to the dispute could bring their case to a court if at least one of them was dissatisfied with the reasons and conclusions expressed in the award. This viewpoint was completely contrary to the practice, as well as the doctrinal features of arbitration all around the world. This legal concept was fortunately amended in the Ordinance of 2003. Accordingly, the arbitral award was final[68] and could not be reviewed by any other judicial organs. [69] This was a steady landmark in enlarging the prestige and belief of business communities in arbitration.

If, 30 days after the day when an award was issued, no party had filed a petition for setting aside the award, and a certain party had not performed its obligations mentioned in the award, the other party could seek for the recognition and enforcement of the award before the relevant court. [70] This provision applied only to domestic awards. The recognition and enforcement of foreign awards was modified by the Civil Procedure Code of 2004.[71] The 30–day period was also applied for initiating a setting aside suggestion. If a party applied for the setting aside procedure on the 31st day, this petition would be dismissed by the jurisdictional court.[72]

[67] Decision No 113/2010/KDTM–PT of 9 June 2010 of the Appellate Court of the Supreme Court in Ho Chi Minh City.

[68] Vietnam Lawyer Association, Summary Report on the Implementation of the Ordinance on Commercial Arbitration (Hội Luật gia Việt Nam, Báo cáo tổng kết thi hành Pháp lệnh Trọng tài thương mại) (2009) Part A(I).

[69] Article 6 of the Ordinance of 2003.

[70] Article 51(1) of the Ordinance of 2003.

[71] Law No 24/2004/QH11 was enacted by the National Assembly on 15 June 2004, amended by Law No 65/2011/QH12 on 29 March 2011.

[72] Decision No 1198/2008/QĐST–KDTM of 11 August 2008 of the Provincial Court of Ho Chi Minh City.

b) Drawbacks of the Ordinance of 2003

The idea to upgrade the Ordinance of 2003 to a specific law on arbitration, enacted by the National Assembly, rather than its Standing Committee, formed a few years after the introduction of the Ordinance of 2003.[73] From 2008, there were several studies stating the need to amend the Ordinance of 2003 and to issue a new law concentrating on arbitration. Due to its contradictions and disadvantages, the Ordinance of 2003 disclosed many challenges for both business entities and arbitration. These contradictions included:[74]

Arbitrability under the Ordinance of 2003 led to diverging ways of understanding whether disputes between members of a same company arising out of the transferring and selling shares and other negotiable instruments could be submitted to arbitration.[75] Article 2(3) of the Ordinance of 2003, in contrast to Decree 116/CP, was silent on the matter. The judicial practice of Vietnamese jurisdictional courts meant that an award relating to this kind of dispute could be set aside afterwards, due to its lack of arbitrability.[76]

Another matter could be raised as to whether only a person or business organisation with business registration, e.g. a limited company and joint stock company, could take part in arbitral proceedings as a claimant, a defendant or in some other capacity. The possibility of governmental administrative organs or non–profit organisations attending arbitration proceedings was still opaque.[77] The Ordinance of 2003 only accepted written forms of

[73] Thi Hoai Phuong Nguyen, 'On the solutions to renovate the law governing the relationship of commercial arbitration procedure (Về các giải pháp hoàn thiện pháp luật điều chỉnh quan hệ tố tụng trọng tài thương mại)' (2006) Volume 3 State and Law Journal 34.

[74] Anh Duong Vu, 'Practice of applying the Ordinance on commercial arbitration at Vietnam International Arbitration Centre (Thực tiễn áp dụng Pháp lệnh trọng tài thương mại tại Trung tâm trọng tài quốc tế Việt Nam)' (2008) Volume 3 Legal Science Journal 5 – 14.

[75] Vietnam Lawyer Association, Summary Report on the Implementation of the Ordinance on Commercial Arbitration (Hội Luật gia Việt Nam, Báo cáo tổng kết thi hành Pháp lệnh Trọng tài thương mại) (2009) Part A(II)(1).

[76] Decision No 02/2008/QĐST–KDTM of 20 May 2008 of the Provincial Court of Hanoi.

[77] Vietnam Lawyer Association, Summary Report on the Implementation of the Ordinance on Commercial Arbitration (Hội Luật gia Việt Nam, Báo cáo tổng kết thi hành Pháp lệnh Trọng tài thương mại) (2009) Part A(II)(1).

arbitration agreements, [78] including agreements composed on paper as well as by electronic devices such as telex, fax, email and others. In the event that the parties did not have an arbitration agreement, the exchange of a statement of claim and a statement of defence were not sufficient in order to create a valid and appropriate arbitration agreement.[79]

Pursuant to Article 33 of the Ordinance of 2003, interim measures[80] could not be applied before the arbitral tribunal was established. This legal point was apparently irreconcilable with the international practice of arbitration and sometimes insignificant due to its lateness.[81] In any case, the power to grant an interim measure merely belonged to the authority of the court, not the arbitral tribunal. For instance, in an arbitration procedure of the Vietnam International Arbitration Centre, the Provincial Court of Hanoi granted an interim measure to freeze an amount of money in a party's bank account. The court pointed out that this amount of money was frozen in order to guarantee the enforcement of the arbitral award after it was rendered.[82] In another case, the arbitral tribunal sent a Practice Note to a third party to suggest that it should stop paying dividends to the respondent in arbitration. At the stage of setting aside afterwards, the Provincial Court of Hanoi held that the arbitral tribunal only had the power to study the case and collect evidence; on the other hand it did not have the power to advise a third party to stop paying dividends to the respondent. This Practice Note could be construed as an order of interim measure, and the tribunal was wrong in sending it to the third party.[83]

Article 50 of the Ordinance of 2003 depicted a so–called simple mechanism to set aside the arbitral award. Under Article 54 of the Ordinance of 2003, a provincial court of Vietnam

[78] Article 9 (1) of Ordinance of 2003.

[79] Decision No 02/2008/QĐST–KDTM of 20 May 2008 of the Provincial Court of Hanoi.

[80] Literally, Vietnamese law in all of its legal papers regarding arbitration used the term 'urgent and temporary measure' (biện pháp khẩn cấp tạm thời) instead of 'interim measure'.

[81] Vietnam Lawyer Association, Summary Report on the Implementation of the Ordinance on Commercial Arbitration (Hội Luật gia Việt Nam, Báo cáo tổng kết thi hành Pháp lệnh Trọng tài thương mại) (2009) Part A(II)(5).

[82] Decision 03/KT–QĐTT of 15 October 2004 of the Provincial Court of Hanoi.

[83] Decision No 02/2008/QĐST–KDTM of 20 May 2008 of the Provincial Court of Hanoi.

could render a decision to set aside an award in some specific cases. The judicial practice of the Vietnamese provincial courts is described via the following cases.

(i) No arbitral agreement or invalidity of the arbitral agreement

When a dispute arose out of a sales contract between two Vietnamese companies (VI and VA), VA sued VI before the Asian International Commercial Arbitration Centre, although the sales contract did not contain any provisions relating to the jurisdiction of this arbitration centre. After receiving the statement of claim, the arbitration centre sent a practice note to VI and requested that this company should submit its statement of defence and appoint its arbitrator. Afterwards, VI served a statement of defence to the arbitration centre. The Provincial Court of Hanoi determined that the arbitration did not exist and held that the arbitral tribunal of the Asian International Commercial Arbitration Centre did not have the jurisdiction to resolve the case between VI and VA.[84] This case was unpersuasive because in the case of the non–existence of a practical arbitration, the exchange of a statement of claim and a statement of defence is also construed as a valid arbitration agreement.

In a commercial contract between a British Virgin Islands' company and a Philippine company, the parties agreed that any disputes would be resolved through *arbitration at the Vietnamese Chamber of Commerce and Industry*. After a dispute arose, the Philippine company initiated an arbitration procedure governed by the Vietnam International Arbitration Centre. The arbitral tribunal of the Vietnam International Arbitration Centre then rendered a partial award confirming its competence to resolve the case. However, the Provincial Court of Hanoi set aside this partial award after determining that *"the term 'arbitration at the Vietnamese Chamber of Commerce and Industry' was the wrong name, and that this term could not be viewed as 'the Vietnam Arbitration Centre at the Vietnamese Chamber of Commerce and Industry."*[85]

[84] Decision No 02/2008/QĐST–KDTM of 20 May 2008 of the Provincial Court of Hanoi.
[85] Decision No 07/2009/QĐ–GQYC of 18 December 2009 of the Provincial Court of Hanoi.

In another case, a loan contract signed on 6 November 1998 between a British Virgin Islands' company and a Vietnamese company stipulated that the dispute arising out of this contract would be resolved by the Vietnam International Arbitration Centre in Hanoi. Nevertheless, on 20 October 2003 the two companies signed another contract amending the contract signed on 6 November 1998. This amended contract included a dispute resolution clause stating that, "*any dispute arising out of this contract will be resolved by a jurisdictional court*." When a dispute arose, the British Virgin Islands' company initiated civil litigation before the Provincial Court of Ho Chi Minh City. This court determined that it had jurisdiction over the dispute, because the parties under the implementing contract had abolished the jurisdiction of the Vietnam International Arbitration Centre.[86]

In some cases, arbitration agreements have been found to be invalid because one of the parties did not have the capacity to enter into the commercial contract. In a specific case heard before the Provincial Court of Hanoi, a representative of an Indonesian company was not appropriately authorised by the director of the company. The representative certainly did not have the capacity to sign the sales contract that included an arbitration agreement. The jurisdictional court held to set the award aside due to the representative's incapacity.[87] In the appeal stage, the Appellate Court of the Supreme Court in Hanoi affirmed the first instance decision to set aside the award because the court investigated that the Indonesian company did not exist in practice.[88] Similarly, the Provincial Court of Ho Chi Minh City also set aside an award rendered by an arbitral tribunal of the Vietnam International Arbitration Centre due to the reason that the representative of a party had not been legally authorised.[89]

[86] Decision No 421/2006/KDTM–ST of 24 August 2006 of the Provincial Court of Ho Chi Minh City.

[87] Decision No 02/2005/XQĐTT–ST of 11 May 2005 of the Provincial Court of Hanoi.

[88] Decision No 207/2005/QĐ–TANDTC of 13 October 2005 of the Appellate Court of the Supreme Court in Hanoi.

[89] Decision No 2611/2009/QĐST–KDTM 10 September 2009 of the Provincial Court of Ho Chi Minh City.

In many Vietnamese cases, the parties concluded a *pathological arbitration clause*. These pathological clauses could, in some cases, lead to domestic arbitral awards before the jurisdictional provincial courts of Vietnam being set aside. In a case heard before the Provincial Court of Hanoi, two Vietnamese parties concluded in their leasing contract a provision whereby any dispute arising out of this contract will be resolved by a "*competent economic arbitration*". When a party initiated civil litigation to sue the other party before the Provincial Court of Hanoi, the court adjudicated that the arbitration clause was invalid and inoperative, so the jurisdiction for the dispute would belong to the court.[90] On the other hand, in a similar case heard by the Provincial Court of Ho Chi Minh City, two Vietnamese companies had agreed: "any dispute arising out of the sub–contractor contract will be resolved by *economic arbitration in Ho Chi Minh City*". Instead of holding that the pathological clause was invalid, the court interpreted the term "*economic arbitration in Ho Chi Minh City"* as "*Ho Chi Minh City Commercial Arbitration Centre*". The court also determined that the Ho Chi Minh City Commercial Arbitration Centre had handled the case precisely, and the fact that an arbitral tribunal of this arbitration centre had rendered an award was appropriate. In particular, the petitioner for setting aside, who had also been the defendant in the arbitration procedure, had summited a statement of defence and suggested that the arbitration centre appoint an arbitrator for it. So, the court refused to set aside the arbitral award.[91] The decision of the Provincial Court of Ho Chi Minh City was so persuasive because it applied the theory of *favorem validitatis* to interpret the arbitration agreement, and invoked the principle of *venire contra factum proprium* to refuse the setting aside suggestion of the petitioner.

In some other cases relating to a pathological clause, the Provincial Court of Ho Chi Minh City had divergent adjudicating viewpoints when handling petitions for setting aside an arbitration award. In a certain case in 2004, the Vietnamese party requested this court to set aside an arbitral award rendered by an arbitral tribunal of the Vietnam International

[90] Decision No 116/2007/PT–KDTM of 23 and 29 May 2007 of the Provincial Court in Hanoi.

[91] Decision No 1745/2007/QĐ–VDS 20 September 2007 of the Provincial Court of Ho Chi Minh City.

Arbitration Centre. In the sales contract between this Vietnamese party and a Korean Company, the parties agreed to submit their disputes to the *Vietnam International Arbitration Centre in Ho Chi Minh City*. The court determined that the term "*Vietnam International Arbitration Centre in Ho Chi Minh City*" could not be construed as the real name "*Vietnam International Arbitration Centre at Vietnamese Chamber of Commerce and Industry*" because the two names were not identical, and as the Vietnam International Arbitration Centre was based in Hanoi rather than in Ho Chi Minh City. Therefore, the court decided to set aside the arbitral award.[92] This decision was hardly persuasive due to its adjudicating reason. Firstly, there has been no arbitration centre in Vietnam named the Vietnam International Arbitration Centre apart from the Vietnam International Arbitration Centre at the Vietnamese Chamber of Commerce and Industry. Therefore, the intention of the parties to choose this centre was obvious and thus indisputable. Secondly, the term "*in Ho Chi Minh City*" should be interpreted as the place of arbitration, rather than being merged with the name of the arbitration centre. Five years later, the Provincial Court of Ho Chi Minh City faced another petition to set aside an arbitral award rendered by the Vietnam International Arbitration Centre. As opposed to the decision ruled in 2004 above, the court in this case applied the principle of pro–arbitration and *favorem validitatis* while adjudicating that the term "Vietnam International Arbitration Centre – Vietnamese Chamber of Commerce and Industry in Ho Chi Minh City" could be understood as the exact name "Vietnam International Arbitration Centre at the Vietnamese Chamber of Commerce and Industry" and that the place of arbitration was Ho Chi Minh City. Accordingly, the arbitral tribunal had the jurisdiction to hear the case and the petition to set aside was dismissed.[93] In another case handled by the Appellate Court of the Supreme Court in Ho Chi Minh City, the court also followed the notion set in the decision of the Provincial Court of Ho Chi Minh City in 2009, holding that the term "Vietnam International Arbitration Centre of the Vietnamese Chamber of Commerce and Industry" must be interpreted as the term "Vietnam International Arbitration Centre at the Vietnamese

[92] Judgement No 01/QĐKT of 14 July 2004 of the Provincial Court of Ho Chi Minh City.

[93] Decision No 2611/2009/QĐST–KDTM of 10 September 2009 of the Provincial Court of Ho Chi Minh City.

Chamber of Commerce and Industry". Thereupon, the arbitral tribunal of this centre had the competence to resolve the case, and the award could not be set aside.[94]

(ii) Flaws of an arbitral tribunal's composition or flaws of the arbitral procedure

When the composition of the arbitral tribunal or the arbitral procedure had significant flaws that would affect the outcome of the dispute, after being rendered the award could be set aside before a jurisdictional court of Vietnam. In a sales contract between a Singaporean company and a Vietnamese company, these parties agreed that an arbitral tribunal of the Vietnam International Arbitration Centre at the Vietnamese Chamber of Commerce and Industry would resolve any disputes arising out of the contract. The language of the arbitral procedure would be English. The arbitral tribunal decided to open the hearing session on 6 May 2005 and served notice to the parties. Prior to the hearing session, the lawyer who was the authorised representative of the Singaporean company advised the arbitral tribunal to postpone the hearing session because he had to attend a litigation hearing before a jurisdictional Vietnamese court that same day. The tribunal refused his suggestion. Then, the lawyer sent a note to the Singaporean company stating that he would cease to represent the company. Due to the short notice, the Singaporean company could not authorise another person to attend the arbitration hearing, so it served a practice note to the arbitral tribunal suggesting that it postpone the hearing session. Unfortunately, the arbitral tribunal did not accept the Singaporean company's suggestion, and the hearing session took place without the Singaporean company present. In the first instance stage of setting aside the arbitral award before the Provincial Court of Hanoi, the court did not accept the petition filed by the Singaporean company to set aside the award.[95] However, in the appeal stage before the Appellate Court of the Supreme Court in Hanoi, this court rendered the decision to amend the first instance decision and held to set aside the arbitral award. This court determined that,

[94] Decision No 182/2010/QĐPT–KDTMPT of 8 October 2010 of the Appellate Court of the Supreme Court in Ho Chi Minh City.

[95] Decision No 03/KDTM–ST of 29 July 2005 of the Provincial Court in Hanoi.

while the arbitral tribunal had refused the suggestion to postpone the hearing session, the right of the Singaporean party to be heard had been violated.[96]

In another case between a Vietnamese company and a Singaporean company, heard by the Provincial Court of Ho Chi Minh City, the Vietnamese company suggested that the jurisdictional court set aside an arbitral award rendered by an arbitral tribunal of the Vietnam International Arbitration Centre due to a flaw in the arbitration procedure. This Vietnamese company argued that its director could not speak English, so the arbitration centre appointed an interpreter in order to help the director. The Vietnamese company argued that the interpreter did not have the capacity to translate. Due to his disqualifications, the interpreter could not translate the arguments of the Vietnamese company exactly, therefore the legitimate rights and interests of the Vietnamese company were violated. The court held that in the arbitration agreement the parties had agreed to use English in the arbitration procedure. Thus, under the principle of *venire contra factum proprium*, the Vietnamese company could not raise any reasons relating to the language of the arbitration procedure. Additionally, the matter that the interpreter was not qualified to interpret the statement of the Vietnamese company's director would not constitute as grounds for setting aside the award. Therefore, the court held to refuse the petition to set aside the arbitral award.[97] In addition, the Appellate Court of the Supreme Court in Hanoi refused to set aside an arbitral award although the arbitral tribunal used the term "arbitral committee" rather than the more precise term "arbitral tribunal". The court adjudicated that the usage of the term arbitral committee by the arbitral tribunal did not lead to any procedural flaws in the arbitral procedure.[98]

[96] Decision No 04/2006/QĐ of 6 January 2006 of the Appellate Court of the Supreme Court in Hanoi.

[97] Decision No 27/2006/QĐKDTM–ST of 24 January 2006 of the Provincial Court of Ho Chi Minh City.

[98] Decision No 10/2006/PT of 10 January 2006 of the Appellate Court of the Supreme Court in Hanoi.

(iii) Excess of competence or *ultra petita*

The competence of an arbitral tribunal is firstly determined by the consent of the disputing parties in a commercial contract. Therefore, in the event that the arbitral tribunal exceeds its jurisdiction set by the parties in advance, the award can be set aside due to the reason of excess or *ultra petita*. The grounds for a refusal relating to excess (or *ultra petita*) has an intimate relationship with the grounds relating to the validity of the arbitration agreement. Hence, these two grounds are often cited together when setting aside an arbitral award. Notably, only the exceeding part would be set aside, meanwhile the other parts that fall within the jurisdiction of the arbitral tribunal are still considered final and binding.

In a case between a Vietnamese company and a foreign company, the process contract concluded by the parties governed that any disputes relating to the contract would be resolved by the Vietnam International Arbitration Centre. Due to the financial struggles of the Vietnamese company, the foreign company lent the Vietnamese company a total of USD 263,000. Because the Vietnamese company failed to return the amount of the loaned money back to the foreign company, the foreign company initiated civil litigation before the Provincial Court of Ho Chi Minh City. The court adjudicated that it had jurisdiction over the loan transactions, but that the dispute relating to the process contract fell under the jurisdiction of an arbitral tribunal of the Vietnam International Arbitration Centre.[99] Although the decision of this court was compatible with the wording in the Ordinance of 2003, it could be more in favour of arbitration if the court determined that the arbitration would also have the jurisdiction to hear the dispute relating to the loan transactions. Another supposition can be raised, whereby if the arbitral tribunal had resolved both disputes arising out of the process contract and the loan transactions, the part of the award relating to the loan transactions could be set aside. This event was not depicted in the decision of the Provincial Court of Ho Chi Minh City, but if it had taken place, the award would be set aside following the adjudicated tendency of the court.

[99] Decision No 390/2006/DS–ST of 27 April 2006 of the Provincial Court of Ho Chi Minh City.

(iv) Committing obligation of the arbitrator

In turn, Article 13 (2)(a) of the Ordinance of 2003 depicted that the arbitrator had an obligation to comply with the provisions of the Ordinance. Therefore, it could be inferred that all the provisions of the Ordinance of 2003 could be applied as grounds to annul the arbitral awards; even if the arbitrator breached only one provision of the Ordinance of 2003, the arbitral award could be set aside. [100] This was indeed strange and different from the practice of international arbitration. For instance, in the practice of Vietnamese courts, some jurisdictional courts set aside arbitral awards on unpersuasive grounds. In a case heard before the Provincial Court of Hanoi, the arbitral tribunal sent a Practice Note requiring a third party, rather than the disputing parties before the arbitration procedure, to stop paying a portion of the dividends to the respondent in arbitration. The court adjudicated that this action by the arbitral tribunal led to a violation of the confidentiality of the arbitration procedure, and that this violation caused the breach of the obligations of the arbitrators and the arbitral tribunal. [101] Although the determination of the court, which pointed out that the arbitral tribunal did not have the power to grant interim measures, was compatible with the provisions of the Ordinance of 2003, the determination that it formed grounds for setting aside the award was inappropriate.

In some cases, the court determined that the arbitrators had breached their obligations under the scope of the Ordinance of 2003. The flaw of breaching an obligation of the arbitrator is actually a specific case of a defect in arbitral tribunal's composition, or a defect of arbitral procedure. In the first instance stage, the Provincial Court of Ho Chi Minh City did not set aside a certain award. In particular, the arbitral tribunal had not given any reason to support the decision while rendering the arbitral tribunal.[102] In the appeal stage, the Appellate Court of the Supreme Court in Ho Chi Minh City set aside the award, while determining that the

[100] See: Van Dai Do and Hoang Hai Tran, *Vietnamese Law on Commercial Arbitration (Pháp luật Việt Nam về trọng tài thương mại)* (National Political Publisher – The Truth 2011) 48.
[101] Decision No 02/2008/QĐST–KDTM of 20 May 2008 of the Provincial Court of Hanoi.
[102] Decision No 1579/2010/KDTM–QĐST of 28 September 2010 of the Provincial Court of Ho Chi Minh City.

situation whereby the arbitral tribunal had not mentioned any reason for its decision led to the breach of the obligations of the arbitrators.[103] In another interesting case between a Vietnamese company and a Thai company, the Vietnamese petitioner applying to set aside the award claimed that the representative of the Thai company had given the arbitral tribunal's secretary an envelope containing a certain amount of money after the tribunal had rendered the award in the hearing session. The Vietnamese company argued that the actions of the Thai company proved that the Thai company had already known the final result of the dispute. Moreover, while the tribunal's secretary received this envelope, the tribunal obviously breached their obligations. In response, the director of the Thai company argued that the envelope contained the payment for the arbitration fees. The court adjudicated that the reason for setting aside the award was unacceptable, because the Vietnamese company did not release any evidence relating to the arbitrators' obligations.[104]

(v) Arbitral award contrary to Vietnam's public interests

The Ordinance of 2003 did not govern provisions on the concept and limitations of the term "*Vietnam's public interests*". In the cases collected under the validity of the Ordinance of 2003, there were no cases in which the jurisdictional courts set aside the arbitral award by applying the concept of the violation of Vietnam's public interests. In cases heard by the Provincial Court of Hanoi in 2007[105] and by the Provincial Court of Ho Chi Minh City, also in 2007,[106] two courts appropriately refused the petition to set aside arbitral awards because the petitioner only raised the ground of a violation of Vietnam's public interests, but could not further point out how the award was contrary to Vietnam's public interests.

[103] Decision No 51/2011/KDTM–QĐPT of 8 April 2011 of the Appellate Court of the Supreme Court in Ho Chi Minh City.

[104] Decision No 1880/2009/KDTM–QĐST of 28 July 2009 of the Provincial Court of Ho Chi Minh City.

[105] Decision No 01/QĐST–TTTM of 12 March 2007 of the Provincial Court of Hanoi.

[106] Decision No 1745/2007/QĐ–VDS of 20 September 2007 of the Provincial Court of Ho Chi Minh City.

The Ordinance was expected to open a new era of arbitration in Vietnam, but in reality its role was quite modest.[107] In addition to external elements, including the perceptions and beliefs of the business communities, the traditional custom of choosing a judicial court, the organisation and activities of the arbitration centre, the qualifications and professional skills of arbitrators and the willing supports of courts and civil execution organs,[108] the Ordinance of 2003 itself contained several drawbacks and therefore had to be amended. Along with the need to amend the Ordinance of 2003, based on the international experience and practices, the first draft of a law on arbitration was introduced on 29 June 2008. After 10 versions, with many commentaries and suggestions, the National Assembly eventually enacted a specific law on arbitration, named the Law on Commercial Arbitration 2010 (hereinafter the Arbitration Law of 2010).[109]

3. The Arbitration Law of 2010

The Arbitration Law of 2010 has been the result of learning the practice and theories of several countries in the common law system, such as the United States, the United Kingdom and Singapore, as well as other Asian countries like Japan, China and Thailand. [110] The Arbitration Law of 2010 approached the standard legal concepts described in the Model Law more than the Ordinance of 2003, and it could make Vietnam as a more attractive place for arbitration, in the courses of both domestic and international regions, due to its several advanced provisions.[111]

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[107] Dinh Tho Nguyen, 'Several features on improving the law on commercial arbitration in order to meet the requirement of integrating into international economy (Một số vấn đề về hoàn thiện pháp luật trọng tài thương mại đáp ứng yêu cầu hội nhập kinh tế quốc tế)' (2008) Volume 6 State and Law Journal 49.

[108] Thong Anh Phan, 'Why Vietnamese enterprises are not in favour of arbitration to resolve commercial dispute (Tại sao doanh nghiệp Việt Nam không mặn mà với việc giải quyết tranh chấp hợp đồng thương mại bằng trọng tài)' (2009) Volume 7 Democracy and Law Journal 25 – 31.

[109] Law No 54/2010/QH12 on Commercial Arbitration was issued by National Assembly on 17 June 2010.

[110] Tri Uc Dao, 'Fundamental matters of Law on commercial arbitration (Những vấn đề cơ bản của Luật trọng tài thương mại)' (2009) Volume 1 State and Law Journal 7.

[111] Tri Uc Dao, 'Fundamental matters of Law on commercial arbitration (Những vấn đề cơ bản của Luật trọng tài thương mại)' (2009) Volume 1 State and Law Journal 7.

a) Advancements of the Arbitration Law of 2010

(i) The name "Arbitration Law of 2010" attracted considerations from academics and practitioners, with two main perspectives in particular. The first followed the idea that the tradition of arbitration in Vietnam[112] only related to commercial disputes. This viewpoint harmonised with one of three reservations of Vietnam while joining the New York Convention.[113] The second perspective stated that the arbitrability of a dispute should cover other civil transactions such as torts and non–contractual relationships and so on.[114] Finally, the Arbitration Law of 2010 preserved the spirit of the Ordinance of 2003 and allowed only commercial disputes to be resolved by arbitration. Therefore, the name of the new law is the "Law on Commercial Arbitration", rather than the "Law on Arbitration".

(ii) Unlike the Ordinance of 2003, Article 2 of the Arbitration Law of 2010 does not describe the scope and definition of 'commercial activities'. However, it briefly sets out that arbitration can resolve disputes between parties arising from commercial activities, disputes arising between parties at least one of whom is engaged in commercial activities, as well as other disputes between parties that the law stipulates will be resolved by arbitration. The judicial practice of Vietnamese jurisdictional courts pointed out that contracts concluded by the parties include several types of

[112] From the start of the mechanism of state economic arbitration to the modern concepts of Vietnamese law, all disputes re solved by arbitration must be incompatible with commerce. See, e.g. Trung Tin Nguyen, 'Some ideas on the draft of Law on Arbitration (Mấy ý kiến về dự thảo luật trọng tài)' (2008) Volume 2 State and Law Journal 30 – 33.

[113] The Convention on Recognition and Enforcement of Foreign Arbitral Awards was adopted by United Nations on 10 June 1958 and entered into force on 7 June 1959.

[114] Some intellectuals argued that other jurisdictions in the Asian region also used term of 'law on arbitration' in their texts, such as Japan (Arbitration Act 2003), South Korean (Arbitration Act 1999, amended 2016), and Thailand (Arbitration Act 2002) and the scope of those law has been so flexible; see: Van Hau Duong, 'Commentary on the scope of the law on arbitration (Bàn về phạm vị điều chỉnh của luật trọng tài)' (2009) Volume 5 Democracy and Law 34 – 36; Anh Son Duong, 'Grounds for extending the competence of arbitration (Những luận cứ để mở rộng thẩm quyền của trọng tài)' (2009) Volume 11 State and Law 36 – 41.

commerce, such as sales,[115] insurance,[116] leasing,[117] logistics,[118] joint venture,[119] construction,[120] loan.[121] Even if a dispute arises out of a labour contract[122] or between shareholders of a company,[123] it could also be resolved by arbitration.

(iii) The form of arbitration agreements has not been limited to paper and documents collected by electronic devices.[124] The exchange of information via paper and electronic form mentioning the validity of an arbitral agreement could also be accepted. Moreover, exchanging statements of claim and defence, where they transparently expresses the existence of an agreement, could be considered as having been in written form too. In most cases, the arbitral agreements existed as a clause in commercial contracts signed by the parties.[125] In a specific case, the Provincial Court

[115] Decision No 01/2016/QĐ–GQKN of 25 January 2016 of the District Court of Pleiku, Gia Lai Province; Judgment No 419/2014/KDTM–PT of 26 March 2014 of the Provincial Court of Ho Chi Minh City; 03/2; Judgment No 54/2013/KDTM–ST of 15 October 2013 of the District Court of Tan Binh, Ho Chi Minh City; Judgment No 1663/2013/KDTM–PT of 23 December 2013 of the Provincial Court of Ho Chi Minh City; Decision 526/2013/KDTM–QĐ of 15 May 2013 of the Provincial Court of Ho Chi Minh City.

[116] Decision No 979/2016/QĐ–PQTT of 21 September 2016 of the Provincial Court of Ho Chi Minh City.

[117] Decision No 1222/2014/QĐ–PQTT of 14 October 2014 of the Provincial Court of Ho Chi Minh City; Decision No 1655/2012/QĐST–KDTM of 15 November 2012 of the Provincial Court of Ho Chi Minh City.

[118] Decision No 01/2016/QĐ–PQTT of 15 March 2016 of the Provincial Court of Hanoi; Decision No 09/2016/QĐ–PQTT of 14 December 2016 of the Provincial Court of Hanoi.

[119] Decision No 817/2016/QĐ–PQTT of 25 August 2016 of the Provincial Court of Ho Chi Minh City.

[120] Decision No 105/2014/KDTM–ST of 19 September 2014 of District Court of Phu Nhuan, Ho Chi Minh City; Decision No 810/2017/QĐ–PQTT of 29 June 2017 of the Provincial Court of Ho Chi Minh City.

[121] Decision No 03/2016/QĐ–GQKN of 10 May 2016 of the Provincial Court of Hanoi.

[122] Judgment No 20/2012/HC–PT of 6 June 2012 of the Appellate Court of the Supreme Court in Ho Chi Minh City.

[123] Decision No 01/2013/QĐ.HPQTT of 26 March 2013 of the Provincial Court of Can Tho.

[124] Article 16(2) of the Arbitration Law of 2010.

[125] Decision No 01/2016/QĐ–GQKN of 25 January 2016 of the District Court of Pleiku, Gia Lai Province; Decision No 979/2016/QĐ–PQTT of 21 September 2016 of the Provincial Court of Ho Chi Minh City; Decision No 1222/2014/QĐ–PQTT of 14 October 2014 of the Provincial Court of Ho Chi Minh City; Judgment No 20/2012/HC–PT of 6 June 2012 of the Appellate Court of the Supreme Court in Ho Chi Minh City; Judgment No 419/2014/KDTM–PT of 26 March 2014 of the Provincial Court of Ho Chi Minh City; Decision No 817/2016/QĐ–PQTT of 25 August 2016 of the Provincial Court of Ho Chi Minh City; Judgment No 54/2013/KDTM–ST of 15 October 2013 of the District Court of Tan Binh, Ho Chi Minh City; Judgment No 1663/2013/KDTM–PT of 23 December 2013 of the Provincial Court of Ho Chi Minh City; Decision No 105/2014/KDTM–ST of 19 September 2014 of District Court of Phu Nhuan, Ho Chi Minh City; Decision No 03/2016/QĐ–GQKN of 10 May 2016 of the Provincial Court of Hanoi; Decision No 810/2017/QĐ–PQTT of 29

of Ho Chi Minh City held that the arbitration agreements had to be in a written form, while the commercial contracts could be established in a oral and written form, or even implied through the performances of the parties.[126] The notion of this court's decision was unpersuasive and even contrary to the wording of the Arbitration Law of 2010.

In a logistics contract, the parties agreed that the Economic Court of Ho Chi Minh City, which has been a chamber of the Provincial Court of Ho Chi Minh City, would resolve any disputes. Nonetheless, in a statement agreed by the parties later, those parties agreed to choose the Vietnam International Arbitration Centre in Hanoi to resolve any disputes. Once a dispute arose, one of the parties initiated an arbitration procedure before this arbitration centre and the centre handled the case. At the stage of setting aside the arbitral award, the Provincial Court of Ha Noi applied the theory of *favorem validitatis* and adjudicated that the arbitral tribunal of the Vietnam International Arbitration Centre had the jurisdiction to resolve the disputed merit.[127]

In another logistics contract, two companies (C and G) agreed to choose the Vietnam International Arbitration Centre to resolve any disputes between them. Company G concluded an insurance contract with an insurance company. After a dispute arose out of the logistics contract, the insurance company paid a certain amount of insurance to company C, and then sued company G before the Vietnam International Arbitration Centre. At the stage of setting aside the arbitral award, the Provincial Court of Hanoi determined that, due to the essence of the insurance contract, the insurance company would take the position of company C in the arbitration clause. Therefore, it had been precise and appropriate that the arbitral tribunal of

June 2017 of the Provincial Court of Ho Chi Minh City; Decision 526/2013/KDTM–QĐ of 15 May 2013 of the Provincial Court of Ho Chi Minh City.

[126] Decision No 1598/2012/KDTM–QĐ of 31 October 2012 of the Provincial Court of Ho Chi Minh City

[127] Decision No 09/2016/QĐ–PQTT of 14 December 2016 of the Provincial Court of Hanoi.

the Vietnam International Arbitration Centre had heard the case between company G and the insurance company.[128]

In a case heard before the Provincial Court of Can Tho, the arbitration agreement was established in a company charter or a shareholder agreement rather than a commercial contract. For example, sections 8 and 26 of the company charter stipulated that any disputes arising out of the company's activities would be resolved by a jurisdictional organ of the competent court. Afterwards, in the shareholders' agreement made by the shareholders of this company, those shareholders consented that the International Arbitration Centre Vietnamese Chamber of Commerce and Industry would resolve any disputes arising out of the agreement. The Provincial Court of Can Tho, in the course of setting aside the arbitral award, held that the term "International Arbitration Centre Vietnamese Chamber of Commerce and Industry" in this pathological clause could be interpreted as the "Vietnam International Arbitration Centre at Vietnamese Chamber of Commerce and Industry". So the arbitral tribunal of the Can Tho Commercial Arbitration Centre did not have the jurisdiction to resolve this dispute.[129]

(i) The Arbitration Law of 2010 was the first legal instrument to govern the protection of the legitimate rights of consumers in Vietnam. The right to object to arbitral proceedings in standard contracts could apply to consumers. If the company initialises an arbitral procedure and a certain consumer does not wish to attend this procedure, the consumer still has the right to choose the relevant court to resolve the dispute.[130] In a typical case heard before the District Court of Binh Tan, Ho Chi Minh City, the sales contract between a consumer and a real estate company provided that any disputes would be resolved via negotiation, mediation or arbitration at the Ho Chi Minh City Commercial Arbitration Centre. The consumer

[128] Decision No 01/2016/QĐ–PQTT of 15 March 2016 of the Provincial Court of Hanoi.

[129] Decision No 01/2013/QĐ.HPQTT of 26 March 2013 of the Provincial Court of Can Tho.

[130] Article 17 of the Arbitration Law of 2010.

argued that she was not provided with any information about the arbitration agreement. Therefore, she believed that the arbitration would not have jurisdiction over her dispute. Given that the company had its registered office in the Binh Tan District Ho Chi Minh City, she was able to sue the company before the District Court of Binh Tan, Ho Chi Minh City. The court referred to Article 17 of the Arbitration Law of 2010 and adjudicated that, irrespective of the existence of an arbitration agreement, the consumer had the absolute right to attend the arbitration procedure, as a claimant or a defendant. If the consumer had decided to bring her case before a jurisdictional court, her legal action would be absolutely appropriate.[131]

(ii) The provision on the nationality of the arbitrators is described clearly. Not only Vietnamese individuals, but also foreign scholars and practitioners have the right to become arbitrators in Vietnam, provided they can satisfy the basic qualifications listed in the Arbitration Law of 2010.[132]

(iii) Article 20 of the Arbitration Law of 2010 set out the qualifications that arbitrators must acquire, including having full civil law capacity as prescribed in the Civil Code, having a university qualification and at least five years of work experience in the discipline that they studied. In special cases, an expert with highly specialised qualifications and considerable practical experience may still be selected to act as an arbitrator, providing he is able to fulfil the requirements prescribed in Article 20 of the Arbitration Law of 2010. A person that fulfils all of the qualifications prescribed will not be permitted to act as an arbitrator if he or she falls into one of the following categories: a person currently serving as a judge, a procurator, an investigator or an enforcement officer, a person working as an official of a court, a procuracy, an investigative agency or a judgment enforcement agency, a person under a criminal

[131] Decision No 608/2014/DS–ST of 16 September 2014 of District Court of Binh Tan, Ho Chi Minh City.
[132] Article 20 of the Arbitration Law of 2010.

charge or prosecution, a person serving a criminal sentence or a person who has served a sentence but whose criminal record has not been cleared yet.

(iv) The Arbitration Law of 2010 dedicates a full chapter to interim measures.[133] The authority to issue an interim measure is not only given to a respective court, but also to an arbitration tribunal. These measures are depicted similarly to what was in the Civil Procedure Code of 2004. As opposed to the Ordinance of 2003, interim measures could be applied before the establishment of an arbitral tribunal. This provision is an essential feature because it can help a party to exercise its right in the event that the other party intends to dispose of its properties.

(v) Additionally, the Arbitration Law of 2010 sets out that the courts[134] play vital roles as 'efficient supportive mechanisms' in the arbitral proceedings. The jurisdiction of the courts for arbitral proceedings has been vast, including appointing and replacing arbitrators for the parties in the case of ad hoc arbitration,[135] reviewing the validity of arbitral agreements as well as the jurisdiction of arbitral tribunals, [136] summoning witnesses and experts, collecting evidence, granting interim measures, [137] setting aside arbitral awards (within exclusive grounds, such as there was no arbitration

[133] Chapter VII with six articles.

[134] Article 7(3) of the Arbitration Law of 2010 reads that the courts with competence over arbitration activities are be courts of provinces and cities under central authority.

[135] Decision No 1112/2015/QĐ–CĐTTV of 30 September 2015 of the Provincial Court of Ho Chi Minh City.

[136] Decision No 1655/2012/QĐST–KDTM of 15 November 2012 of the Provincial Court of Ho Chi Minh City; Decision No 03/2016/QĐ–GQKN of 10 May 2016 of the Provincial Court in Hanoi; Decision No 526/2013/KDTM–QĐ of 15 May 2013 of the Provincial Court of Ho Chi Minh City; Decision No 1065/2013/QĐKDTM–ST of 6 September 2013 of the Provincial Court of Ho Chi Minh City; Decision No 1222/2014/QĐ–PQTT of 14 October 2014 of the Provincial Court of Ho Chi Minh City; Decision 03/2014/QĐ–TTTM of 18 February 2014 of the Provincial Court of Hanoi.

[137] Decision No 03/2013/QĐ–BPKCTT of 22 February 2013 of the Provincial Court of Hanoi; Decision No 21/2012/QĐ–BPKCTT of 17 February 2012 of the Provincial Court of Ho Chi Minh City; Decision No 1254/2013/QĐ–BPKCTT of 17 October 2013 of the Provincial Court of Ho Chi Minh City; Decision No 228/2014/QĐ–HBBPKCTT.

agreement,[138] an invalid arbitration agreement, [139] *ultra petita*,[140] violations of the arbitral procedure,[141] a contradiction between the arbitral award and the fundamental principles of Vietnamese law)[142] as well as recognising and enforcing ad hoc arbitral awards.

b) Challenges of the Arbitration Law of 2010

Pursuant to statistics from the Vietnam International Arbitration Centre, in the period between 2003 and 2014, 46 out of 679 arbitral awards rendered by the arbitral tribunals of this arbitration centre were suggested to be set aside before the provincial courts of Vietnam. The provincial courts decided to set aside 19 arbitral awards and refused to set aside 25 awards. Of the 19 arbitral awards set aside, the Provincial Court of Hanoi conducted 14 cases while the Provincial Courts of Ho Chi Minh City heard five cases.[143] From a more detailed perspective, nine out of 26 arbitral awards (34.62%) were set aside under the validity of the Ordinance of 2003 (from 2003 to 2011). Additionally, in the period between 2011 and 2014, the Vietnamese provincial courts set aside ten out of 20 arbitral awards (50%). According to the statistics of the Provincial Court of Ho Chi Minh City, two out of 24 petitions for setting aside arbitral awards were accepted in the period of 2003 – 2010. From 2011 to January 2014, this court handled 24 petitions for setting aside arbitral awards and rendered to set aside five

[138] Decision No 1409/2014/QĐ–PQTT of 1 December 2014 of the Provincial Court of Ho Chi Minh City; Decision No 923/2017/QĐ–PQTT of 21 July 2017 of the Provincial Court of Ho Chi Minh City.

[139] Decision No 759/2014/QĐKDTM–ST of 1 July 2014 of the Provincial Court of Ho Chi Minh City.

[140] Decision No 1536/2012/QĐKDTM–ST of 12 October 2012 of the Provincial Court of Ho Chi Minh City; Decision No 795/2017/QĐ–PQTT of 27 June 2017 of the Provincial Court of Ho Chi Minh City;

[141] Decision No 1536/2012/QĐKDTM–ST of 12 October 2012 of the Provincial Court of Ho Chi Minh City; Decision No 1598/2012/KDTM–QĐ of 31 October 2012 of the Provincial Court of Ho Chi Minh City; Decision No 580/2014/KDTM–QĐST of 21 May 2014 of the Provincial Court of Ho Chi Minh City; Decision No 09/2014/QĐ–PQTT of 3 October 2014 of the Provincial Court of Hanoi.

[142] Decision No 590/2015/QĐ–PQTT of 30 September 2015 of the Provincial Court of Ho Chi Minh City; Decision No 06/2013/QĐ–TTTM of 28 March 2013 of the Provincial Court of Hanoi.

[143] Anh Duong Vu, Current situation of setting aside arbitral awards at the Vietnam International Arbitration Centre (Thực trạng hủy phán quyết trọng tài tại VIAC) in Supreme Court – Vietnam International Arbitration Centre – Ho Chi Minh City University of Law, 'Summary Record of Workshop on Setting aside arbitral awards' (Kỷ yếu tọa đàm Hủy phán quyết trọng tài) (Ho Chi Minh University of Law, January 2015).

arbitral awards.[144] Overall, the percentage of setting aside arbitral awards before the provincial courts of Vietnam from 2003 to 2014 was significant.

Article 55 of the Ordinance of 2003 said that any parties unsatisfied with the first instance court's decision had 15 days in which to appeal the decision. This period would commence from the day when the court issued the decision. In the operative parts of the collected case law, the provincial courts of Hanoi and Ho Chi Minh City in the first instance stage always adjudicated that the parties could appeal the first instance decision within 15 days.[145][146] In a specific case,[147] although the Provincial Court of Ho Chi Minh City did not clearly mention the appellate possibility of the parties to the dispute, those parties certainly had the legitimate right governed in law to appeal.

Additionally, the collected case law also pointed out several cases where the Appellate Court of the Supreme Court in Hanoi[148] and the Appellate Court of the Supreme Court in Ho Chi

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[144] Cong Phu Nguyen, Grounds for setting aside arbitral awards – practical application and innovative proposal (Căn cứ hủy phán quyết trọng tài – thực trạng áp dụng và kiến nghị hoàn thiện) in Supreme Court – Vietnam International Arbitration Centre – Ho Chi Minh City University of Law, 'Summary Record of Workshop on Setting aside arbitral awards' (Kỷ yếu tọa đàm Hủy phán quyết trọng tài) (Ho Chi Minh University of Law, January 2015).

[145] Decision No 1198/2008/QĐST–KDTM of 11 August 2008 of the Provincial Court of Ho Chi Minh City; Decision No 01/QĐKT of 14 July 2004 of the Provincial Court of Hanoi; Decision No

[146] /2005/XQĐTT–ST of 11 May 2005 of the Provincial Court of Hanoi; Decision No 06/TTST of 23 September 2005 of the Provincial Court of Hanoi; Decision No 27/2006/QĐKDTM–ST of 24 January 2006 of the Provincial Court of Ho Chi Minh City; Decision No 03/KT–QĐTT of 15 October 2004 of the Provincial Court of Hanoi; Decision No 01/QĐST–TTTM of 12 March 2007 of the Provincial Court of Hanoi; Decision No 1745/2007/QĐVDS of 20 September 2007 of the Provincial Court of Ho Chi Minh City; Decision No 02/2008/QĐST–KDTM of 20 May 2008 of the Provincial Court of Hanoi; Decision No 866/2009/KDTM–QĐST of 15 April 2009 of the Provincial Court of Ho Chi Minh City; Decision No 1881/2009/KDTM–QĐST of 28 July 2009 of the Provincial Court of Ho Chi Minh City;
Decision No 1880/2009/KDTM–QĐST of 28 July 2009 of the Provincial Court of Ho Chi Minh City; Decision No 2611/2009/QĐST–KDTM of 10 September 2009 of the Provincial Court of Ho Chi Minh City; Decision No 2637/2009/KDTM–QĐST of 11 September 2009 of the Provincial Court of Ho Chi Minh City; Decision No 37/2006/KDTM–ST of 14 and 20 April 2006 of the Provincial Court of Hanoi;
Decision No 833/2010/QĐKSTM–ST of 10 June 2010 of the Provincial Court of Ho Chi Minh City; Decision No 04/2011/QĐST–KDTM of 28 May 2011 of the Provincial Court of Hanoi.

[147] Judgement No 01/QĐKT of 14 July 2004 of the Provincial Court of Ho Chi Minh City.

[148] Decision 113/2010/KDTM–PT of 9 June 2010 of the Appellate Court of the Supreme Court in Hanoi; Judgment No 11/KTPT of 14 January 2005 of the Appellate Court of the Supreme Court in Hanoi; Decision No

Minh City[149] heard appealable petitions served by the parties that were dissatisfied with the first instance decision. Apparently, the existence of an appellate mechanism was a positive trend because it granted the dissatisfied party an opportunity to bring its case before an appellate court of the Supreme Court. A case decided in Decision 113/2010/KDTM–PT of 9 June 2010 by the Appellate Court of the Supreme Court in Hanoi was a typical example. A dispute arising out of a sales contract between a Vietnamese company and a Russian company was brought before the Vietnam International Arbitration Centre. The Vietnamese company suggested that the chairman of this arbitration centre should appoint an arbitrator (arbitrator X) for the company. At a later stage of the arbitral procedure, the Vietnamese company claimed that arbitrator X had not acted objectively and impartially, and so suggested that the arbitral tribunal replace arbitrator X. Nevertheless, the presiding arbitrator and the other arbitrator refused to replace arbitrator X because the Vietnamese company could not display any evidence regarding the partiality of arbitrator X. After the award was rendered, the Vietnamese party filed a petition to set aside the arbitral award before a jurisdictional court. This court accepted the Vietnamese company's petition and held to set aside the arbitral award. The Russian company, dissatisfied with the first instance court's decision, appealed this decision before the Appellate Court of the Supreme Court in Hanoi. The appellate court adjudicated that the first instance decision had been inappropriate and held that the arbitral award was still valid and enforceable. The judicial tendency of this court was persuasive and sufficiently followed the notion of pro–arbitration.

207/2005/QĐ–TANDTC of 13 October 2005 of the Appellate Court of the Supreme Court in Hanoi; Decision No 04/2006/QĐ of 6 January 2006 of the Appellate Court of the Supreme Court in Hanoi; Decision No 10/2006/PT of 10 January 2006 of the Appellate Court of the Supreme Court in Hanoi; Decision No 112/2006/TTPT of 2 June 2006 of the Appellate Court of the Supreme Court in Hanoi.

[149] Decision 05/2010/KDTM–QĐPT of 15 January 2010 of of the Supreme Court in Ho Chi Minh City; Decision No 182/2010/QĐPT–KDTMPT of 8 October 2010 of the Appellate Court of the Supreme Court in Ho Chi Minh City; Decision No 51/2011/KDTM–QĐPT of 8 April 2011 of the Appellate Court of the Supreme Court in Ho Chi Minh City; Decision No 60/2010/KDTM–QĐPT of 9 April 2010 of the Appellate Court of the Supreme Court in Ho Chi Minh City.

The possibility for the parties to appeal the first instance decision on setting aside the arbitral award was not maintained due to the introduction of the Arbitration Law of 2010. Article 71(10) of this legal instrument stipulates that decisions of the provincial court are final and enforceable. This provision leads to the controversial matter of whether the decision on setting aside or refusing to set aside an arbitral award can be appealed in the appeal stage, or re–examined in the re–opening phase or phase of cassation. In the process of composing the draft Arbitration Law, there was an idea that the procedure of setting aside arbitral awards did not require an appeal stage, because the resolving judicial committee included three judges, and as the one–stage mechanism of setting aside could make arbitration more attractive and prompt. [150] Another viewpoint stated that the re–opening and cassation phrases were unnecessary due to the prompt nature of arbitration.[151] Therefore, the Arbitration Law does not govern any provisions regarding the possibility of the parties to appeal the first instance decisions relating to setting aside an arbitral award via the appellate procedure or the re–opening phrase or the cassation phrase. The inability to appeal a first instance decision on setting aside an award is affirmed in the practice notes enacted by the Standing Committee of the National Assembly[152] as well as the Supreme Court.[153]

Prior to 2 July 2014, the day on which Resolution No 01/2014/NQ–HĐTP of 20 March 2014 issued by the Council of Justices of the Supreme Court came into force, the Vietnamese provincial courts provided that decisions on setting aside arbitral awards are usually "*final and enforceable"*.[154] In some cases, the provincial courts merely adjudicated whether arbitral

[150] Van Dai Do and Hoang Hai Tran, *Vietnamese Law on Commercial Arbitration (Pháp luật Việt Nam về trọng tài thương mại)* (National Political Publisher – The Truth 2011) 378 – 379.

[151] Van Dai Do and Hoang Hai Tran, *Vietnamese Law on Commercial Arbitration (Pháp luật Việt Nam về trọng tài thương mại)* (National Political Publisher – The Truth 2011) 374 – 375.

[152] Practice Note No 810/UBTVQH13–TP of 26 December 2014 of the Standing Committee of the National Assembly.

[153] Practice Note No 07/TANDTC–KHXX of 13 January 2015 of the Supreme Court.

[154] Decision No 1598/2012/KDTM–QĐ of 31 October 2012 of the Provincial Court of Ho Chi Minh City; Decision No 1254/2013/QĐ–BPKCTT of 17 October 2013 of the Provincial Court of Ho Chi Minh City; Decision No 1254/2012/QĐ–BPKCTT of 24 August 2012 of the Provincial Court of Ho Chi Minh City; Decision No 1655/2012/QĐST–KDTM of 15 November 2012 of the Provincial Court of Ho Chi Minh City; Decision 07/2012/QĐST–TTTM of 13 December 2012 of the Provincial Court of Hanoi; Decision No

awards should be set aside[155] or not,[156] rather than mentioning the finality and enforceability of their decisions. Not only the decision on setting aside a final award, but also the decision on setting aside a partial award governing the arbitral tribunal's jurisdiction is final, enforceable and unappealable.[157] After 2 July 2014, the provincial courts of Vietnam usually mentioned in their decisions on setting aside arbitral awards that "*this decision is final and enforceable. The parties have no right to appeal this decision.*"[158] This is the reason why these provincial courts applied Form 08 attached to Resolution 01/2014/NQ–HĐTP of 20 March 2014, issued by the *Council* of *Justices* of the Supreme Court. Despite governing the statement "*The parties have no right to appeal this decision,*" some decisions after the day 2 July 2014 issued

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1065/2013/QĐKDTM–ST of 6 September 2013 of the Provincial Court of Ho Chi Minh City; Decision 10/2013/QĐST–TTTM of 30 May 2013 of the Provincial Court of Hanoi; Decision 580/2014/KDTM–QĐST of 21 May 2014 of the Provincial Court of Ho Chi Minh City; Decision 06/2013/QĐ–TTTM of 28 March 2013 of the Provincial Court of Hanoi.

[155] Decision No 05/2012/QĐST–TTTM of 6 December 2012 of the Provincial Court

[156] Decision 49/2012/QĐKDTM–ST of 16 January 2012 of the Provincial Court of Ho Chi Minh City.

[157] Decision 03/2014/QĐ–TTTM of 18 February 2014 of the Provincial Court of Hanoi.

[158] 157 Decision No 01/2016/QĐ–PQTT of 15 March 2016 of the Provincial Court of Hanoi; Decision No 871/2016/QĐ–PQTT of 25/8/2016 of the Provincial Court of Ho Chi Minh City; Decision No 09/2016/QĐ–PQTT of 14 December 2016 of the Provincial Court of Hanoi; Decision No 810/2017/QĐ– PQTT of 29 June 2017 of the Provincial Court of Ho Chi Minh City; Decision 923/2017/QĐ–PQTT of 21 July 2017 of the Provincial Court of Ho Chi Minh City; Decision No 393/2017/QĐ–PQTT of 3 April 2017 of the Provincial Court of Ho Chi Minh City; Decision No 1172/2015/QĐ–PQTT of 26 October 2015 of the Provincial Court of Ho Chi Minh City; Decision No 481/2016/QĐ–PQTT of 20 May 2016 of the Provincial Court of Ho Chi Minh City; Decision No 160/2017/QĐ–PQTT of 20 February 2017 of the Provincial Court of Ho Chi Minh City; Decision No 07/2017/QĐ–PQTT of 18 August 2017 of the Provincial Court of Hanoi; Decision No 32/2015/QĐ–PQTT of 8 January 2015 of the Provincial Court of Ho Chi Minh City; Decision No 147/2017/QĐ–PQTT of 17 February 2017 of the Provincial Court of Ho Chi Minh City; Decision No 971/2017/QĐ–PQTT of 2 August 2017 of the Provincial Court of Ho Chi Minh City; Decision No 09/2014/QĐ–PQTT of 3 October 2014 of the Provincial Court of Hanoi; Decision No 627/2017/QĐ–GQKN of 24 May 2017 of the Provincial Court of Ho Chi Minh City; Decision No 803/2015/QĐ–PQTT of 20 August 2015 of the Provincial Court of Ho Chi Minh City; Decision No 795/2017/QĐ–PQTT of 27 June 2017 of the Provincial Court of Ho Chi Minh City; Decision No 509/2015/QĐ–PQTT of 27 May 2015 of the Provincial Court of Ho Chi Minh City; Decision No 224/2015/QĐ–PT of 17 March 2015 of the Provincial Court of Ho Chi Minh City; Decision No 825/2015/QĐ–PQTT of 19 August 2015 of the Provincial Court of Ho Chi Minh City; Decision No 03/2017/QĐ–PQTT of 13 April 2017 of the Provincial Court of Hanoi; Decision No 979/2016/QĐ–PQTT of 21 September 2016 of the Provincial Court of Ho Chi Minh City; Decision No 10/2016/QĐ– PQTT of 22 December 2016 of the Provincial Court of Hanoi; Decision No 471/2016/QĐ–PQTT of 19 May 2016 of the Provincial Court of Ho Chi Minh City; Decision No 983/2016/QĐ–PQTT of 22 September 2016 of the Provincial Court of Ho Chi Minh City; Decision No 315/2017/QĐ–PQTT of 21 March 2017 of the Provincial Court of Ho Chi Minh City; Decision No 02/2017/QĐ–PQTT of 27 March 2017 of the Provincial Court of Hanoi; Decision No 930/2015/QĐ–PQTT of 10/9/2015 of the Provincial Court of Ho Chi Minh City; Decision No 1222/2014/QĐ–PQTT of 14 October 2014 of the Provincial Court of Ho Chi Minh City; Decision No 159/2017/QĐST–KDTM of 20 February 2017 of the Provincial Court of Ho Chi Minh City; Decision No 1161/2015/QĐ–PQTT of 23 October 2015 of the Provincial Court of Ho Chi Minh City; Decision No 1409/2014/QĐ–PQTT of 1 December 2014 of the Provincial Court of Ho Chi Minh City; Decision No 923/2017/QĐ–PQTT of 21 July 2017 of the Provincial Court of Ho Chi Minh City; Decision No 759/2014/QĐKDTM–ST of 1 July 2014 of the Provincial Court of Ho Chi Minh City; Decision No 1536/2012/QĐKDTM–ST of 12 October 2012 of the Provincial Court of Ho Chi Minh City; Decision No 795/2017/QĐ–PQTT of 27 June 2017 of the Provincial Court of Ho Chi Minh City.

by the provincial courts only adjudicated that "*this decision is final and enforceable*".[159] Notably, in a specific case, the Provincial Court of Ho Chi Minh City set aside an arbitral award. At the end of this decision, the jurisdictional court not only adjudicated that "*this decision is final and enforceable. The parties have no right appeal this decision,*" but also suggested that "*the parties can resolve the dispute before arbitration again or before a jurisdictional court.*"[160] Due to the absence of an appealable mechanism, many arbitral awards were unpersuasively set aside[161][162] via the abuse of the jurisdictional provincial courts.[163]

D. Statistics

1. Number of arbitration centres and arbitrators

Pursuant to a summary report of the Vietnam Lawyer Association, there were seven arbitration centres in total, with 212 arbitrators in 2009.[164] The statistics published on the website of the Legal Aid Department of the Ministry of Justice[165] points out that there are 21 arbitration centres with at least 496 arbitrators. These arbitration centres include the Alliance Commercial Abitration Centre – ACAC (Trung tâm trọng tài thương mại Liên Minh), the

[159] Decision No 02/2017/QĐ–PQTT of 27 March 2017 of the Provincial Court of Hanoi; Decision No 159/2017/QĐST–KDTM of 20 February 2017 of the Provincial Court of Ho Chi Minh City; Decision No 1161/2015/QĐ–PQTT of 23 October 2015 of the Provincial Court of Ho Chi Minh City.

[160] Decision No 471/2016/QĐ–PQTT of 19 May 2016 of the Provincial Court of Ho Chi Minh City

[161] Decision No 1536/2012/QĐKDTM–ST of 12 October 2012 of the Provincial Court of Ho Chi Minh City; Decision No 10/2013 of 30 May 2013 of the Provincial Court in Hanoi; Decision No

[162] /2014/KDTM–QĐ of 21 October 2014 of the Provincial Court of Ho Chi Minh City; Decision No 10/2014/QĐ–PQTT of 2014 of the Provincial Court of Hanoi; Decision No 1655/2012/QĐST–KDTM of 15 November 2012 of the Provincial Court of Ho Chi Minh City; Decision No 1598/2012/KDTM– QĐ of 31 October 2012 of the Provincial Court of Ho Chi Minh City; Decision 01/2013/QĐ.HĐQTT of 26 March of the Provincial Court of Can Tho.

[163] Xuan Hai Bui, 'Discussion on the reason of setting aside arbitral awards in Vietnam nowadays (Luận bàn về các nguyên nhân của tình trạng hủy phán quyết trọng tài ở Việt Nam hiện nay)' (2015) Volume 3 Legal Science Journal 25.

[164] Vietnam Lawyer Association, Summary Report No 10/BCPL–HLGVN of 30 April 2009 on the Implementation of the Ordinance on Commercial Arbitration (Hội Luật gia Việt Nam, Báo cáo tổng kết thi hành Pháp lệnh Trọng tài thương mại) (2009) Part A(I).

[165] Statistics of the of the Legal Aid Department of the Ministry of Justice, http://bttp.moj.gov.vn/qt/Pages/trong–tai–tm.aspx (accessed on 19 May 2019).

Asia Commerical International Arbitration Centre – ACIAC (Trung tâm trọng tài thương mại Á Châu), the Can Tho Commercial Arbitration Centre – CCAC (Trung tâm trọng tài thương mại Cần Thơ), the Thang Long Trade Arbitration Centre – TLAC (Trung tâm trọng tài thương mại Thăng Long), the Viet Finance Arbitration – VFA (Trung tâm trọng tài thương mại Tài chính Việt), the Capital Arbitration Centre (Trung tâm trọng tài thương mại Thủ Đô), the Finance Commercial Arbitration Centre – FCCA (Trung tâm trọng tài thương mại Tài chính chính), the Global Commercial Arbitration Centre – GCAC (Trung tâm trọng tài thương mại Toàn Cầu), the Gia Dinh Arbitration Centre – GDAC (Trung tâm trọng tài thương mại Gia Định), the Nam Viet Commercial Aribitration Centre – NVCAC (Trung tâm trọng tài thương mại Nam Việt), the Pacific International Arbitration Centre – PIAC (Trung tâm trọng tài quốc tế Thái Bình Dương), the Saigon Commercial Arbitration Centre – SCAC (Trung tâm trọng tài thương mại Sài Gòn), the Ho Chi Minh City Commercial Arbitration Centre – TRACENT (Trung tâm trọng tài thương mại Thành phố Hồ Chí Minh), the Vietnam International Arbitration Centre – VIAC (Trung tâm trọng tài quốc tế Việt Nam), the Vietnam Justice Arbitration Centre – VIETJAC (Trung tâm trọng tài thương mại Công Lý Việt Nam), the Vietnam Finance and Banking Commercial Arbitration Centre – VIFIBAR (Trung tâm trọng tài thương mại Tài chính Ngân hàng Việt Nam), the South East Asia Arbitration Centre – SEAAC (Trung tâm trọng tài thương mại Đông Nam Á), the Vietnam Lawyer's Commercial Arbitration Centre – VLCAC (Trung tâm trọng tài thương mại Luật gia Việt Nam), the Southern Trade Arbitration Centre – STAC (Trung tâm trọng tài thương mại Phía nam), the Highland Commercial Arbitration Centre – HARCEN (Trung tâm trọng tài thương mại Cao Nguyên) and the Thinh Tri Commercial Arbitration Centre – TTCAC (Trung tâm trọng tài thương mại Thịnh Trí). However, in the past the Ministry of Justice decided to withdraw the operative registrations from two arbitration centres, those being the Vien Dong Commercial Arbitration Centre VID.ARCE (Trung tâm trọng tài thương mại Viễn Đông)[166] and the Hanoi Commercial Arbitration Centre – HCAC (Trung tâm trọng tài thương mại Hà Nội).[167]

[166] Decision No 2401/QĐ–BTP of 27 September 2013 of the Ministry of Justice.

[167] Decision No 2402/QĐ–BTP of 27 September 2013 of the Ministry of Justice.

The number of arbitrators, the year of establishment and the location of those arbitration centres are depicted in the table below:

Arbitration centre	Number of arbitrators	Established Year	Location
ACAC	5	2015	District 10, Ho Chi Minh City
ACIAC	37	1997	Ba Dinh District, Hanoi City
CCAC	11	1999	Ninh Kieu District, Can Tho
TLAC	5	2016	Thanh Xuan District, Hanoi City
VFA	10	2016	District 1, Ho Chi Minh City
CAC	3	2016	Dong Da District, Hanoi City
FCCA	6	2012	Binh Thanh District, Ho Chi Minh City
GCAC	19	2014	Phu Nhuan District, Ho Chi Minh City
GDAC	6	n/i	Binh Chanh District, Ho Chi Minh City
NVCAC	5	2014	Tan Binh District, Ho Chi Minh City
PIAC	78	2006	District 11, Ho Chi Minh City
SCAC	5	2014	District 1, Ho Chi Minh City
TRACENT	27	1997	District 3, Ho Chi Minh City
VIAC	144	1993	Dong Da District, Hanoi City
VIETJAC	5	2015	Thanh Xuan District, Hanoi City
VIFIBAR	9	2012	District 1, Ho Chi Minh City

SEAAC	5	2017	South Tu Liem District, Ho Chi Minh City
VLCAC	59	2016	Binh Thanh District, Ho Chi Minh City
STAC	36	2017	Thu Duc District, Ho Chi Minh City
HARCEN	5	2017	Buon Ma Thuot, Dak Lak Province
TTCAC	16	n/i	District 3, Ho Chi Minh City
Total	496		

2. Number of cases

a) Jurisdictional courts of Vietnam

In Vietnam, national courts have played a significant role in resolving disputes arising between individuals and legal entities. According to the statistics of the Supreme Court, as well as of other courts in the judicial system, Vietnamese courts have handled an enormous amount of cases every year. The following tables indicate the number of cases handled and resolved by all Vietnamese courts in the judicial system from year to year:

Year	1/9/2000 – 30/9/2011	2007	2009	2010	2011	2012
Number of handled cases	3,143,746 (civil and commercial cases)[168]	108,060 (civil and commercial cases)[169]	214,174[170]	215,741[171]	246,915[172]	271,306[173]

[168] Vietnamese Supreme Court, 'Presentation of 16 April 2013 of the Vietnamese Supreme Court at the National Conference on the Summary implementation of the Law on Marriage and Family 2000 (from 1 September 2000 to 30 September 2011) (Báo cáo tham luận của Tòa án nhân dân tối cao tại Hội nghị toàn quốc tổng kết thi hành Luật hôn nhân và gia đình năm 2000 ngày 16/4/2013 (từ ngày 01/9/2000 đến ngày 30/9/2011)' (2013).

[169] Thi Le Thoa Bach, 'Dispute resolution via arbitration and supportive mechanism of courts (Giải quyết tranh chấp bằng trọng tài và cơ chế hỗ trợ của tòa án)' (2009) Volume 14 Legislative Studies Journal 23 – 29; Statistics on the adjudication of courts of 64 provinces from 1 January to 31 December 2007.

[170] Vietnamese Supreme Court, 'Report No 20/BC–TANDTC of 1 September 2010 of the Vietnamese Supreme Court on summary of implementation of the Civil Procedure Code of 2004 (Báo cáo số 20/BC– TANDTC ngày 01/9/2010 của Tòa án nhân dân tối cao tổng kết 5 năm thi hành Bộ luật tố tụng dân sự)' (Vietnamese Supreme Court 2010).

[171] Vietnamese Supreme Court, 'Report No 01/BC–TA of 4 January 2011 on the judicial task of 2010 and core mission of 2011 (Báo cáo số 01/BC–TA ngày 4/1/2011 về tổng kết công tác năm 2010 và nhiệm vụ trọng tâm công tác năm 2011 của ngành tòa án án nhân)' (2011).

[172] Vietnamese Supreme Court, 'Report No 36/BC–TA of 28 December 2011 on the judicial task of 2011 and core mission of 2012 (Báo cáo số 36/BC–TA ngày 28/12/2011 về tổng kết công tác năm 2011 và nhiệm vụ trọng tâm công tác năm 2012 của ngành tòa án nhân dân)' (2011).

[173] Vietnamese Supreme Court, 'Report No 05/BC–TA ngày 18 January 2013 on the judicial task of 2012 and core mission of 2013 (Báo cáo số 05/BC–TA ngày 18/01/2013 của Tòa án nhân dân tối cao về tổng kết công tác năm 2012 và nhiệm vụ trọng tâm công tác năm 2013 của ngành tòa án nhân dân' (2011).

Number of resolved cases	Over 2,500,000 (civil and commercial cases)[174]	80,773 (civil and commercial cases)[175]	194,358[176]	194,372[177]	222,386[178]	246,215[179]

[174] Vietnamese Supreme Court, 'Presentation of 16 April 2013 of the Vietnamese Supreme Court at the National Conference on the Summary implementation of the Law on Marriage and Family 2000 (from 1 September 2000 to 30 September 2011) (Báo cáo tham luận của Tòa án nhân dân tối cao tại Hội nghị toàn quốc tổng kết thi hành Luật hôn nhân và gia đình năm 2000 ngày 16/4/2013 (từ ngày 01/9/2000 đến ngày 30/9/2011)' (2013).

[175] Thi Le Thoa Bach, 'Dispute resolution via arbitration and supportive mechanism of courts (Giải quyết tranh chấp bằng trọng tài và cơ chế hỗ trợ của tòa án)' (2009) Volume 14 Legislative Studies Journal 23 – 29; Statistics on the adjudication of courts of 64 provinces from 1 January to 31 December 2007.

[176] Vietnamese Supreme Court, 'Report No 20/BC–TANDTC of 1 September 2010 of the Vietnamese Supreme Court on summary of implementation of the Civil Procedure Code of 2004 (Báo cáo số 20/BC– TANDTC ngày 01/9/2010 của Tòa án nhân dân tối cao tổng kết 5 năm thi hành Bộ luật tố tụng dân sự)' (2010).

[177] Vietnamese Supreme Court, 'Report No 01/BC–TA of 4 January 2011 on the judicial task of 2010 and core mission of 2011 (Báo cáo số 01/BC–TA ngày 4/1/2011 về tổng kết công tác năm 2010 và nhiệm vụ trọng tâm công tác năm 2011 của ngành tòa án án nhân)' (2011).

[178] Vietnamese Supreme Court, 'Report No 36/BC–TA of 28 December 2011 on the judicial task of 2011 and core mission of 2012 (Báo cáo số 36/BC–TA ngày 28/12/2011 về tổng kết công tác năm 2011 và nhiệm vụ trọng tâm công tác năm 2012 của ngành tòa án nhân dân)' (2011).

[179] Vietnamese Supreme Court, 'Report No 05/BC–TA ngày 18 January 2013 on the judicial task of 2012 and core mission of 2013 (Báo cáo số 05/BC–TA ngày 18/01/2013 của Tòa án nhân dân tối cao về tổng kết công tác năm 2012 và nhiệm vụ trọng tâm công tác năm 2013 của ngành tòa án nhân dân' (Vietnamese Supreme Court 2011).

Year	2006 – 2011	2012 (10/2011 – 9/2012)	2011 – 2016	2017	1/12/2017 – 30/11/2018	2016 – 2018
Number of handled cases	1,045,621[180]	360,941[181]	1,809,080[182]	553,066[183]	558,152[184]	1,438,845[185]
Number of resolved cases	no information)	332,868[186]	1,781,410[187]	n/i	499,013[188]	1,379,709[189]

[180] Vietnamese Supreme Court, 'Summary Report of 1 March 2016 of the Chief Justice of the Supreme Court on the judicial task of courts in the National Assembly XIII's tenure (Báo cáo tóm tắt của Chánh án Tòa án nhân dân tối cao về công tác của các tòa án trong nhiệm kỳ Quốc hội Khóa XIII)' (2016).
[181] Ministry of Justice, 'Draft of the decision on approval of the project on enhancing the line–up of arbitrators, arbitration centres and some orientation of one or some pilot arbitration centres with international competitive capability in the term 2018 – 2023 (Dự thảo Quyết định phê duyệt Đề án nâng cao năng lực đội ngũ trọng tài viên, Trung tâm trọng tài và định hướng một hoặc một số Trung tâm trọng tài điểm có khả năng cạnh tranh quốc tế giai đoạn 2018–2023)' (Ministry of Justice 2017).
[182] Vietnamese Supreme Court, 'Summary Report of 1 March 2016 of the Chief Justice of the Supreme Court on the judicial task of courts in the National Assembly XIII's tenure (Báo cáo tóm tắt của Chánh án Tòa án nhân dân tối cao về công tác của các tòa án trong nhiệm kỳ Quốc hội Khóa XIII)' (2016).
[183] Vietnamese Supreme Court, 'Summary Report of December 2018 on the judicial task of 2018 and the core mission of 2019 (Báo cáo tổng kết công tác năm 2018 và nhiệm vụ trọng tâm công tác năm 2019 của các tòa án)' (2018).
[184] Vietnamese Supreme Court, 'Summary Report of December 2018 on the judicial task of 2018 and the core mission of 2019 (Báo cáo tổng kết công tác năm 2018 và nhiệm vụ trọng tâm công tác năm 2019 của các tòa án)' (2018).
[185] Vietnamese Supreme Court, 'Summary Report of 14 January 2019 on the judicial task from 2016 – 2018 and the core mission in the near future (Báo cáo tóm tắt công tác tòa án từ đầu nhiệm kỳ đến nay và năm 2018 – Nhiệm vụ trọng tâm thời gian tới)' (2019).
[186] Ministry of Justice, 'Draft of the decision on an approval of the project on enhancing the line–up of arbitrators, arbitration centres and some orientation of one or some pilot arbitration centres with international competitive capability in the term 2018 – 2023 (Dự thảo Quyết định phê duyệt Đề án nâng cao năng lực đội ngũ trọng tài viên, Trung tâm trọng tài và định hướng một hoặc một số Trung tâm trọng tài điểm có khả năng cạnh tranh quốc tế giai đoạn 2018 – 2023)' (Ministry of Justice 2017).
[187] Vietnamese Supreme Court, 'Summary Report of 1 March 2016 of the Chief Justice of the Supreme Court on the judicial task of courts in the National Assembly XIII's tenure (Báo cáo tóm tắt của Chánh án Tòa án nhân dân tối cao về công tác của các tòa án trong nhiệm kỳ Quốc hội Khóa XIII)' (2016).
[188] Vietnamese Supreme Court, 'Summary Report of December 2018 on the judicial task of 2018 and the core mission of 2019 (Báo cáo tổng kết công tác năm 2018 và nhiệm vụ trọng tâm công tác năm 2019 của các tòa án)' (2018).
[189] Vietnamese Supreme Court, 'Summary Report of 14 January 2019 on the judicial task from 2016 – 2018 and the core mission in the near future (Báo cáo tóm tắt công tác tòa án từ đầu nhiệm kỳ đến nay và năm 2018 – Nhiệm vụ trọng tâm thời gian tới)' (2019).

Cases handled and adjudicated by district courts and provincial courts of Hanoi (HN) and Ho Chi Minh City (HCMC) are expressed in the following table:

Year	2007	2007	2012	2013	2017	2018
Number of handled cases	9,000 (HN)[190][191][192]	42,000 (HCMC) [189]	54,493 (HCMC) [190]	56,968 (HCMC)[193]	30,777 (HN)[194]	36,472 (HN)[195]

[190] Thi Le Thoa Bach, 'Dispute resolution via arbitration and supportive mechanism of courts (Giải quyết tranh chấp bằng trọng tài và cơ chế hỗ trợ của tòa án)' (2009) Volume 14 Legislative Studies Journal 23 – 29; Statistics on the adjudication of courts of 64 provinces from 1 January to 31 December 2007.

[191] Thi Le Thoa Bach, 'Dispute resolution via arbitration and supportive mechanism of courts (Giải quyết tranh chấp bằng trọng tài và cơ chế hỗ trợ của tòa án)' (2009) Volume 14 Legislative Studies Journal 23 – 29; Statistics on the adjudication of courts of 64 provinces from 1 January to 31 December 2007.

[192] Provincial Court of Ho Chi Minh City, 'Summary Report on the judicial task of 2013 and core mission of 2014 (Báo cáo tổng kết công tác năm 2013 và nhiệm vụ trọng tâm công tác năm 2014 của Tòa án nhân dân Thành phố Hồ Chí Minh) (2014).

[193] Provincial Court of Ho Chi Minh City, 'Summary Report on the judicial task of 2013 and core mission of 2014 (Báo cáo tổng kết công tác năm 2013 và nhiệm vụ trọng tâm công tác năm 2014 của Tòa án nhân dân Thành phố Hồ Chí Minh) (2014).

[194] Judicial Academy, 'Training arbitration profession in the Judicial Academy the operative task of 2018 and orientation of 2019 of two–level courts of Hanoi (from 1 October 2017 to 31 October 2018) (Báo cáo kết quả công tác 2018 và phương hướng nhiệm vụ 2019 của TAND hai cấp TP HN 20/11/2018 từ 1/10/2017 đến 31/10/2018)' (2018).

[195] Provincial Court of Hanoi, 'Report of 20 November 2018 on the operative task of 2018 and orientation of 2019 of two–level courts of Hanoi (from 1 October 2017 to 31 October 2018) (Báo cáo kết quả công tác 2018 và phương hướng nhiệm vụ 2019 của TAND hai cấp TP HN 20/11/2018 từ 1/10/2017 đến 31/10/2018)' (2018).

Number of adjudicated cases	43,171 (HCMC)[196]	46,061 (HCMC)[197]	43,171 (HCMC)[198]	46,061 (HN)[199]	27,755 (HN)[200]	30,001 (HN)[201]

[196] Provincial Court of Ho Chi Minh City, 'Summary Report on the judicial task of 2013 and core mission of 2014 (Báo cáo tổng kết công tác năm 2013 và nhiệm vụ trọng tâm công tác năm 2014 của Tòa án nhân dân Thành phố Hồ Chí Minh) (2014).

[197] Provincial Court of Ho Chi Minh City, 'Summary Report on the judicial task of 2013 and core mission of 2014 (Báo cáo tổng kết công tác năm 2013 và nhiệm vụ trọng tâm công tác năm 2014 của Tòa án nhân dân Thành phố Hồ Chí Minh) (2014).

[198] Provincial Court of Ho Chi Minh City, 'Summary Report on the judicial task of 2013 and core mission of 2014 (Báo cáo tổng kết công tác năm 2013 và nhiệm vụ trọng tâm công tác năm 2014 của Tòa án nhân dân Thành phố Hồ Chí Minh) (2014).

[199] 197 Provincial Court of Ho Chi Minh City, 'Summary Report on the judicial task of 2013 and core mission of 2014 (Báo cáo tổng kết công tác năm 2013 và nhiệm vụ trọng tâm công tác năm 2014 của Tòa án nhân dân Thành phố Hồ Chí Minh) (2014).

[200] Provincial Court of Hanoi, 'Report of 20 November 2018 on the operative task of 2018 and orientation of 2019 of two–level courts of Hanoi (from 1 October 2017 to 31 October 2018) (Báo cáo kết quả công tác 2018 và phương hướng nhiệm vụ 2019 của TAND hai cấp TP HN 20/11/2018 từ 1/10/2017 đến 31/10/2018)' (2018).

[201] Provincial Court of Hanoi, 'Report of 20 November 2018 on the operative task of 2018 and orientation of 2019 of two–level courts of Hanoi (from 1 October 2017 to 31 October 2018) (Báo cáo kết quả công tác 2018 và phương hướng nhiệm vụ 2019 của TAND hai cấp TP HN 20/11/2018 từ 1/10/2017 đến 31/10/2018)' (2018).

As for commercial cases, the statistics of the cases handled and resolved by the courts of the whole judicial system are depicted as below:

Year	2005	2006	2007	2008
Number of handled cases	1,485[202]	2,866[203]	4,798[204]	6,034[205]
Number of adjudicated cases	1,223[206]	2,274[207]	4,206[208]	5,343 [209]

[202] Vietnamese Supreme Court, 'Report No 20/BC–TANDTC of 1 September 2010 of the Vietnamese Supreme Court on summary of implementation of the Civil Procedure Code of 2004 (Báo cáo số 20/BC– TANDTC ngày 01/9/2010 của Tòa án nhân dân tối cao tổng kết 5 năm thi hành Bộ luật tố tụng dân sự)' (2010).
[203] Vietnamese Supreme Court, 'Report No 20/BC–TANDTC of 1 September 2010 of the Vietnamese Supreme Court on summary of implementation of the Civil Procedure Code of 2004 (Báo cáo số 20/BC– TANDTC ngày 01/9/2010 của Tòa án nhân dân tối cao tổng kết 5 năm thi hành Bộ luật tố tụng dân sự)' (2010).
[204] Vietnamese Supreme Court, 'Report No 20/BC–TANDTC of 1 September 2010 of the Vietnamese Supreme Court on summary of implementation of the Civil Procedure Code of 2004 (Báo cáo số 20/BC– TANDTC ngày 01/9/2010 của Tòa án nhân dân tối cao tổng kết 5 năm thi hành Bộ luật tố tụng dân sự)' (2010).
[205] Vietnamese Supreme Court, 'Report No 20/BC–TANDTC of 1 September 2010 of the Vietnamese Supreme Court on summary of implementation of the Civil Procedure Code of 2004 (Báo cáo số 20/BC– TANDTC ngày 01/9/2010 của Tòa án nhân dân tối cao tổng kết 5 năm thi hành Bộ luật tố tụng dân sự)' (2010).
[206] Vietnamese Supreme Court, 'Report No 20/BC–TANDTC of 1 September 2010 of the Vietnamese Supreme Court on summary of implementation of the Civil Procedure Code of 2004 (Báo cáo số 20/BC– TANDTC ngày 01/9/2010 của Tòa án nhân dân tối cao tổng kết 5 năm thi hành Bộ luật tố tụng dân sự)' (2010).
[207] Vietnamese Supreme Court, 'Report No 20/BC–TANDTC of 1 September 2010 of the Vietnamese Supreme Court on summary of implementation of the Civil Procedure Code of 2004 (Báo cáo số 20/BC– TANDTC ngày 01/9/2010 của Tòa án nhân dân tối cao tổng kết 5 năm thi hành Bộ luật tố tụng dân sự)' (2010).
[208] Vietnamese Supreme Court, 'Report No 20/BC–TANDTC of 1 September 2010 of the Vietnamese Supreme Court on summary of implementation of the Civil Procedure Code of 2004 (Báo cáo số 20/BC– TANDTC ngày 01/9/2010 của Tòa án nhân dân tối cao tổng kết 5 năm thi hành Bộ luật tố tụng dân sự)' (2010).
[209] Vietnamese Supreme Court, 'Report No 20/BC–TANDTC of 1 September 2010 of the Vietnamese Supreme Court on summary of implementation of the Civil Procedure Code of 2004 (Báo cáo số 20/BC– TANDTC ngày 01/9/2010 của Tòa án nhân dân tối cao tổng kết 5 năm thi hành Bộ luật tố tụng dân sự)' (2010).

Year	2013	2014	2015	2017	2018
Number of handled cases	(no information)	(no information)	(no information)	(no information)	(no information)
Number of adjudicated cases	17,426[210]	16,993[211]	17,262[212]	14,016[213]	15,439 (sales cases: 21.32%; finance and banking cases: 32.77%)[214]

[210] Judicial Academy, 'Training arbitration profession in the Judicial Academy – Theoretical basis, practice and operative solution (Đào tạo nghiệp vụ trọng tài thương mại tại Học viện Tư pháp – Cơ sở lý luận, thực tiễn và giải pháp triển khai)' (Institutional Study Project, Judicial Academy 2017) Chapter I, Part 1.2.

[211] Judicial Academy, 'Training arbitration profession in the Judicial Academy – Theoretical basis, practice and operative solution (Đào tạo nghiệp vụ trọng tài thương mại tại Học viện Tư pháp – Cơ sở lý luận, thực tiễn và giải pháp triển khai)' (Institutional Study Project, Judicial Academy 2017) Chapter I, Part 1.2.

[212] Judicial Academy, 'Training arbitration profession in the Judicial Academy – Theoretical basis, practice and operative solution (Đào tạo nghiệp vụ trọng tài thương mại tại Học viện Tư pháp – Cơ sở lý luận, thực tiễn và giải pháp triển khai)' (Institutional Study Project, Judicial Academy 2017) Chapter I, Part 1.2.

[213] Vietnamese Supreme Court, 'Summary Report of December 2018 on the judicial task of 2018 and the core mission of 2019 (Báo cáo tổng kết công tác năm 2018 và nhiệm vụ trọng tâm công tác năm 2019 của các tòa án) (2018).

[214] Vietnamese Supreme Court, 'Summary Report of December 2018 on the judicial task of 2018 and the core mission of 2019 (Báo cáo tổng kết công tác năm 2018 và nhiệm vụ trọng tâm công tác năm 2019 của các tòa án) (2018).

Specifically, the Provincial Court of Hanoi (PCHN) and the Provincial Court of Ho Chi Minh City (PCHCMC) handled and resolved commercial cases as depicted below:

Year	2007	2007	2017	2018
Number of handled cases	(no information)	(no information)	1,950 (PCHN)[215]	2,416 (PCHN)[216]
Number of adjudicated cases	300 (PCHN)[217]	1000 (PCHCMC) [218]	1,115 (PCHN)[219]	1,237 (PCHN)[220]

b) Arbitral tribunals of arbitration centres in Vietnam

A general observation shows that the real number of commercial cases referred to arbitration at all the arbitration centres is only one per cent of those resolved by the courts.[221] According to a summary report of the Vietnam Lawyer Association,[222] from 2004 to 2006 the arbitration

[215] Provincial Court of Hanoi, 'Report of 20 November 2018 on the operative task of 2018 and orientation of 2019 of two–level courts of Hanoi (from 1 October 2017 to 31 October 2018) (Báo cáo kết quả công tác 2018 và phương hướng nhiệm vụ 2019 của TAND hai cấp TP HN 20/11/2018 từ 1/10/2017 đến 31/10/2018)' (2018).

[216] Provincial Court of Hanoi, 'Report of 20 November 2018 on the operative task of 2018 and orientation of 2019 of two–level courts of Hanoi (from 1 October 2017 to 31 October 2018) (Báo cáo kết quả công tác 2018 và phương hướng nhiệm vụ 2019 của TAND hai cấp TP HN 20/11/2018 từ 1/10/2017 đến 31/10/2018)' (2018).

[217] Thi Le Thoa Bach, 'Dispute resolution via arbitration and supportive mechanism of courts (Giải quyết tranh chấp bằng trọng tài và cơ chế hỗ trợ của tòa án)' (2009) Volume 14 Legislative Studies Journal 23 – 29; Statistics on the adjudication of courts of 64 provinces from 1 January to 31 December 2007.

[218] Thi Le Thoa Bach, 'Dispute resolution via arbitration and supportive mechanism of courts (Giải quyết tranh chấp bằng trọng tài và cơ chế hỗ trợ của tòa án)' (2009) Volume 14 Legislative Studies Journal 23 – 29; Statistics on the adjudication of courts of 64 provinces from 1 January to 31 December 2007.

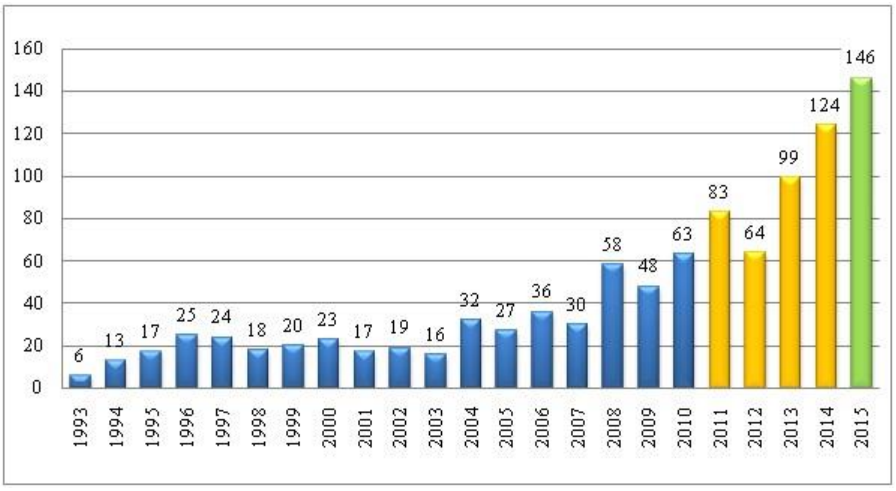
[219] Provincial Court of Hanoi, 'Report of 20 November 2018 on the operative task of 2018 and orientation of 2019 of two–level courts of Hanoi (from 1 October 2017 to 31 October 2018) (Báo cáo kết quả công tác 2018 và phương hướng nhiệm vụ 2019 của TAND hai cấp TP HN 20/11/2018 từ 1/10/2017 đến 31/10/2018)' (2018).

[220] Provincial Court of Hanoi, 'Report of 20 November 2018 on the operative task of 2018 and orientation of 2019 of two–level courts of Hanoi (from 1 October 2017 to 31 October 2018) (Báo cáo kết quả công tác 2018 và phương hướng nhiệm vụ 2019 của TAND hai cấp TP HN 20/11/2018 từ 1/10/2017 đến 31/10/2018)' (2018).

[221] Judicial Academy, 'Training arbitration profession in the Judicial Academy – Theoretical basis, practice and operative solution (Đào tạo nghiệp vụ trọng tài thương mại tại Học viện Tư pháp – Cơ sở lý luận, thực tiễn và giải pháp triển khai)' (Institutional Study Project, Judicial Academy 2017) Chapter I, Part 1.2.

[222] Vietnam Lawyer Association, Summary Report No 10/BCPL–HLGVN of 30 April 2009 on the Implementation of the Ordinance on Commercial Arbitration (Hội Luật gia Việt Nam, Báo cáo tổng kết thi hành Pháp lệnh Trọng tài thương mại) (2009) Part A(I).

centres handled 117 cases. Pursuant to a summary report of the Ministry of Justice,[223] from 2011 to 31 December 2015 the arbitration centres in Vietnam handled 1,831 and rendered 1,549 arbitral awards. In 2015, the arbitration centres in Vietnam resolved 1,255 cases.[224] As shown by a particular set of statistics of the Vietnam International Arbitration Centre,[225] from 1993 to 2015 this arbitration centre handled and resolved 1,052 cases. In 2016, [224] this arbitration centre handled 155 cases.



Resolution No 19–2017/NQ–CP of 6 February 2017 of the Vietnamese Government stipulated that the courts were overloaded in the course of dispute resolution.[225] The time to resolve cases was often long and expensive for the parties. On average, the jurisdictional courts

[223] Ministry of Justice, 'Report No 74/BC–BTP of 8 April 2016 of the Ministry of Justice on Summary of 4–year implementation of the Arbitration Law (Báo cáo số 74/BC–BTP ngày 8/4/2016 của Bộ Tư pháp về việc sơ kết 04 năm Luật trọng tài thương mại)' (2016).

[224] Ministry of Justice, 'Report No 74/BC–BTP of 8 April 2016 of the Ministry of Justice on Summary of 4–year implementation of the Arbitration Law (Báo cáo số 74/BC–BTP ngày 8/4/2016 của Bộ Tư pháp về việc sơ kết 04 năm Luật trọng tài thương mại)' (2016).

[225] Statistics of the Vietnam International Arbitration Centre of 2015, http://viac.vn/thong–ke/thong–ke– tinh–hinh–giai–quyet–tranh–chap–nam–2015–tai–viac–a170.html (accessed on 19 May 2019). [224] Statistics of the Vietnam International Arbitration Centre of 2016, http://viac.vn/thong–ke/thong–ke– tinh–hinh–giai–quyet–tranh–chap–tai–viac–nam–2016–a749.html (accessed on 19 May 2019). [225] Vietnamese Government, 'Resolution No 19–2017/NQ–CP of 6 February 2017 on the main duties and measures for improving the business environment and enhancing national competitiveness in 2017 and orientation towards 2020 (Nghị quyết số 19–2017/NQ–CP ngày 6/2/2017 về tiếp tục thực hiện những nhiệm vụ, giải pháp chủ yếu cải thiện môi trường kinh doanh, nâng cao năng lực cạnh tranh quốc gia năm 2017, định hướng đến năm 2020)' (Vietnamese Government 2017).

needed 400 days[226] to resolve a contract, and this matter cost 29% of the contract amount.[227] The government is trying to reduce this term to 300 days.[228]

[226] Vietnamese Government, 'Resolution No 19–2017/NQ–CP of 6 February 2017 on the main duties and measures for improving the business environment and enhancing national competitiveness in 2017 and orientation towards 2020 (Nghị quyết số 19–2017/NQ–CP ngày 6/2/2017 về tiếp tục thực hiện những nhiệm vụ, giải pháp chủ yếu cải thiện môi trường kinh doanh, nâng cao năng lực cạnh tranh quốc gia năm 2017, định hướng đến năm 2020)' (Vietnamese Government 2017).

[227] Thanh Tu Nguyen (Ministry of Justice), 'Presentation at the Seminar on the practical application of law on contract and dispute resolution via mediation and arbitration in Ho Chi Minh City of 8 October 2018 (Tọa đàm về Thực tiễn áp dụng pháp luật về hợp đồng và giải quyết tranh chấp bằng phương thức hòa giải, trọng tài tại Thành phố Hồ Chí Minh ngày 8/10/2018)' (2018).

[228] Vietnamese Government, 'Resolution No 19–2017/NQ–CP of 6 February 2017 on the main duties and measures for improving the business environment and enhancing national competitiveness in 2017 and orientation towards 2020 (Nghị quyết số 19–2017/NQ–CP ngày 6/2/2017 về tiếp tục thực hiện những nhiệm vụ, giải pháp chủ yếu cải thiện môi trường kinh doanh, nâng cao năng lực cạnh tranh quốc gia năm 2017, định hướng đến năm 2020)' (Vietnamese Government 2017).

Chapter II. Recognition and enforcement of foreign arbitral awards

A. Historical background of the recognition and enforcement of foreign arbitral awards in Vietnam

After a long–standing arbitral procedure with complex stages,[229] the essential goal of the creditor of a certain award is practical enforcement, which could help the creditor to exercise its legitimate rights and interests. This feature is significant in international arbitration,[230] where the foreign arbitration procedure is held between parties with their registered offices in different countries or with different nationalities.[231]

Experience in international arbitration has shown that the debtor will, in most cases, voluntarily perform the obligations stated in the foreign arbitral award.[232] In the event that the debtor persistently refuses to perform the obligations, the laws of relevant countries provide for several mechanisms[233] to help the creditor protect his or her interests. This means that, if the debtor resides or is based in a country foreign to the creditor, or has assets there,[234] then the creditor can bring the award before a jurisdictional court of that country in order to ensure the recognition and enforcement of the award. The equivalent applies to a legal entity that has

[229] For instance, under the Rules of International Center for Dispute Resolution of the American Arbitration Association (AAA–ACDR Rules), an arbitral procedure will undergo at least six stages including (i) case initiation stage; (ii) arbitrator invitation stage; (iii) arbitrator appointment stage; (iv) preliminary hearing and information exchange stage; (v) hearing stage and (vi) award stage. https://www.adr.org/sites/default/files/document_repository/AAA_Stages_of_the_Arbitration_Process .pdf (accessed 19 May 2019).

[230] Lew/Mistelis/Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 688.

[231] Article 1(3)(a) of the Model Law of 1985 (amended in 2006).

[232] According to a survey of Queen Mary University in 2008, up to 90% of arbitral awards were voluntarily enforced without any petitions. The full Queen Mary University, Survey on Corporate Attitudes: Recognition and Enforcement of Foreign Awards of 2008 can be accessed via website http://www.arbitration.qmul.ac.uk/research/2008/index.html (accessed 19 May 2019).

[233] Sébastien Besson and Jean–François Poudret, *Comparative Law of International Arbitration* (Stephen Berti and Annette Ponti trs, 2nd ed., Sweet & Maxwell–Schulthess 2007) 793.

[234] Blackaby/Partasides/Redfern/Hunter, *Redfern and Hunter on International Arbitration* (6th ed., Oxford University Press 2015) para. 11.24 – 11.25.

its headquarters located in a respective country. Vietnam is no exception to this, with Vietnamese laws prescribing a clear and detailed procedure in order for creditors to seek the recognition and enforcement of a foreign arbitral award before a Vietnamese court.

Vietnam's accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, created by the United Nations on 10 June 1958[235] (hereinafter the New York Convention or the Convention), led to the Vietnamese National Assembly issuing legal documents that govern the recognition and enforcement of foreign arbitral awards.[236] From the time when the Vietnamese president ratified the New York Convention, several periods can be analysed in order to examine the history of the enactment and amendment of Vietnamese legal provisions.

1. Before joining the New York Convention

a) Necessity

The centrally planned economic system blocked all market forces and there was no incentive towards private business.[237] Inside the planned economy, the State controlled all trade and only state–owned enterprises could participate in commercial transactions. Additionally, only those enterprises had the right to enter into commercial relationships with enterprises from Socialist Bloc countries.[238]

[235] This convention has attracted the participation of 159 countries and territories across the world, http://www.newyorkconvention.org/countries (accessed 19 May 2019).

[236] Pip Nicholson and Thi Minh Nguyen, 'Commercial Disputes and Arbitration in Vietnam' (2000) Volume 17(5) Journal of International Arbitration 3.

[237] Phong Tuan Tran, 'Vietnam's economic liberalization and outreach: legal reform' (2003) Volume 9(1) Law & Bus. Rev. Am. 142.

[238] Phong Tuan Tran, 'Vietnam's economic liberalization and outreach: legal reform' (2003) Volume 9(1) Law & Bus. Rev. Am. 142.

Ten years after reunification, the Vietnamese Government realised that the only way to overcome the challenges of the planned economy was to introduce an open market.[239] This open market attracted foreign companies to invest in both the capital and the infrastructure in Vietnam via joint ventures or business cooperation contracts.[240] As a result, the commercial relationships between Vietnamese enterprises and the companies of other countries gradually developed in quality and quantity. However, there were disputes arising out of the commercial co–operations between the Vietnamese and foreign enterprises. In some cases they attended commercial arbitrations conducted outside of Vietnam. An important question could be raised as to whether the award rendered by those arbitrations could be recognised and enforced in Vietnam. A clear answer could not be easily determined.

b) Possibility

Some Vietnamese commentators have argued that an award issued by a foreign arbitral tribunal was definitely recognisable and enforceable under the provisions of the Law on Foreign Investment in Vietnam of 1987,[241] which said that "*in case the disputants cannot negotiate the disputes, the dispute can be brought before a Vietnamese economic arbitration organisation or another arbitration organisation, or a judicial mechanism pursuant to the autonomy of parties.*"[242] Moreover, in some treaties on legal assistance between Vietnam and other countries, especially the countries of the former Socialist Bloc, [243] details of the recognition and enforcement of foreign arbitral awards were mentioned. For instance, Article 51(2) of the Treaty on Legal Assistance in Civil, Family and Criminal Matters between

[239] John Gillespie, 'Commercial Arbitration in Vietnam' (1991) Volume 8(3) Journal of International Arbitration 27.

[240] Pip Nicholson and Thi Minh Nguyen, 'Commercial Disputes and Arbitration in Vietnam' (2000) Volume 17(5) Journal of International Arbitration 2.

[241] Law on Foreign Investment in Vietnam of 1987 (enacted by the National Assembly on 29 December 1987).

[242] Article 25 of Law on Foreign Investment in Vietnam of 1987.

[243] Thi Anh Thu Nguyen, 'The New York Convention on the Recognition and Enforcement of Foreign Arbitral Award and its application in Vietnam (Công ước New York 1958 về công nhận và cho thi hành phán quyết của trọng tài nước ngoài và việc thực hiện tại Việt Nam)' (LL.M Thesis, Law Faculty of Vietnam National University, 2002) 61.

Vietnam and Hungary[244] governs that "*binding and enforceable decisions of court or other organs of a respective signatory will be recognised and enforced in the other signatory.*" Similarly, Article 26(2) of the Treaty on Legal Assistance in Civil and Criminal Matters between Vietnam and the former Czechoslovakia [245] also stipulates "*Signatories recognise and enforce, in their territories, arbitral awards.*" Along with the treaties on legal assistance, some bilateral investment treaties between Vietnam and other countries touch on the recognition and enforcement of foreign arbitral awards.[246] For instance, Article 12 of the Agreement on the Reciprocal Promotion and Protection of Investments between Vietnam and Australia [247] expressed that the "*Contracting party will, under its own jurisdiction, provide for the recognition and enforcement of a judicial decision or an arbitral award.*"

Nevertheless, international scholars and practitioners tended to have divergent perceptions about the possibility of the recognition and enforcement of foreign awards in Vietnam. Those authors argued that Vietnam was, at that time, unlikely to ratify the New York Convention until it had reorganised the court system and established a system of non– governmental commercial arbitration.[248] As Vietnam was not a member of the New York Convention, there was no guarantee that a foreign award would be recognised and enforced by a court in Vietnam. [249] The lack of an appropriate mechanism in relation to the recognition and

[244] The Treaty on Legal Assistance was signed between Vietnam and Hungary on 18 January 1987.

[245] The Treaty on Legal Assistance was signed between Vietnam and the former Czechoslovakia on 12 October 1987. Subsequently, Slovakia adopted this treaty on 28 May 1993, while the Czech Republic adopted it on 30 September 1993.

[246] Trung Tin Nguyen, *Recognition and Enforcement of commercial arbitral awards in Vietnam (Công nhận và cho thi hành các quyết định của trọng tài thương mại tại Việt Nam)* (Justice Publisher 2005) 163 – 170.

[247] Agreement on the Reciprocal Promotion and Protection of Investments between Vietnam and Australia (signed on 5 March 1991).

[248] John Gillespie, 'Private Commercial Rights in Vietnam: A Comparative Analysis' (1994) Volume 30(2) Stan. J. Int'l L. 368.

[249] John Gillespie, 'Private Commercial Rights in Vietnam: A Comparative Analysis' (1994) Volume 30(2) Stan. J. Int'l L. 368.

enforcement of foreign awards vastly restricted the ability of a creditor to seek the enforcement of a foreign award in Vietnam.[250]

2. Ordinance of 1995

As previously mentioned, before joining the New York Convention, the recognition and enforcement of foreign arbitral awards was rarely sought in Vietnam.[251] This led to the practical result that several foreign awards in which foreign enterprises were the creditors, could not be enforced because the Vietnamese courts perceived international arbitration as a "*foreign process*", which could ultimately infringe upon national sovereignty.[252] Nevertheless, the perspective of the Vietnamese courts changed once they realised the importance and necessity of the recognition and enforcement of foreign arbitral awards in Vietnam. In order to create a trusted mechanism,[253] the Vietnamese Government decided to participate in the New York Convention pursuant to Decision No 453/QĐ–CTN of the Vietnamese President.

a) Decision No 453/QĐ–CTN

Decision No 453/QĐ–CTN of 14 September 1995 established a hallmark, because it
was the first time in the legal history of Vietnam that a specific legal instrument governed the recognition and enforcement of foreign arbitral awards in Vietnam.[254] Acceding to the New York Convention had numerous meanings for a developing country like Vietnam. Firstly, the recognition and enforcement of foreign arbitral awards was guaranteed under appropriate

[250] Thuy Tran Le, 'Vietnam: Can An Effective Arbitration System Exist?' (1997–1998) Volume 2 Loy. L.A. Int'l & Comp. L.J. 377.

[251] Thi Anh Thu Nguyen, 'The New York Convention on the Recognition and Enforcement of Foreign Arbitral Award and its application in Vietnam (Công ước New York 1958 về công nhận và cho thi hành phán quyết của trọng tài nước ngoài và việc thực hiện tại Việt Nam)' (LL.M Thesis, Law Faculty of Vietnam National University, 2002) 61.

[252] Thuy Tran Le, 'Vietnam: Can An Effective Arbitration System Exist?' (1997–1998) Volume 2 Loy. L.A. Int'l & Comp. L.J. 377.

[253] Hong Quy Mai, 'Practice of economic dispute resolution in accordance with the innovation of trade law (Thực tiễn giải quyết tranh chấp kinh tế với việc hoàn thiện pháp luật kinh doanh)' (Ministerial Study Project, Ho Chi Minh City University of Law 1997) 78.

[254] Van Hau Duong, *Vietnamese arbitration in the renovation progress (Trọng tài Việt Nam trong tiến trình đổi mới)* (National Political Publisher 1999) 254.

conditions and regulations in Vietnam. Thus, the implementation of the New York Convention was able to fill a legal gap in Vietnamese law. The clear and official legal framework[255] that recognised and enforced foreign awards promoted and encouraged the Vietnamese Government to protect the legitimate rights and interests of foreign investors, who have often been the creditors in foreign awards.[256] This circumstance helped to improve the confidence of foreign investors in the recognition and enforcement of foreign arbitral awards,[257] as well as in the legal environment of Vietnam.[258]

Lastly, acceding to the New York Convention set beneficiary conditions for Vietnam in the process of international economic integration. According to the wording of Decision No 453/QĐ–CTN, Vietnam is required to maintain three reservations listed in the New York Convention: the scope of application, the reciprocity principle[259] and the arbitrability of the dispute. Although some eminent scholars and practitioners have claimed that the reservations of the New York Convention are premised on the old principle of the universal applicability of international treaties and should be abolished,[260] those provisions on reservations continue to exist in the text of the Convention.

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[255] Thanh Huy Nguyen, 'Mechanism on enforcement of commercial arbitration – theoretical and practical features (Cơ chế thi hành quyết định của trọng tài thương mại – những vấn đề lý luận và thực tiễn)' (LL.M Thesis, Law Faculty of Vietnam National University 2009) 22.

[256] Thi Anh Thu Nguyen, 'The New York Convention on the Recognition and Enforcement of Foreign Arbitral Award and its application in Vietnam (Công ước New York 1958 về công nhận và cho thi hành phán quyết của trọng tài nước ngoài và việc thực hiện tại Việt Nam)' (LL.M Thesis, Law Faculty of Vietnam National University, 2002) 64.

[257] Judicial Scientific Institute of Vietnamese Supreme Court, 'Theoretic and practical matters on the recognition and enforcement of foreign court' judgments and foreign arbitral awards (Những vấn đề lý luận và thực tiễn của công nhận và cho thi hành tại Việt Nam bản án, quyết định dân sự của tòa án nước ngoài, quyết định của trọng tài nước ngoài)' (2009) Bulletin of Judicial Science 22.

[258] Trung Tin Nguyen, *Recognition and Enforcement of commercial arbitral awards in Vietnam (Công nhận và cho thi hành các quyết định của trọng tài thương mại tại Việt Nam)* (Justice Publisher 2005) 171.

[259] Richard Garnett and Kien Cuong Nguyen, 'Enforcement of Arbitration Awards in Vietnam' (2006) Volume 2(2) Asian International Arbitration Journal 139.

[260] Albert Jan van den Berg, *50 Years of the New York Convention (ICCA Congress Series No 14)* (Kluwer Law International 2009) 653.

(i) Application for solely other member states

Vietnam only acceded to the New York Convention in order to recognise and enforce foreign arbitral awards made in the territory of other member states of this Convention.[261] This reservation can be construed as the most popular one required by member countries. It leads to the circumstance whereby an arbitral award made in a non–member state of the New York Convention would not be recognised and enforced before Vietnamese courts pursuant to the regulations of this Convention.[262]

Some critics have argued that this reservation is essential and should not be withdrawn, as it stipulates a principle of fair treatment to foreign awards,[263] which requires that member states to the Convention must be treated better than other non–member states in the course of the recognition and enforcement of foreign awards. However, in order to encourage the recognition and enforcement of foreign arbitral awards in Vietnam irrespective of whether or not the country where the award was made is a party to the Convention, the withdrawal of this reservation is necessary and is reasonably acceptable.[264]

Vietnam can certainly learn from Germany's experience, after that country ratified the New York Convention on 30 June 1961 and it came into effect on 28 September 1961.[265] At the time of the ratification, Germany also upheld the reservation and required that only foreign awards made in another member state could be recognised and enforced. A respective decision issued in 1964 by the Higher Regional Court of Hamburg[266] refused to recognise a

[261] Article 2 of the Decision No 453/QĐ–CTN; Thi Bich Lien Bui, 'Arbitration in Vietnam' in Shahla F. Ali and Tom Ginsburg (eds), *International Commercial Arbitration in Asia* (3rd ed., Juris 2013) 588.

[262] As of acceding to the New York Convention, the Vietnamese authorities have not received any petition for the recognition and enforcement of a foreign award made in a non–member state to the Convention.

[263] Van Hoi Dao, *Renovating law on commercial dispute resolution in our country (Hoàn thiện pháp luật giải quyết tranh chấp kinh tế ở nước ta)* (National Political Publisher 2004) 151.

[264] Trung Tin Nguyen, 'On the conditions to recognise and enforce arbitral awards in Vietnam (Về các điều kiện công nhận và cho thi hành tại Việt Nam quyết định của trọng tài)' (2000) 6 State and Law Journal 36.

[265] Wolfgang Kühn, 'Current Issues on the Application of the New York Convention: A German Perspective' (2008) 25(6) Journal of International Arbitration 743.

[266] Higher Regional Court of Hamburg 15.04.1964 – 5 U 116/63.

certain award made in England as that country had not acceded to the Convention.[267] Nevertheless, in order to provide for a more generous mechanism to recognise and enforce foreign arbitral awards, Germany withdrew its previously mentioned reservation on 31 August 1998.[268]

(ii) Principle of reciprocity for non–member states

Even though the Vietnamese authorities have not faced any awards made in non– member states to the Convention, a respective award of this type can still be recognised and enforced in Vietnam in light of the "*principle of reciprocity*".[269] The principle of reciprocity is predicted in two cases: in the first case, Vietnam and the country of origin have a particular treaty on legal assistance, and in the second case, a treaty between Vietnam and the country of origin has not been established.[269] In the first case, it has been quite clear that an award made in another contracting country can obviously be petitioned for recognition and enforcement in Vietnam, under the provisions of the treaty.[270]

On the other hand, the second circumstance requires significant consideration. Along with the document service, witness appointments and evidence collection, the Vietnamese legislators

[267] The United Kingdom, (but not including Scotland) ratified the New York Convention on 24 September 1975 with effect as from 23 December 1975.

[268] Reimar Wolff (ed), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards – Commentary* (C.H.Beck–Hart–Nomos 2012) 559; Böcksteigel/Kröll/Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice* (2nd ed, Kluwer Law International 2015) 445. [269] Judicial Scientific Institute of Vietnamese Supreme Court, 'Theoretic and practical matters on the recognition and enforcement of foreign court's judgments and foreign arbitral awards (Những vấn đề lý luận và thực tiễn của công nhận và cho thi hành tại Việt Nam bản án, quyết định dân sự của tòa án nước ngoài, quyết định của trọng tài nước ngoài)' (2009) Bulletin of Judicial Science, 26; Article 2 of Decision
No 453/QĐ–CTN.

[269] Xuan Nhu Bui, 'Study on solutions to prevent legal risks in international commercial activities of Vietnamese enterprises (Nghiên cứu giải pháp tránh rủi ro pháp lý trong hoạt động thương mại quốc tế của doanh nghiệp Việt Nam)' (Ministerial Study Project, Ministry of Justice 2009) 52.

[270] For instance, North Korea is not a signatory of the New York Convention, but signed a treaty on legal assistance with Vietnam on 3 May 2002. The treaty mentions the mutual recognition and enforcement of arbitral awards. If the creditor of an arbitral award rendered in North Korea would like to file a petition for recognition and enforcement of an award in Vietnam, the Vietnamese court will apply the provisions of that treaty.

deliberated that the recognition and enforcement of foreign arbitral awards, as well as the recognition and enforcement of a foreign court's judgments, could be considered "*legal assistance*" in the field of transnational civil matters.[271] The principle of reciprocity in this instance is interpreted by the Vietnamese Ministry of Foreign Affairs, as well as by other Vietnamese ministries and organisations.[272] Unfortunately, there is still no specific legal document that provides for the principle of reciprocity in legal assistance between Vietnam and other countries.[273]

(iii) Arbitrability

A reservation relating to the arbitrability of a commercial dispute has also been a popular feature for the member states of the New York Convention. Several countries, including China, Denmark, Hungary, India, Nigeria, Poland, South Korea, the United States and so on, have only applied the New York Convention to recognise and enforce arbitral awards in connection with commercial disputes. This reservation was also suggested when Vietnam acceded to the Convention. It means that an award resolving a dispute arising out of a legal relationship rather than a commercial conflict will not be recognised and enforced in Vietnam by the Vietnamese jurisdictional courts.[274]

The term "*commercial relationship*" has not been defined in the Convention.[275] The limitation and scope of this term must, therefore, be interpreted based on the purpose of the Convention.

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[271] Article 10 of Law No 08/2007/QH12 on Legal Assistance (Law on Legal Assistance of 2007), enacted by the National Assembly on 21 November 2007.

[272] Article 66(1) of the Law on Legal Assistance.

[273] Part 2.2.6 of Report No 43/BC–TANDTC of 26 February 2015 on the Summary of 10 years of implementing the Civil Procedure Code of 2004 (amended in 2011) prepared by the Supreme Court.

[274] Pip Nicholson and Thi Minh Nguyen, 'Commercial Disputes and Arbitration in Vietnam' (2000) Volume 17(5) Journal of International Arbitration 3.

[275] The situation whereby contracting states determine the term "commercial relationship" pursuant to their own law can cause several problems, see: Blackaby/Partasides/Redfern/Hunter, *Redfern and Hunter on International Arbitration* (6th ed., Oxford University Press 2015) para. 11.47.

In accordance with the spirit of pro–recognition and pro–enforcement,[276] the Convention encourages and promotes member states to interpret the term "commercial relationship" as broadly as possible. In contrast, Vietnamese courts have tended to interpret the term "*commercial relationship*" quite narrowly,[277] and this negative attitude has led to the disadvantageous circumstance that many arbitral awards could not be recognised and enforced in Vietnam.[278]

(iv) Interpretation of the Convention

There are just three reservations in light of Decision No 453/QĐ–CTN.[279] However, certain commentators that have analysed the wording of Decision No 453/QĐ–CTN point out that, in addition to the three reservations listed above, Vietnam has another reservation, namely the role of Vietnamese law in interpreting the provisions of the Convention.[280] This observation seems to be an unpersuasive statement pursuant to both theoretical and practical perspectives. It also differs from most of the other member states of the New York Convention.[281]

Although Article III of the Convention states that the procedural rules of the enforcing country will definitely be applied for the whole process of the recognition and enforcement of foreign

[276] Kronke/Nacimiento/Otto (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International 2010) 116.

[277] Richard Garnett and Kien Cuong Nguyen, 'Enforcement of Arbitration Awards in Vietnam' (2006) Volume 2(2) Asian International Arbitration Journal 142; Xuan Hop Dang, 'Towards a Stronger Arbitration Regime for Vietnam' (2007) Volume 3(1) Asian International Arbitration Journal 83.

[278] Decision No 02/PTDS of 21 January 2003 of the Appellate Court of the Supreme Court in Ho Chi Minh City; Phuoc Hiep Hoang, 'Transposing international treaties that Vietnam signed and acceded to in order to serve the process of international economic integration (Nội luật hóa các điều ước quốc tế Việt Nam ký kết và tham gia phục vụ quá trình hội nhập kinh tế quốc tế)' (Ministerial Study Project, Legal Science Institute of Ministry of Justice 2006) 332.

[279] Van Hoi Dao, *Renovating law on commercial dispute resolution in our country (Hoàn thiện pháp luật giải quyết tranh chấp kinh tế ở nước ta)* (National Political Publisher 2004) 151.

[280] Thi Anh Thu Nguyen, 'The New York Convention on the Recognition and Enforcement of Foreign Arbitral Award and its application in Vietnam (Công ước New York 1958 về công nhận và cho thi hành phán quyết của trọng tài nước ngoài và việc thực hiện tại Việt Nam)' (LL.M Thesis, Law Faculty of Vietnam National University, 2002) 63.

[281] George A. Bermann (ed), *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts* (Springer 2017) 10.

arbitral awards,[282] it could not be construed that the domestic law of the enforcing country will prevail over the original spirit and wording of the Convention. As a result, the New York Convention should and must be interpreted by its initial spirit as well as its own wording, rather than the domestic laws of the member states.

Returning to the controversies between Vietnamese commentators, there is no doubt that the Vietnamese courts have to apply the rules set out in the current effective laws when assessing a petition for the recognition and enforcement of foreign arbitral awards in Vietnam. However, the term "*rules*" in this case must be understood as stages or steps in which the Vietnamese authorities and disputing parties conduct their mandates. The term "rules", as described in the text of Decision No 453/QĐ–CTN must be deliberated, as Vietnamese law cannot be the basis for interpreting the provisions of the New York Convention. Consequently, the provision of Decision No 453/QĐ–CTN reads that "*All interpretations of the Convention before Vietnamese courts and other authorities must be followed the Constitution and laws of Vietnam,*"[283] conveys that only procedural laws, rather than the substantive laws of Vietnam, can be used to interpret the provisions of the New York Convention, and that this statement could not be mentioned as a reservation.[284]

b) Implementation of the New York Convention in the Ordinance of 1995

Only a few days after acceding to the New York Convention, the National Assembly of Vietnam enacted the Ordinance on the Recognition and Enforcement of Foreign Arbitral Awards in Vietnam on 14 September 1995 (hereinafter the Ordinance of 1995).[285] This enactment set out the duties of Vietnam as a member of the Convention and prevailed willing

[282] Marike Paulsson, *The 1958 New York Convention in Action* (Kluwer Law International 2016) 23.

[283] Article 2 of Decision No 453/QĐ–CTN; Decision No 01/2013/QTST–KDTM of 27 May 2013 of the Provincial Court of Long An.

[284] Van Hoi Dao, *Renovating law on commercial dispute resolution in our country (Hoàn thiện pháp luật giải quyết tranh chấp kinh tế ở nước ta)* (National Political Publisher 2004) 151.

[285] Richard Garnett and Kien Cuong Nguyen, 'Enforcement of Arbitration Awards in Vietnam' (2006) Volume 2(2) Asian International Arbitration Journal 139.

commitments to protect the legitimate rights and interests of foreign investment via the recognition and enforcement of foreign arbitral awards in Vietnam.[286] The Ordinance of 1995, in three chapters and 24 articles, transposed the spirit of the New York Convention into the Vietnamese jurisdiction [287] and created the foundation for the procedure on the recognition and enforcement of arbitral awards.[288]

Due to the quintessence of *lex fori* in this procedure, some local features of Vietnamese law, which were not contrary to the New York Convention, were also provided for in the Ordinance of 1995. Core legal matters of procedure, including the definitions of a foreign award, the service of documents, grounds for a refusal, the role of procuracy and the ability to appeal the court's decision, were described clearly in the Ordinance of 1995. [289] The Ordinance provided the prevailing parties to foreign arbitral awards, as well as the relevant Vietnamese bodies, with fundamental incentives to undertake procedural stages and to understand their rights and obligations in the procedure of recognising and enforcing awards.[290] The Ordinance provided the prevailing parties to foreign arbitral awards a workable

[286] Phuoc Hiep Hoang, 'Transposing international treaties that Vietnam signed and acceded to in order to serve the process of international economic integration (Nội luật hóa các điều ước quốc tế Việt Nam ký kết và tham gia phục vụ quá trình hội nhập kinh tế quốc tế)' (Ministerial Study Project, Legal Science Institute of Ministry of Justice 2006) 225.

[287] Thi Anh Thu Nguyen, 'The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and its application in Vietnam (Công ước New York 1958 về công nhận và cho thi hành phán quyết của trọng tài nước ngoài và việc thực hiện tại Việt Nam)' (LL.M Thesis, Law Faculty of Vietnam National University, 2002) 66.

[288] Van Hoi Dao, *Renovating law on commercial dispute resolution in our country (Hoàn thiện pháp luật giải quyết tranh chấp kinh tế ở nước ta)* (National Political Publisher 2004) 152 – 154.

[289] Institute of Judicial Science of the People's Supreme Court, *Treatise on judicial science: Theoretical and practical matters of the recognition and enforcement of judgments, decisions of foreign courts and foreign arbitral awards (Chuyên đề khoa học xét xử: Những vấn đề lý luận và thực tiễn của công nhận và cho thi hành tại Việt Nam bản án, quyết định dân sự của Tòa án nước ngoài, quyết định của Trọng tài nước ngoài)* (2009) 22 – 23.

[290] Thong Anh Phan, 'The relationship between the court and the arbitration in arbitral procedure (Mối quan hệ giữa tòa án và trọng tài trong quá trình tố tụng trọng tài)' (LL.M Thesis, Ho Chi Minh City University of Law 2006) 40.

mechanism to exercise their rights in the course of the recognition and enforcement of foreign arbitral awards in Vietnam.[291]

c) Statistics and analyses

The number of petitions for the recognition and enforcement of foreign arbitral awards brought before Vietnamese jurisdictional courts at this time was exceedingly modest. By 2001, only a few petitions had been submitted, and those petitions were always unsuccessful.[292] Generally, from when Vietnam became a member of the New York Convention to May 2002, there were just eight petitions brought before Vietnamese courts, and only three of those were recognised and enforced.[293] The awards brought before Vietnamese courts were made in various countries such as Russia, China, France, Australia and Switzerland.[294]

The reason behind this phenomenon was that Vietnamese enterprises usually chose to go before national courts rather than arbitration, including both domestic and foreign arbitration institutions, in order to resolve their commercial disputes. In addition, Vietnamese courts were insufficiently experienced when facing this type of petition. Some courts even held the opinion that foreign arbitration would be considered foreign proceedings and did not have any connection with Vietnamese law. At the time, the Vietnamese courts were in favour of a *révision au fond* where those courts often tried to re–examine the merits of the dispute.[295]

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[291] Thong Anh Phan, 'The relationship between the court and the arbitration in arbitral procedure (Mối quan hệ giữa tòa án và trọng tài trong quá trình tố tụng trọng tài)' (LL.M Thesis, Ho Chi Minh City University of Law 2006) 40.

[292] Van Toan Truong & Sesto E *Vecchi*, 'Enforcing a Foreign Arbitral Award in Vietnam' (2001) Volume 29(7) International Business Lawyer 321.

[293] Van Hoi Dao, *Renovating law on commercial dispute resolution in our country (Hoàn thiện pháp luật giải quyết tranh chấp kinh tế ở nước ta)* (National Political Publisher 2004) 152.

[294] Thong Anh Phan, 'The relationship between the court and the arbitration in arbitral procedure (Mối quan hệ giữa tòa án và trọng tài trong quá trình tố tụng trọng tài)' (LL.M Thesis, Ho Chi Minh City University of Law 2006) 46.

[295] Thong Anh Phan, 'The relationship between the court and the arbitration in arbitral procedure (Mối quan hệ giữa tòa án và trọng tài trong quá trình tố tụng trọng tài)' (LL.M Thesis, Ho Chi Minh City University of Law

3. Civil Procedure Code of 2004 (amended in 2011)

a) Codification of the provisions on recognition and enforcement

Before the existence of a Code on Civil Procedure, there were three legislative documents providing for the procedure of dispute settlements in Vietnam,[296] including Ordinance No 27–LCT/HĐNN8 of 7 December 1989 on Procedures for the Settlement Civil Cases, issued by the State Council; the Ordinance on Procedures for Settling Economic Cases of 1994, enacted by the Standing Committee of the National Assembly (coming into force via Order No 31–L/CTN of the Vietnamese President of 29 March 1994); and the Ordinance on Procedures for Settling Labour Disputes of 1996 enacted by the Standing Committee of the National Assembly (coming into force via Order No 48–L/CTN of the Vietnamese President of 11 April 1996). In addition, the Ordinance on the Recognition and Enforcement of Foreign Judgement and the Ordinance of 1995 relate to the recognition and enforcement of foreign judgements and foreign arbitral awards.

The legal instruments mentioned above were issued at different times and several provisions were contradictory. Therefore, the respective courts applied them inappropriately and arbitrarily.[297] Moreover, those ordinances only regulated particular procedural matters; therefore, the lack of provisions on the general and fundamental principles of civil procedure was obvious.[298] This lack of provisions caused many varied challenges for Vietnamese courts when resolving cases not predicted by those instruments on civil procedure.[299]

2006) 46; Van Hoi Dao, Renovating law on commercial dispute resolution in our country (Hoàn thiện pháp luật giải quyết tranh chấp kinh tế ở nước ta) (National Political Publisher 2004) 152.

[296] Vietnamese Supreme Court, 'Report No 09/BC–TANDTC of 9 August 2010 of the Supreme Court on the Summary of five years of implementing the Code of Civil Procedure of 2004 (Báo cáo số 09/BC– TANDTC ngày 9/8/2010 của Tòa án nhân dân tối cao tổng kết 5 năm thi hành Bộ luật tố tụng dân sự).

[297] Cong Binh Nguyen, *Textbook on Civil Procedure Law (Giáo trình luật tố tụng dân sự)* (Justice Publisher 2006) 24.

[298] Vietnamese Supreme Court, 'Report No 09/BC–TANDTC of 9 August 2010 of the Supreme Court on the Summary of five years of implementing the Code of Civil Procedure of 2004 (Báo cáo số 09/BC– TANDTC ngày 9/8/2010 của Tòa án nhân dân tối cao tổng kết 5 năm thi hành Bộ luật tố tụng dân sự).

[299] Vietnamese Supreme Court, 'Report No 09/BC–TANDTC of 9 August 2010 of the Supreme Court on the Summary of five years of implementing the Code of Civil Procedure of 2004 (Báo cáo số 09/BC– TANDTC ngày 9/8/2010 của Tòa án nhân dân tối cao tổng kết 5 năm thi hành Bộ luật tố tụng dân sự).

In order to overcome the challenges and drawbacks of the contemporary circumstances, the Vietnamese National Assembly issued Code No 24/2004/QH11 on Civil Procedure of 15 June 2004 (hereinafter the Civil Procedure Code of 2004). This instrument was seen as the first codification of civil procedural provisions.[300] The Civil Procedure Code of 2004 was admired as a specific procedural law governing all relationships on civil and commercial matters in Vietnam. It officially marked a new development in the Vietnamese legal system, which helped surmount the scattered, contradictory and defected features of previous statutes.[301] Additionally, the Civil Procedure Code of 2004, with 418 articles in 36 chapters, regulated aspects of civil procedure, including fundamental principles, the court's jurisdiction, the rights and obligations of judicial bodies and parties, evidence and the burden of proof, interim measures, time limitations, proceedings to resolve civil cases and civil matters and the recognition and enforcement of foreign judgments and foreign arbitral awards.

The features of the recognition and enforcement of foreign arbitral awards were mostly set out in Chapter XXVI and Chapter XXIX. These chapters covered specific matters of the recognition and enforcement proceedings consisting of the definition of a foreign award, the principles of recognition and enforcement proceedings, the appealability of the court's decision, the service of documents, the role of procuracy and the grounds for a refusal to recognise and enforce an award. In compliance with the notion of the Civil Procedure Code of 2004, the recognition and enforcement of foreign arbitral awards was treated as a civil matter,[302] which indicated that parties only file petitions for certain requests, rather than initiate lawsuits against other parties before respective courts.[303] Therefore, in the absence of

[300] Cong Binh Nguyen, *Textbook on Civil Procedure Law (Giáo trình luật tố tụng dân sự)* (Justice Publisher 2006) 24.

[301] Cong Binh Nguyen, *Textbook on Civil Procedure Law (Giáo trình luật tố tụng dân sự)* (Justice Publisher 2006) 24.

[302] Article 26(5) of the Civil Procedure Code of 2004.

[303] Nguyen Gia Thien Le, 'Time limit to file petition for the recognition and enforcement of foreign arbitral awards: a comparative perspective' (2017) Volume 35(1) ASA Bulletin 105.

an applicable law for this recognition and enforcement, the general provisions on civil matters would be applied.[304]

Pursuant to the hierarchy of legal sources in Vietnam, the statutes, including codes and laws, have a more prevailing effectiveness in comparison to ordinances. Therefore, upgraded provisions on the recognition and enforcement of foreign arbitral awards by designing this legal procedure as chapters of the first Code of Civil Procedure was of great significance.[305] It demonstrated the consideration and willingness of the Vietnamese Government to comply with the application of the New York Convention.[306]

b) Localisation and misunderstanding of the regulations of the New York Convention

In contrast to countries choosing to apply the New York Convention directly, such as Germany after the reformation of arbitration law in 1998,[307] Vietnam has been inclined to transpose the provisions of the Convention into its national legislation by enacting statutes on the recognition and enforcement of foreign arbitral awards.[308] The Ordinance of 1995 was, as mentioned above, a completely copied version of the Convention, allowing significant similarities to the original version to be maintained. The divergence of those legal papers was really very limited in practice.

[304] Nguyen Gia Thien Le, 'Time limit to file petition for the recognition and enforcement of foreign arbitral awards: a comparative perspective' (2017) Volume 35(1) ASA Bulletin 105.

[305] Thi Anh Thu Nguyen, 'The New York Convention on the Recognition and Enforcement of Foreign Arbitral Award and its application in Vietnam (Công ước New York 1958 về công nhận và cho thi hành phán quyết của trọng tài nước ngoài và việc thực hiện tại Việt Nam)' (LL.M Thesis, Law Faculty of Vietnam National University, 2002) 92.

[306] Quang Chuc Tran, 'Recognition and Enforcement of Foreign Arbitral Awards in Vietnam' (2005) Volume 22(6) Journal of International Arbitration 487.

[307] Böcksteigel/Kröll/Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice* (2nd ed, Kluwer Law International 2015) 445, 446.

[308] Sy Chung Pham and To Uyen Phan, 'Support Vietnam in participating in ASEAN Economic Community Version: final report' (MUTRAP EU–Vietnam, December 2014) 12.

In an attempt to localise the provisions of the New York Convention, Vietnamese legislators tried to interpret those provisions while drafting the Civil Procedure Code of 2004. Unfortunately, due to a lack of practical experience with handling the recognition and enforcement of foreign arbitral awards, the provisions of the Civil Procedure Code of 2004 inappropriately reflected fundamental features of the New York Convention. This regrettable instance led to several challenges and obstacles, hindering the recognition and enforcement of foreign arbitral awards in Vietnam.[309]

Overall, the Civil Procedure Code of 2004 contradicted the Ordinance of 1995. In 2011, some provisions of the Civil Procedure Code of 2004 were amended when the National Assembly enacted Law No 65/2011/QH12 on Amending and Supplementing a Number of Articles of the Civil Procedure Code (hereinafter *the Civil Procedure Code of 2004 (amended in 2011)*). However, all the provisions on the recognition and enforcement of foreign arbitral awards remained unchanged.

c) Statistics and analyses

In Report No 305/BC–BTP of 18 December 2013 of the Ministry of Justice on Matters of Setting Aside a Domestic Arbitral Award and the Non–recognition and Enforcement of Foreign Arbitral Awards in Vietnam, the Ministry of Justice mentioned that, from 2010 to 2013, the number of petitions for the recognition and enforcement of foreign arbitral awards had been increasing year by year. The number of petitions from 2010, 2011, 2012, and from January to November 2013, were four, eight, 36 and 11 respectively. However, in particular in the first six months of 2013, six out of seven arbitral awards rendered by arbitration tribunals of the International Cotton Association were not recognised in Vietnam.

[309] Quang Chuc Tran, 'Recognition and Enforcement of Foreign Arbitral Awards in Vietnam' (2005) Volume 22(6) Journal of International Arbitration 488.

At a conference summarising 20 years of accession to the New York Convention, held by the Ministry of Justice on 21 November 2014, an officer representing the Supreme Court stated that, from 2004 to 2014, Vietnamese courts had received 52 petitions for the recognition and enforcement of foreign arbitral awards. Nevertheless, only 28 of these 52 petitions were recognised and enforced.[310]

Additionally, in a presentation by the Provincial Court of Ho Chi Minh City in the Seminar on Improving the Application of the New York Convention, held by Ministry of Justice on 8 December 2016,[311] a representative of this court stated that, from 2012 to 2016, this court had handled 26 petitions for the recognition and enforcement of foreign arbitral awards, and ten petitions had been rejected.

As part of acceding to the New York Convention, the Vietnamese Chamber of Commerce and Industry was to be appointed as the administrative body. However, once an official member of the Convention, the Vietnamese Government did not finally establish an official administrative body with the power to monitor the application and implementation of the New York Convention. Vietnamese authorities, including the courts and the Ministry of Justice, did not share information and statistics with others.[312]

Overall, the Vietnamese courts refused to recognise nearly half of all the petitions applying for the recognition and enforcement of foreign arbitral awards in Vietnam. This is a significant figure in comparison to the number of petitions recognised in other countries. The

[310] Vietnamese Supreme Court, Presentation of the Supreme Court at the Conference on Summarising 20 years After Acceding to the New York Convention, held by the Ministry of Justice on 21 November 2014.

[311] Provincial Court of Ho Chi Minh City, Contribution of the Provincial Court of Ho Chi Minh City in the Seminar on Improving the Application of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in Vietnam, held by Ministry of Justice on 8 December 2016.

[312] Thong Anh Phan, 'The relationship between the court and the arbitration in arbitral procedure (Mối quan hệ giữa tòa án và trọng tài trong quá trình tố tụng trọng tài)' (LL.M Thesis, Ho Chi Minh City University of Law 2006) 67.

main reason that led to this result was that the Vietnamese courts inappropriately applied the spirit of the New York Convention in three circumstances:[313]

(i) using Vietnamese substantive law in order to determine the legal capacity of a foreign party signing an arbitration agreement;
(ii) using Vietnamese procedural law in order to determine the appropriateness of the arbitral procedure;
(iii) using Vietnamese law in order to interpret foreign law.

Those inappropriate applications of the law in the procedure of adjudicating petitions for the recognition and enforcement of foreign arbitral awards led to the refusal of many foreign awards. Contradictions in legal provisions, as well as the inappropriate application of the New York Convention, would affect the business and investment environment in general and undermine the trust of foreign enterprises in the Vietnamese legal system. This challengeable situation would enable foreign enterprises to sue the Vietnamese Government under treaties for the economic encouragement and investment protection where Vietnam is a signatory.[314]

B. Current legal sources of the recognition and enforcement of foreign award in Vietnam

1. More favourable application in the New York Convention

The New York Convention has been the most sufficient legal instrument on the recognition and enforcement of foreign arbitral awards in Vietnam. Other instruments, including the law (e.g. civil procedure codes, arbitration laws), as well as soft law documents, such as decrees of the Government, circulars of ministries or resolutions of the Supreme Court, must follow the

[313] Report No 305/BC–BTP on 18 December 2013 of Ministry of Justice, Part 2 on Evaluating the circumstances of setting aside domestic arbitral awards and the non–recognition and enforcement of foreign arbitral awards.
[314] Report No 305/BC–BTP on 18 December 2013 of Ministry of Justice, Part 2 on Evaluation of the circumstances of setting aside domestic arbitral awards and the non–recognition and enforcement of foreign arbitral awards.

provisions of the New York Convention.[315] In the event that there are any conflicts between the New York Convention and Vietnamese legal instruments, the provisions of the Convention will definitely prevail over domestic laws, meaning that Vietnamese courts are obliged to apply those provisions.

Designed with a philosophy of pro–recognition and pro–enforcement, the New York Convention in its Article VII(1) says that *the provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States.* This observation has construed to mean that a member of the Convention could apply other treaties,[316] in both bilateral and unilateral forms, to deliberate the procedure of recognition and enforcement of foreign arbitral awards in its territory rather than the Convention.[317] This provision has often been mentioned as the principle of the "*more favourable application*", which is one of the essential reasons for the worldwide universal ratification of the New York Convention.[318]

Some exclusive jurisdictions, like Germany, have tended to pursue the New York Convention strictly and rejected the possibility of applying any other treaties that are more onerous to the recognition and enforcement of foreign arbitral awards. However, German legislators clearly set out in the Civil Procedure Code that *the provisions of other treaties on recognition and enforcement of foreign arbitral awards shall remain unaffected*.[319] It means that if there are

[315] Van Dai Do and Hoang Hai Tran, *Vietnamese Law on Commercial Arbitration (Pháp luật Việt Nam về trọng tài thương mại)* (National Political Publisher – The Truth 2011) 421.
[316] Gary B. Born, *International Arbitration: Law and Practice* (2nd ed., Kluwer Law International 2015) §1.04 para. 28.
[317] Marike Paulsson, *The 1958 New York Convention in Action* (Kluwer Law International 2016) 112.
[318] Reimar Wolff (ed), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards – Commentary* (C.H.Beck–Hart–Nomos 2012) 451.
[319] Article 1061(1) of the German Civil Procedure Code.

any other treaties more favourable to the recognition and enforcement of foreign arbitral awards, those treaties will prevail over the New York Convention.[320]

In the adjudicating practice of German courts, some courts have applied the provisions of treaties on legal assistance between Germany and other parties like the Soviet Union or Belgium to resolve a petition for the recognition and enforcement of foreign arbitral awards. However, the application of treaties on legal assistance other than the New York Convention has been extremely rare.[321]

In contrast to Germany, Vietnam has applied the New York Convention directly to arbitral awards rendered in another member state only if there is no bilateral treaty between Vietnam and that state. In the event that there is a bilateral treaty between Vietnam and a state providing for the recognition and enforcement of foreign arbitral awards, the bilateral treaty will be invoked if this treaty is more favourable than the New York Convention.[322]

2. Treaties on legal assistance between Vietnam and other parties

Legal assistance in the field of private law has been mentioned in several treaties on legal assistance between Vietnam and other countries. Assistance in private law involves three fundamental features: legal mandate, consular legalisation and recognition and enforcement of foreign courts' judgments and foreign arbitral awards.[323] Treaties on legal assistance between

[320] Böcksteigel/Kröll/Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice* (2nd ed., Kluwer Law International 2015) 47.

[321] Dennis Solomon, 'Interpretation and Application of the New York Convention in Germany' in George A. Bermann (ed), *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts* (Springer 2017) 335; Böcksteigel/Kröll/Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice* (2nd ed., Kluwer Law International 2015) 47.

[322] Nguyen Gia Thien Le and Thi Thuy Linh Nguyen, 'Recognition and enforcement of foreign arbitral awards in Vietnam: A perspective of the Treaties on Legal Assistance (Công nhận và cho thi hành phán quyết của trọng tài nước ngoài tại Việt Nam – Nhìn từ các hiệp định tương trợ tư pháp)' (2019) Volume 1 People's Court Journal 24.

[323] Thong Anh Phan, 'The relationship between the court and the arbitration in arbitral procedure (Mối quan hệ giữa tòa án và trọng tài trong quá trình tố tụng trọng tài)' (LL.M Thesis, Ho Chi Minh City University of Law 2006) 55.

Vietnam and other countries can be divided into three particular groups.[324] The first group includes treaties that do not touch on the recognition and enforcement of foreign arbitral awards at all, the second group includes treaties that invoke the New York Convention, while the third group includes treaties that provide for detailed regulations on the recognition and enforcement of foreign arbitral awards.

a) Treaties without any specific provisions on the recognition and enforcement of foreign arbitral awards

The Treaty on Legal Assistance in Civil, Family, Labour and Criminal Matters between Vietnam and Cuba,[325] the Treaty on Legal Assistance in Civil, Family and Criminal matters between Vietnam and Poland[326] and the Treaty on Legal Assistance in Civil, Family, Labour and Criminal matters between Vietnam and Belarus[327] do not include any provisions on the recognition and enforcement of foreign arbitral awards. Additionally, Cuba,[328] Poland[329] and Belarus[330] are official members of the New York Convention, so the recognition and enforcement of an award rendered in the territory of those states will be considered following the provisions of the New York Convention.[331]

[324] Nguyen Gia Thien Le and Thi Thuy Linh Nguyen, 'Recognition and enforcement of foreign arbitral awards in Vietnam: A perspective of the Treaties on Legal Assistance (Công nhận và cho thi hành phán quyết của trọng tài nước ngoài tại Việt Nam – Nhìn từ các hiệp định tương trợ tư pháp)' (2019) Volume 1 People's Court Journal 25 – 26.

[325] Signed in La Havana on 30 November 1984.

[326] Signed in Warsaw on 22 March 1993.

[327] Signed in Minsk on 14 September 2000.

[328] Cuba acceded to the Convention on 30 December 1974 with two reservations, including that it only applies to an award made in another member state, and only applies to commercial disputes.

[329] Poland acceded to the Convention on 10 June 1958 with two reservations, including that it only applies to an award made in another member state, and only applies to commercial disputes.

[330] Belarus acceded to the Convention on 29 December 1958 with one reservation that the recognition and enforcement of an arbitral award made in a non–contracting state will apply reciprocal treatment.

[331] Judicial Scientific Institute of Vietnamese Supreme Court, 'Theoretic and practical matters on the recognition and enforcement of foreign court' judgments and foreign arbitral awards (Những vấn đề lý luận và thực tiễn của công nhận và cho thi hành tại Việt Nam bản án, quyết định dân sự của tòa án nước ngoài, quyết định của trọng tài nước ngoài)' (2009) Bulletin of Judicial Science 79.

b) Treaties invoking the New York Convention

Eight out of 18 treaties providing for the recognition and enforcement of arbitral award in Vietnam invoke the New York Convention. Those are treaties on legal assistance between Vietnam and other parties including Russia,[332] China,[333] France,[334] Ukraine,[335] Algeria,[336] Kazakhstan[337] and Cambodia.[338] Those states are members of the New York Convention,[339] so invoking the Convention is meaningful. Firstly, the treaties guarantee the reservation of Vietnam, which only applies the Convention to other signatories. Secondly, the direct application of the New York Convention makes the procedure of the recognition and enforcement of foreign arbitral awards more convenient, because there are no divergences between the New York Convention and those treaties on legal assistance.

c) Treaties with provisions on the recognition and enforcement of foreign arbitral awards

Six out of the treaties that Vietnam signed clearly set out specific provisions on the recognition and enforcement of foreign arbitral awards. Vietnam signed those treaties with countries including the Czech Republic, Slovakia,[340] Bulgaria,[341] Hungary,[342] Laos,[343]

[332] Treaty on Legal Assistance in Civil and Criminal Matters between Vietnam and Russia, signed on 25 August 1998 in Moscow.

[333] Treaty on Legal Assistance in Civil and Criminal Matters between Vietnam and China, signed on 19 October 1998 in Beijing.

[334] Treaty on Legal Assistance in Civil Matters between Vietnam and France, signed on 24 February 1999 in Paris.

[335] Treaty on Legal Assistance in Civil and Criminal Matters between Vietnam and Ukraine, signed on 6 April 2000 in Kiev.

[336] Treaty on Legal Assistance in Civil and Commercial Matters between Vietnam and Algeria, signed on 14 April 2010 in Algiers.

[337] Treaty on Legal Assistance in Civil Matters between Vietnam and Kazakhstan, signed on 31 October 2011 in Hanoi.

[338] Treaty on Legal Assistance in Civil Matters between Vietnam and Cambodia, signed on 21 January 2013 in Hanoi.

[339] Russia, China, France, Ukraine, Algeria, Kazakhstan and Cambodia acceded to the New York Convention on 29 December 1958, 22 January 1987, 25 November 1958, 29 December 1958, 7 February 1989, 20 November 1995 and 5 January 1960 respectively.

[340] Treaty on Legal Assistance in Civil and Criminal Matters between Vietnam and the former Czechoslovakia, signed on 12 October 1982 in Prague. The Czech Republic and Slovakia succeeded this treaty.

[341] Treaty on Legal Assistance in Civil, Family and Criminal Matters between Vietnam and Bulgaria, signed on 3 October 1986 in Sofia.

Mongolia[344] and North Korea.[345] The provisions on the recognition and enforcement of foreign arbitral awards designated in those treaties are not similar to the New York Convention. Some treaties do not regulate particular stages of the recognition and enforcement of foreign awards in detail, while others merge the recognition and enforcement of foreign court judgments and the recognition and enforcement of foreign arbitral awards into a certain procedure.[346]

d) Observations and suggestions

Out of the three groups of treaties between Vietnam and other parties, the first group, which is silent on the recognition and enforcement, has been the most convenient to apply. The recognition and enforcement of awards involving countries in the second group is not complicated because all those treaties invoke the New York Convention. The last group, however, has caused challengeable applications for the recognition and enforcement due to those contradictions:

(i) many treaties ambiguously unify the recognition and enforcement of foreign arbitral awards and the recognition and enforcement of foreign judgement into one procedure;

(ii) provisions on the recognition and enforcement of foreign arbitral awards are not solidly concentrated, but dealt with in divergent provisions located in several parts;

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[342] Treaty on Legal Assistance in Civil, Family and Criminal Matters between Vietnam and Hungary, signed on 18 January 1987 in Hanoi.

[343] Treaty on Legal Assistance in Civil and Criminal Matters between Vietnam and Laos, signed on 6 July 1998 in Hanoi.

[344] Treaty on Legal Assistance in Civil, Family and Criminal Matters between Vietnam and Mongolia, signed on 17 April 2000 in Ulaanbaatar.

[345] Treaty on Legal Assistance in Civil and Criminal Matters between Vietnam and North Korea, signed on 3 May 2002 in Pyongyang.

[346] Judicial Scientific Institute of Vietnamese Supreme Court, 'Theoretic and practical matters on the recognition and enforcement of foreign courts' judgments and foreign arbitral awards (Những vấn đề lý luận và thực tiễn của công nhận và cho thi hành tại Việt Nam bản án, quyết định dân sự của tòa án nước ngoài, quyết định của trọng tài nước ngoài)' (2009) Bulletin of Judicial Science 83.

(iii) provisions on the recognition and enforcement of foreign arbitral awards are not consistent with the spirit of the New York Convention, making the procedure of recognition and enforcement in many cases more complicated and onerous.[347]

Other contradictions between the three groups of treaties between Vietnam and other parties have meant that some treaties require prevailing parties or creditors to foreign awards to apply the petitions for recognition and enforcement of the relevant award via the Ministry of Justice.[348] Meanwhile, other treaties force the prevailing parties to add certain legal papers that are not mentioned in Article IV of the New York Convention.[349] Such contradictions merely make the procedure for recognising and enforcing foreign arbitral awards in Vietnam more inconvenient and need to be amended.[350]

3. The Civil Procedure Code of 2015

a) Motivation and necessity to amend the Civil Procedure Code of 2004 (amended in 2011)

The Ministry of Justice published a report pointing out contradictions and challenges to the recognition and enforcement of foreign arbitral awards. Those include:[351]

[347] Judicial Scientific Institute of Vietnamese Supreme Court, 'Theoretic and practical matters on the recognition and enforcement of foreign courts' judgments and foreign arbitral award (Những vấn đề lý luận và thực tiễn của công nhận và cho thi hành tại Việt Nam bản án, quyết định dân sự của tòa án nước ngoài, quyết định của trọng tài nước ngoài)' (2009) Bulletin of Judicial Science 83.

[348] Thong Anh Phan, 'The relationship between the court and the arbitration in arbitral procedure (Mối quan hệ giữa tòa án và trọng tài trong quá trình tố tụng trọng tài)' (LL.M Thesis, Ho Chi Minh City University of Law 2006) 55.

[349] Nguyen Gia Thien Le and Thi Thuy Linh Nguyen, 'Recognition and enforcement of foreign arbitral awards in Vietnam: A perspective of the Treaties on Legal Assistance (Công nhận và cho thi hành phán quyết của trọng tài nước ngoài tại Việt Nam – Nhìn từ các hiệp định tương trợ tư pháp)' (2019) Volume 1 People's Court Journal 28 – 29.

[350] The uncertainty of those provisions and a proposal for reform will be demonstrated in subsequent parts.

[351] Thi Minh Ha Tran, Report proposing a mechanism for coordination and monitoring between related agencies to ensure the recognition and enforcement of foreign arbitral awards in accordance with the provisions of the New York Convention on the Recognition and Execution of Foreign Arbitration Awards, Part II: Practicing coordination and monitoring of the implementation of the New York Convention (Báo cáo đề xuất cơ chế phối hợp, theo dõi giữa các cơ quan liên quan nhằm đảm bảo việc công nhận và cho thi hành phán quyết trọng tài nước ngoài được thực hiện theo quy định của Công ước New York về Công nhận và Cho thi hành Phán quyết trọng tài nước ngoài, Phần II: Thực tiễn phối hợp và theo dõi thực hiện Công ước New York).

(i) the percentage of court decisions refusing to recognise foreign arbitral awards was considerable (46% petitions were refused recognition);

(ii) the real time of handling petitions for the recognition and enforcement of foreign arbitral awards takes longer than compared to the provisions set in the Civil Procedure Code of 2004 (amended in 2011);

(iii) the various courts are understanding and applying the provisions differently. (iv) the business of checking, summarising and promoting the code was not considered or conducted permanently.

The most decisive reason that led to uncertainty in practice when recognising and enforcing foreign arbitral awards in Vietnam was the unworkable provisions of the Civil Procedure Code of 2004 (amended in 2011). The provisions on the definition of a foreign arbitral award, the time limit by which to file a petition for recognition and enforcement, the service of documents, the role of procuracy, the burden of proof and the appealability of court' decisions as set out in the Civil Procedure Code of 2004 (amended in 2011) were so opaque, or even contrary to the clearly established regulations of the New York Convention.[352] Therefore, those provisions largely created challenges for Vietnamese courts while they dealt with suggestions for the recognition and enforcement of foreign arbitral awards.[353]

[352] Nguyen Gia Thien Le, 'Recognition and enforcement of foreign arbitral awards (Công nhận và cho thi hành phán quyết của trọng tài nước ngoài)' (2016) Volume 24 Legislative Studies Journal 46 – 51.

[353] Thi Minh Ha Tran, Report proposing a mechanism for coordination and monitoring between related agencies to ensure the recognition and enforcement of foreign arbitral awards in accordance with the provisions of the New York Convention on the Recognition and Execution of Foreign Arbitration Awards, Part II: Practicing coordination and monitoring of the implementation of the New York Convention (Báo cáo đề xuất cơ chế phối hợp, theo dõi giữa các cơ quan liên quan nhằm đảm bảo việc công nhận và cho thi hành phán quyết trọng tài nước ngoài được thực hiện theo quy định của Công ước New York về Công nhận và Cho thi hành Phán quyết trọng tài nước ngoài, Phần II: Thực tiễn phối hợp và theo dõi thực hiện Công ước New York)'.

b) A new dawn and some comments

After hearing the concerns of foreign companies, especially those that were the petitioners in recognition and enforcement procedures, and in order to establish a more arbitration–friendly mechanism by coming back to the intended spirit of the New York Convention, Vietnam had to check and amend all provisions relating to recognition and enforcement provided for in the Civil Procedure Code of 2004. The Supreme Court, as the appointed drafter of the new Civil Procedure Code, assessed that the inefficiencies in the Civil Procedure Code of 2004 (amended in 2011) were due to the lack of harmonised provisions on recognition and enforcement. Therefore, the Supreme Court decided to follow the direction of amending the provisions on the recognition and enforcement of foreign arbitral awards, rather than the direction of maintaining those contradictory provisions.[354]

The fundamental viewpoint of making the Civil Procedure Code of 2015 was to guarantee that the legal innovations meet the requirement of international integration, and that they comply with international treaties that Vietnam has signed or acceded to.[355] This viewpoint was obviously set out in the course of the recognition and enforcement of foreign arbitral awards. The features of recognising and enforcing foreign arbitral awards are governed in Chapter XXXVII of the Civil Procedure Code of 2015, with 13 articles (from Article 451 to Article 463).

As with the Civil Procedure Code of 2004 (amended in 2011), this chapter sets out the whole procedure that a petition for the recognition and enforcement of foreign arbitral awards should

[354] Group matter 11 of the Report No 23/BC–TANDTC on the Estimation of the effectiveness of the new draft of the Civil Procedure Code on 10 April 2015, composed by the Vietnamese Supreme Court.

[355] Vietnamese Supreme Court – US AIDS, 'Training Summary Record of Workshop on New Points of the Civil Procedure Code of 2015 and the New York Convention 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (Kỷ yếu tập huấn Những quy định mới của Bộ luật tố tụng dân sự 2015 và Công ước New York 1958 về Công nhận và cho thi hành phán quyết trọng tài nước ngoài)' (Vietnamese Supreme Court, 8/2016) 16.

undergo. Pursuant to the evaluation and the consideration of several opinions,[356] the Civil Procedure Code of 2015 has undergone notable efforts and introduced several innovations that almost overcome the previous contradictions existing in the Civil Procedure Code of 2004 (amended in 2011) and manage to strictly implement the application of the New York Convention 1958.[357] The encouraged innovations involve the time limits, the burden of proof, the service of documents, the types of documents and the role of procuracy.[358]

Nevertheless, in spite of revising several important matters, the Civil Procedure Code of 2015 is still considered one of the most controversial matters that must be taken into account before a jurisdictional court. The controversial matter seems to be the definition of a foreign arbitral award.

C. Definition of a foreign arbitral award

1. A foreign award under the New York Convention

a) Determination of an award

The drafters of the New York Convention were unable to come up with a suitable definition of the term "*arbitral award*",[359] so the formulations of the Convention remain silent on the definition of an arbitral award. This has led to scholars in the community of international arbitration developing two different ways to determine arbitral awards: *lex fori* and *lex arbitri*.[360]

[356] Nadia Dridi, 'The Enforcement of Foreign Arbitration Awards in Vietnam: Overview and Criticisms' (2017) Volume 59 Harvard International Law Journal.

[357] Eurocham in Vietnam, 'Whitebook 2017: Trade & Investment Issues and Recommendations' 18.

[358] Nguyen Gia Thien Le, 'Recognition and enforcement of foreign arbitral awards (Công nhận và cho thi hành phán quyết của trọng tài nước ngoài)' (2016) Volume 24 Legislative Studies Journal 46 – 51.

[359] Reimar Wolff (ed), New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards – Commentary (C.H.Beck–Hart–Nomos 2012) 32.

[360] Marike Paulsson, The 1958 New York Convention in Action (Kluwer Law International 2016) 98.

In light of Article III of the Convention, which allows the courts residing in the country to recognise and enforce, they are allowed to decide about the rules of procedure to recognise and enforce a foreign award. The first approach '*lex fori'* says that a court of the country where the recognition and enforcement is sought will totally base deliberations on its own law when determining whether a decision of an arbitral tribunal can constitute an award.[361] Nevertheless, this approach could lead in a direction contrary to the notion of the Convention,[362] because it supplies the national court with so much power to consider the notion of an award.

The second approach, by contrast, focuses on the '*lex arbitri*', which means that a decision of the tribunal could be determined as an award under the law of the seat of arbitration,[363] even though it cannot satisfy the requirements to become an award in the country of recognition and enforcement. This approach also involves inherent contradictions, because it leads to a situation whereby a national court has to consider an award that is in conflict with its own law.

In time, the prevailing view suggested helping the national courts recognising and enforcing foreign arbitral awards to overcome the challenges of the principles of both '*lex fori*' and '*lex arbitri*' by what has come to be known as "*autonomous interpretation*". The principle of autonomous interpretation can be construed as a persuasive method that a national court can wisely apply, because this principle is based on the purpose and philosophy of the New York Convention, which is in favour of recognition and enforcement. Thereupon, when a national court is faced with the question of the notion of an award, it can apply the '*lex arbitri*' principle, provided that this application follows in a pro–arbitration, pro–recognition and pro–

[361] John Savage and Emmanuel Gaillard, Fouchard Gaillard Goldman on International Commercial Arbitration (Kluwer Law International 1999) para. 1668.

[362] Reimar Wolff (ed), New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards – Commentary (C.H.Beck–Hart–Nomos 2012) 32.

[363] Karl Heinz Schwab and Gerhard Walter, Schiedsgerichtsbarkeit (C.H.BECK–Helbing & Lichtenhahn 2005) ch. 53, para. 2.

enforcement direction.[364] Notably, the definition of an award depends on the notion of the decision of the arbitral tribunal, rather than the title the tribunal adds to it.[365]

b) Types of award

A decision of an arbitral tribunal that is seeking recognition and enforcement has to meet two fundamental requirements in order to be an award: it has to be *final* and it has to be *binding*.[366] Finality means that the decision is final in the substances of the merits, no matter how partial or full it is.[367] Therefore, it guarantees the principle *res judicata*, which prevents a party from initiating a new procedure to resolve the same dispute in front of another forum. While the requirement of being binding does not lead to the validity of the award, it focuses on the possibility of recognition and enforcement [368] in front of a jurisdictional court. The prevailing notion in the field of international arbitration states that a binding award is an award that can meet all the circumstances to be declared enforceable in the country of origin.[369] Even though the New York Convention is silent on the types of foreign awards that can be recognised and enforced in another state, the experience of international arbitration indicates that there are several typical forms of foreign awards, including a final award, a partial award, an interim award, an award on cost, a default award and a consent award.[370] A *final award* deals with all claims on the merits of the dispute and brings an end to the arbitration

[364] International Council for Commercial Arbitration, *ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges* (Permanent Court of Arbitration 2011) 13, 14.

[365] Blackwater Security Consulting LLC et al. v. Richard P. Nordan, District Court, Eastern District of North Carolina, Northern Division, United States of America, 21 January 2011, 2:06–CV–49–F, cited in United Nations Commission on International Trade Law, *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (United Nations 2016) 214, 215.

[366] Reimar Wolff (ed), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards – Commentary* (C.H.Beck–Hart–Nomos 2012) 44 –53.

[367] Lew/Mistelis/Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 700.

[368] Gary B. Born, *International Arbitration: Law and Practice* (2nd ed., Kluwer Law International 2015) §17.05 para. 47.

[369] Karl Heinz Schwab and Gerhard Walter, *Schiedsgerichtsbarkeit* (C.H.BECK–Helbing & Lichtenhahn 2005) ch. 57, para. 20.

[370] International Council for Commercial Arbitration, *ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges* (Permanent Court of Arbitration 2011) 17 – 18. [372] Bernhard Berger and Franz Kellerhals, *International and Domestic Arbitration in Switzerland* (3rd ed., Stämpfli Publishers 2015) 589.

procedure.[372] After rendering a final award, the arbitral tribunal finishes its mandate, which means that the tribunal become *functus officio*. A *partial award* means an award determining a final decision on a certain part of the claims, leaving the remaining parts for subsequent stages of the arbitral procedure.[371] A *preliminary award*, also called an *interlocutory award*, often covers the matters necessary to dispose of the parties' claims, including the time limit, the law governing the merits, and/or the liability of the parties.[372] An *award on cost* includes contents relating to the amount and allocation of arbitration costs, or even extra costs and advanced costs that must be paid by a respective party to initiate the arbitration procedure. A *default award* is a decision resolving some or all of the substantive issues of the dispute and is rendered without the presence of a party.[373] Last but not least, a *consent award*, also known as an agreed award, is based on an amicable settlement between the parties to the dispute[374] and is mentioned in an award by the arbitral tribunal. By contrast, procedural orders and provisional measures, also called interim measures, do not satisfy the essential categories to be considered an award.[375]

c) Territorial approach and non–domestic approach

The New York Convention supposes two criteria when defining a foreign award: the *territorial approach* and *non–domestic approach*.[376] Under the territorial approach, a foreign award is *an award made in the territory of a state rather than the state where the recognition and enforcement are sought*.[377] While the non–domestic approach states that a foreign award

[371] Bernhard Berger and Franz Kellerhals, *International and Domestic Arbitration in Switzerland* (3rd ed., Stämpfli Publishers 2015) 589.

[372] Bernhard Berger and Franz Kellerhals, *International and Domestic Arbitration in Switzerland* (3rd ed., Stämpfli Publishers 2015) 591 – 593.

[373] John Savage and Emmanuel Gaillard, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) para. 1224.

[374] John Savage and Emmanuel Gaillard, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) para. 1364.

[375] Marike Paulsson, *The 1958 New York Convention in Action* (Kluwer Law International 2016) 198.

[376] Article I(1) of the New York Convention.

[377] Article I(1) of the New York Convention.

is also an award that is *not considered as a domestic award in the state where the recognition and enforcement are sought*.[378]

(i) According to the territorial approach, an award will be treated as a foreign award if it is rendered in a state other than the state where the recognising court is based.[379] Thereupon, nationalities, the place of residence or the headquarters of the conflicting parties do not have any bearing on the foreign status of an award.[380] For instance, an award held in Paris to resolve a dispute between two English companies would be considered a foreign award in front of an English court. The place of arbitration has been deemed a legitimate concept[381] rather than a geographical or physical one.[382] It is often depicted in the arbitration agreement via the consent of the parties. Without the parties' consent, the arbitral tribunal will deliberate it.[383]

(ii) Additional to the territorial approach, which has been widely applied in several member states,[384] the New York Convention also introduces another criterion for national courts to take into consideration: the non–domestic approach. Following the theory of the non– domestic approach, an award is also seen as a foreign award once it is rendered inside the state where the recognising court is based, but this award is

[378] Article I(1) of the New York Convention.

[379] This feature is only diminished when the recognising country applies a reciprocal treatment reservation with other member states of the Convention, see: Albert Jan van den Berg, *The New York Arbitration Convention 1958* (Kluwer Law and Taxation 1981) 12.

[380] International Council for Commercial Arbitration, *ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges* (Permanent Court of Arbitration 2011) 21.

[381] Gary B. Born, *International Arbitration: Law and Practice* (2nd ed., Kluwer Law International 2015) §6.01 para. 2.

[382] International Council for Commercial Arbitration, *ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges* (Permanent Court of Arbitration 2011) 21.

[383] Gary B. Born, *International Arbitration: Law and Practice* (2nd ed., Kluwer Law International 2015) §6.01 para. 2.

[384] Such as Australia, China, Croatia, Germany, Switzerland, Spain, Sweden, France and so on, see: George A. Bermann (ed), Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts (Springer 2017) 113.

not considered as a domestic award under this state's regulation.[385] The New York Convention does not contain any definition of a non– domestic award. It opens the door to national courts determining the qualifications of this type of award.[386]

2. A foreign arbitral award pursuant to German law

German courts have applied the principles of *lex arbitri* and autonomous interpretation[387] to hold whether an arbitral decision can be seen as an award. In a decision of the Federal Court of Justice, the court adjudicated that, based on the purpose of the New York Convention, an award that could not be enforced in the country of origin, is not enforceable in another contracting state.[388]

a) Exclusive territorial approach

The former German arbitration law read that an award could be determined as domestic or foreign, depending on the applicable law to the arbitral procedure.[389] However, this legal opinion has been abolished under the current law. The current law of Germany only applies the territorial approach, which means that German courts will merely consider the place of arbitration and will disregard any other elements.[390] Therefore, an award is construed as a foreign award when it is rendered outside of Germany,[391] even if an award issued in Zurich

[385] Gary B. Born, *International Arbitration: Law and Practice* (2nd ed., Kluwer Law International 2015) §17.01 para. 9.

[386] Sébastien Besson and Jean–François Poudret, *Comparative Law of International Arbitration* (Stephen Berti and Annette Ponti trs, 2nd ed., Sweet & Maxwell–Schulthess 2007) 91.

[387] Böcksteigel/Kröll/Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice* (2nd ed., Kluwer Law International 2015) 47.

[388] Federal Court of Justice, NJW 1982, 1224; Dennis Solomon, 'Interpretation and Application of the New York Convention in Germany' in George A. Bermann (ed), *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts* (Springer 2017) 332.

[389] Reisman/Craig/Park/Paulsson, *International Commercial Arbitration: Cases, Materials and Notes on the Resolution of International Business Disputes* (The Foundation Press 1997) 278.

[390] Dennis Solomon, 'Interpretation and Application of the New York Convention in Germany' in George A. Bermann (ed), *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts* (Springer 2017) 333.

[391] Article 1025(1) and Article 1025(4) of the German Civil Procedure Code.

under DIS Rules is to resolve a dispute between two German companies, this award would be determined as a foreign award.[392]

b) Types of foreign arbitral award

Contrary to countries that transplanted the provisions of the New York Convention into their own jurisdictions, Germany applies the regulations of the Convention directly.[393] German courts have a diversified tradition of being pro–recognition and enforcement of foreign arbitral awards. The awards that have been brought before German courts include most of the kinds of awards introduced in the course of international arbitration. Those types of awards include final awards, partial awards, interim awards, awards on cost as well as agreed awards.

The Higher Regional Court of Karlsruhe recognised and declared a final award made outside of Germany as enforceable.[394] In this case, the debtor did not file a petition to set aside this award before jurisdictional domestic courts in due time under the domestic law. The Higher Regional Court of Karlsruhe adjudicated that the debtor could not raise an objection to the constitution of the arbitral tribunal consisting of three arbitrators with the same nationality, because the debtor did not initiate the setting aside procedure.

The Higher Regional Court of Hamburg recognised and declared a foreign partial award issued by an ICC tribunal in Geneva as enforceable. This award concentrated on the determination of the tribunal on its own competence, as well as a decision on the costs of the arbitral procedure. As is clear from the award, it concerned two different types of awards: a partial award on the competence of the tribunal, as well as an award on costs. The Federal

[392] Higher Regional Court of Munich 14.11.2011 – 34 Sch 10/11, SchiedsVZ 2012, 43, para 37.
[393] Article 1061 of the German Civil Procedure Code.
[394] Higher Regional Court of Karlsruhe, 14.09.2007 – 9 Sch 2/07.

Court of Justice upheld the Higher Regional Court of Hamburg's decision and granted the enforcement of the award in Germany.[395]

In another case, a foreign interim award made in Zurich sought to be recognised and enforced in a matter before the Higher Regional Court of Thuringia. The court adjudicated that the tribunal's rules or decisions granting or rejecting the substances or merits of the dispute could be enforceable in Germany as an award, while rules or decisions granting or rejecting procedural features could not. In this case, the tribunal rendered an interim award authorising the applicant to use the know–how. The Higher Regional Court of Thuringia agreed to recognise and enforce the award, because it determined that this award covered a substantive matter.[396]

The types of foreign award seeking recognition and enforcement before German Higher Regional Courts have been diversified, which is a common phenomenon in the course of international arbitration. Nevertheless, there are some member states of the New York Convention that have provided for the concept of a foreign arbitral award contradictorily, as well as only accepting foreign final awards.[397] Vietnam is a typical example of such a state.

3. Vietnamese perception on foreign arbitral award

a) The nationality approach

(i) The Ordinance of 1995

Vietnamese law has preferred the terminology "*award of foreign arbitration*" to the more exact and common terminology "*foreign arbitral award*", as used in the New York

[395] Federal Court of Justice, 18.01.2007 – III ZB 35/06.

[396] Thüringer Oberlandesgericht: Zum Umfang der Überprüfungskompetenz des Vollstreckungsgerichts nach erfolglosem Aufhebungsverfahren im Ursprungsstaat (2008) 1 SchiedsVZ 44.

[397] Vietnamese Supreme Court – US AIDS, 'Training Summary Record of Workshop on New points of the Civil Procedure Code of 2015 and the New York Convention 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (Kỷ yếu tập huấn Những quy định mới của Bộ luật tố tụng dân sự 2015 và Công ước New York 1958 về Công nhận và cho thi hành phán quyết trọng tài nước ngoài)' (Vietnamese Supreme Court, August 2016) 17.

Convention as well as in other countries, such as Germany. The use of the term "award of foreign arbitration" was introduced in the Ordinance of 1995 and maintained until the current Arbitration Law of 2010. Article 1(1) of the Ordinance of 1995 clearly governed that *an award of foreign arbitration is an award rendered outside of the territory of Vietnam by arbitration chosen by the parties to the dispute*. Additionally, Article 1(2) provided that *an award of foreign arbitration is also an award rendered inside Vietnam by a non–Vietnamese arbitration tribunal*.

From a comparison of the Ordinance of 1995 and the New York Convention, it is obvious that the definition of an award of foreign arbitration under Article 1(1) of the Ordinance of 1995 fully implemented Article 1(1) of the New York Convention, because it was based on the territorial approach.[398] Article 1(2) of the Ordinance of 1995, meanwhile, was interpreted from Article 1(1) of the New York Convention. Under the provision of the New York Convention, a foreign arbitral award can also be an award that is not considered as a domestic award. Vietnamese law interpreted the term "*non–domestic award*" as meaning "*an award rendered inside of Vietnam, but not by a Vietnamese arbitration tribunal.*" At the time of the enactment of the Ordinance of 1995, the definition of Vietnamese arbitration was only understood as an arbitral tribunal established by Vietnamese economic arbitration centres.

Transparently, under the Ordinance of 1995 an award issued by a foreign arbitration tribunal, irrespective of where the arbitration is held, will always be determined as an award of foreign arbitration. This is the reason why Vietnamese law has tended to construe *a foreign arbitral award* as *an award of foreign arbitration*. Additionally, an award rendered by arbitral tribunals belonging to economic arbitration centres (Vietnamese arbitration) is clearly considered a domestic award. The question has been whether an award rendered by a

[398] Trung Tin Nguyen, 'On the recognition and enforcement of foreign arbitral award under the New York Convention 1958 (Về công nhận và cho thi hành quyết định của trọng tài nước ngoài theo Công ước New York 1958)' (2002) Volume 5 State and Law Journal 25.

Vietnamese arbitration outside of Vietnam would be an award of foreign arbitration or a domestic award. Given the territorial approach of Article 1(1) of the Ordinance of 1995, an award rendered by a Vietnamese arbitration outside of Vietnam would seem to be considered an award of foreign arbitration.

The Ordinance of 1995 was not particularly precise when implementing the spirit of the New York Convention to determine the concept of a foreign arbitral award, even though the terminological usage was still ambiguous. Nevertheless, adequate provisions of the Ordinance of 1995 became controversial regulations once they were set out in the Civil Procedure Code of 2004 (amended in 2011).

(ii) Civil Procedure Code of 2004 (amended in 2011)

The provisions of the Ordinance of 1995 relating to the recognition and enforcement of foreign arbitral awards were integrated into the Civil Procedure Code of 2004 (amended in 2011). This legal instrument regulated Part 6 on the recognition and enforcement of a judgment of a foreign court, as well as the recognition and enforcement of an award of foreign arbitration.

As described at Article 342(2) of the Civil Procedure Code of 2004 (amended in 2011), *an arbitral award of foreign arbitration is an award rendered inside or outside the territory of Vietnam by a foreign arbitration tribunal designated by parties in order to resolve disputes arising from business, commercial and labour transactions*.[399] It is inconclusive for the state that the terminology "*award of foreign arbitration*", created in the Ordinance of 1995 as a translated version of the more appropriate terminology "*foreign arbitral award*", was still being used by Vietnamese legislators.

[399] Cong Binh Nguyen, *Textbook on Civil Procedure Law (Giáo trình luật tố tụng dân sự*) (Justice Publisher 2006) 411 – 412.

Nevertheless, the scope of the definition of an award of foreign arbitration under the Civil Procedure Code of 2004 (amended in 2011) was broader and narrower than the scope of the same terminology under the Ordinance of 1995. The Civil Procedure Code of 2004 (amended in 2011) not only governs commercial awards, but also awards issued by foreign labour arbitration,[400] although no labour awards had been brought before the Vietnamese courts. As mentioned above, the Ordinance strictly followed the territorial approach of the New York Convention. By contrast, the Civil Procedure Code of 2004 (amended in 2011) merely took the "*nationality*" of the award into consideration.[401] Irrespective of the place where the award was rendered,[402] it will be considered an award of foreign arbitration if it is issued by a foreign arbitration tribunal.[403] Despite the lack of determination in the Civil Procedure Code of 2004 or in the Ordinance of 1995, foreign arbitration is taken to mean an *arbitral tribunal established under the law of a certain country, rather than Vietnam*.

Generally, the Civil Procedure Code of 2004 (amended in 2011) was a step back in comparison with the Ordinance of 1995, because its understanding could lead to a significant contradiction. The contradiction is whether an award issued outside Vietnam by a respective arbitral tribunal constituted under Vietnamese law is a domestic or a foreign arbitral award.[404] The answer cannot be given by directly applying the provisions of the Civil Procedure 2004 (amended in 2011).[405] The New York Convention, nonetheless, has the clear answer that this

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[400] Nguyen Gia Thien Le, 'Recognition and Enforcement of Foreign Arbitral Awards in Vietnam: Current Perspectives and Typical Cases' (2015) Volume 18(3) International Arbitration Law Review

[401] Hai Ha Do, 'Discourse on the definition of an award of foreign arbitration under the Civil Procedure Code of 2004 (Bàn về khái niệm quyết định của trọng tài nước ngoài theo Bộ luật tố tụng dân sự 2004)' (2007) Volume 5 Legal Science Journal 42.

[402] Hai Ha Do, 'Discourse on the definition of an award of foreign arbitration under the Civil Procedure Code of 2004 (Bàn về khái niệm quyết định của trọng tài nước ngoài theo Bộ luật tố tụng dân sự 2004)' (2007) Volume 5 Legal Science Journal 41 – 42.

[403] Xuan Hop Dang, 'Towards a Stronger Arbitration Regime for Vietnam' (2007) Volume 3(1) Asian International Arbitration Journal 86.

[404] Nguyen Gia Thien Le, 'Recognition and Enforcement of Foreign Arbitral Awards in Vietnam: Current Perspectives and Typical Cases' (2015) Volume 18(3) International Arbitration Law Review

[405] Van Dai Do and Hoang Hai Tran, *Vietnamese Law on Commercial Arbitration (Pháp luật Việt Nam về trọng tài thương mại)* (National Political Publisher – The Truth 2011) 421; Hai Ha Do, 'Discourse on the definition of

type of an award must be seen as a foreign award, as it is made outside the recognising country. Given the hierarchy of legal application in Vietnam, international treaties that Vietnam has been signed or is a member of will prevail over the domestic legal instruments. So the New York Convention will always be applied if there are any conflicted divergences between itself and the Civil Procedure Code of 2004 (amended in 2011) or other laws of Vietnam.[406]

(iii) Arbitration Law of 2010

Although the Civil Procedure Code of 2015 governs the whole procedure of the recognition and enforcement of foreign arbitral awards in Vietnam,[407] it does not contain any provision defining either foreign arbitration or an award of foreign arbitration. Article 424(3) of this legal instrument simply refers to the provisions of the Arbitration Law of 2010. The Arbitration Law of 2010 has an elaborate provision setting out a definition of foreign arbitration.

Article 3(1) of this law reads that *foreign arbitration means an arbitration established in accordance with the foreign arbitration law, which the parties agree to select to resolve their dispute resolution either inside or outside the territory of Vietnam*. Following the perception of the Arbitration Law of 2010, the nationality of a foreign arbitration is determined by the law of the country in which the arbitration is constituted.

The Arbitration Law of 2010, in its definition of an award of foreign arbitration, completely copies the notion of the Civil Procedure Code of 2004 (amended in 2011). Therefore,

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an award of foreign arbitration under the Civil Procedure Code of 2004 (Bàn về khái niệm quyết định của trọng tài nước ngoài theo Bộ luật tố tụng dân sự 2004)' (2007) Volume 5 Legal Science Journal 41 – 44.

[406] Van Dai Do and Hoang Hai Tran, *Vietnamese Law on Commercial Arbitration (Pháp luật Việt Nam về trọng tài thương mại)* (National Political Publisher – The Truth 2011) 421.

[407] Central Committee for Legal Education and Promulgation, Specific Issue on the Civil Procedure Code of 2015 (Hội đồng phổ biến, giáo dục pháp luật Trung ương, Đặc san tuyên truyền pháp luật: Chủ đề Bộ luật Tố tụng dân sự) (2016) 19.

contradictions that existed in the Civil Procedure Code of 2004 (amended in 2011) have not been solved appropriately in the current Arbitration Law of 2010.

b) Prerequisites of an award of foreign arbitration

In addition to being rendered by a foreign arbitration either inside or outside of Vietnam, Article 424(2) of the Civil Procedure Code of 2015 stipulates that *an award of foreign arbitration has to be the final award, resolving all the merits of the dispute, concluding arbitral proceedings and being enforceable*. The notion of this provision only seems to be harmonised with the full award in the practice of international arbitration. The concept of Vietnamese law is so narrow, meaning that this modest approach does not consider an award resolving only a certain part of the dispute's merits, and does not finish the arbitration procedure as an award of foreign arbitration.[408]

Nonetheless, Vietnamese courts, particularly the Provincial Court of Ho Chi Minh City, when faced with petitions for the recognition and enforcement of partial awards on the jurisdiction, rendered by tribunals that are established under the ICC Rules (Arbitration Rules of the International Court of Arbitration of International Chamber of Commerce),[409] has refused to recognise awards in those cases. Petitions for the recognition and enforcement of a partial award will normally be refused by a Vietnamese court pursuant to the unfortunate provisions of the Civil Procedure Codes.

Nevertheless, a theoretical question may arise whether the creditor can submit several partial foreign awards together covering all the merits of a dispute in order for the jurisdictional courts to recognise and enforce. The reality of Vietnamese court adjudications has proved that

[408] Duy Luong Tuong, *Commentaries on the Civil Procedure Code, Arbitration Law and adjudicating practice (Bình Luận Bộ Luật Tố Tụng Dân Sự, Luật Trọng Tài Thương Mại Và Thực Tiễn Xét Xử)* (Justice Publisher 2016) 37.

[409] Decision No 625/2012/QĐST–KDTM of 14 May 2012 of the Provincial Court of Ho Chi Minh City; Decision No 1499/2012/KDTM–QĐ of 28 September 2012 of the Provincial Court of Ho Chi Minh City.

this circumstance can be accepted. In one case, two awards rendered by an arbitral tribunal constituted by a United States' arbitration centre, named the Judicial Arbitration and Mediation Service (JAMS), were brought before the Provincial Court of Hanoi.[410] Two awards were issued by the tribunal, in turn, on 27 September 2013 and 9 December 2013. Those two respective awards together resolved the whole of the dispute arising out of a contribution contract between a Vietnamese company and a United States' enterprise. The court adjudicated that the tribunal had jurisdiction, the debtor lost his right to object and the awards were rendered validly. So, it seems to be possible to recognise and enforce two awards of the JAMS's arbitral tribunal at the same time. This seems to be a persuasive solution of Vietnamese courts in order to pursue the spirit of pro–recognition and pro–enforcement of the New York Convention.

In addition, an award on costs relating to the stages of arbitral procedure will not be recognised and enforced separately. Nevertheless, if an award on costs is submitted at the same time as another award resolving all the merits of the dispute, then it seems that both awards can be recognised and enforced. The Provincial Court of Hanoi followed this direction in its decision[411] accepting award No 60 and award No 101, rendered on 16 May 2016 and 31 August 2016 respectively, by an arbitral tribunal under SIAC Rules (Arbitration Rules of Singapore International Arbitration Centre).

The practice of recognition and enforcement of foreign awards before Vietnamese courts has not dealt with a petition relating to a consent award. On the contrary, it has witnessed a majority of submissions of default awards. In those awards, the creditors were usually foreign enterprises, while the debtors have been Vietnamese companies that were absent in the stages of the arbitration procedure taking place overseas. In some cases, Vietnamese parties did not receive procedural documents from the arbitral tribunals or the arbitration institutions. In other

[410] Decision No 05/2015/KDTM–ST of 25 December 2015 of the Provincial Court of Hanoi.

[411] Decision No 05/2017/QĐKDTM–ST of 21 July 2017 of the Provincial Court in Ha Hoi.

cases, Vietnamese parties intentionally refused to attend the proceedings, despite having received procedural documents served by the tribunals or the institutions.[412]

Another underlying feature in relation to the prerequisites of an award of foreign arbitration is that this award is only taken into consideration by Vietnamese courts when it bears an essence of enforceability. This point of view leads to a practical situation that the debtor to an award cannot file a petition for just recognition without the enforcement of a foreign arbitral award in Vietnam.[413]

The Vietnamese provincial courts have only taken the petition of the creditor into account if the debtor has assets in Vietnam.[414] In one particular case, the Provincial Court of Binh Thuan agreed to enforce a foreign award because, although the debtor did not have a residence in Vietnam, it held shares in a resort based in the Binh Thuan Province.[415] Similarly, the Provincial Court of Hung Yen handled a petition for the recognition and enforcement of a foreign award made by an Indonesia enterprise, where the debtor was a foreign company and had a business relationship with a Vietnamese company.[416] However, in the event that the debtor is dissolved and no natural or legal persons have inherited its assets, the court will

[412] Decision No 03/2015/QĐST–KDTM of 25 September 2015 of the Provincial Court of Hanoi; Decision No 05/2015/KDTM–ST of 25 December 2015 of the Provincial Court of Hanoi; Decision No 02/2016/QĐST–KDTM of 11 November 2016 of the Provincial Court of Binh Thuan; Decision No 09/2016/QĐST–KDTM of 20 September 2016 of the Provincial Court of Binh Duong; Decision No 05/2017/QĐKDTM–ST of 21 July 2017 of the Provincial Court of Hanoi; Decision No 156/2014/QĐST–KDTM of 26 February 2014 of the Provincial Court of Ho Chi Minh City.

[413] Article 425(1) of the Civil Procedure Code of 2015.

[414] Although some authors present that a petition for only the recognition of foreign award can be brought before a provincial court of Vietnam, in the practical experience of Vietnamese courts no decisions have ever been rendered resolving this matter, see: Institute of Judicial Science of the People's Supreme Court, Treatise on judicial science: *Theoretical and practical matters of the recognition and enforcement of judgments, decisions of foreign courts and foreign arbitral awards (Chuyên đề khoa học xét xử: Những vấn đề lý luận và thực tiễn của công nhận và cho thi hành tại Việt Nam bản án, quyết định dân sự của Tòa án nước ngoài, quyết định của Trọng tài nước ngoài)* (2009) 19.

[415] Decision No 02/2016/QĐST–KDTM of 11 November 2016 of the Provincial Court of Binh Thuan.

[416] Decision No 03/2007/ST–KDTM of 10 August 2007 of the Provincial Court in Hung Yen.

terminate the procedure of adjudicating the petition for the recognition and enforcement of a foreign award.[417]

c) Analyses and suggestions

More than 20 years after signing the New York Convention, Vietnamese legislators enacted three legal instruments to govern the recognition and enforcement of foreign arbitral award: the Ordinance of 1995, the Civil Procedure Code of 2004 and the Civil Procedure Code of 2015. Those legal documents have each had their own significance, while establishing an official legal framework for the specific civil procedure called the recognition and enforcement of foreign arbitral award in Vietnam. After analysing the provisions of those legal instruments, it becomes clear that Vietnamese law is gradually growing closer to the global standard of the New York Convention, as well as the practice of countries with more developed arbitration systems.

There are, nonetheless, several divergences between Vietnamese law and the New York Convention that could lead to uncertain contradictions. The potential proposals to amend such contradictions could be given as follows:

(i) From legal instruments including the Ordinance of 1995, the Civil Procedure Code of 2004 (amended in 2011) and the Civil Procedure Code of 2015, it is obvious that Vietnamese legislators have firmly preferred the term "award of foreign arbitration" to the term "foreign arbitral award". The former has been particularly used in Vietnamese laws, while the latter is globally applied in the national laws of most countries around the world, such as Germany. Indisputably, the language of the New York Convention has inclined member states to officially apply the latter. In Vietnam, the use of two terminologies has coming from academics as well as practitioners in the field of arbitration. Some scholars and arbitrators admire the

[417] Decision No 171/2009/QĐ–PT of 26 September 2009 of the Provincial Court of Ho Chi Minh City.

definitions of the foreign arbitral award,[418] while the others verbatim follow the definitions set out in the laws.[419] Obviously, the term 'award of foreign arbitration' could lead to contradictions, as mentioned above, so Vietnamese law should follow the more precise and common definition of the foreign arbitration award. To meet the standard practice of international arbitration, only the term 'foreign arbitration award' (also foreign arbitral award or foreign award) will be given hereinafter.

(ii) The Civil Procedure Code of 2015, along with its predecessor the Civil Procedure Code of 2004 (amended in 2011), stipulates the status of foreign arbitration by referring to its nationality rather than its venue. This means that, regardless of where the arbitration is held, an award is considered to be a foreign arbitral award when it is rendered by a foreign arbitration body constituted by the arbitration law of a country rather than Vietnamese law.[420] This approach may possibly be the genesis of the uncommon term 'award of foreign arbitration'.
The notion taken by Vietnamese law leads to the difficult situation of whether an award rendered outside of Vietnam by an arbitral tribunal established under Vietnamese law should be considered a foreign award or a domestic award.

(iii) Only *an award resolving all the merits of the dispute, finishing arbitral proceedings and being enforceable* can be taken into consideration for recognition and enforcement by the Vietnamese courts. As a result, a partial award and an award on cost cannot be recognised and enforced separately. Those awards must be submitted together with an award resolving the whole dispute on the merits. The current

[418] Van Dai Do, *Law on Vietnam Commercial Arbitration: Cases and Commentaries*, Volume 2 (Hong Duc Publishers – Vietnam Lawyer Association 2018) 5 – 7.
[419] Duy Luong Tuong, *Commentaries on the Civil Procedure Code, Arbitration Law and adjudicating practice (Bình Luận Bộ Luật Tố Tụng Dân Sự, Luật Trọng Tài Thương Mại Và Thực Tiễn Xét Xử)* (Justice Publisher 2016) 5 et seq.
[420] Duy Luong Tuong, *Commentaries on the Civil Procedure Code, Arbitration Law and adjudicating practice (Bình Luận Bộ Luật Tố Tụng Dân Sự, Luật Trọng Tài Thương Mại Và Thực Tiễn Xét Xử)* (Justice Publisher 2016) 39.

regulations and the notion of Vietnamese law can lead to several drawbacks in comparison with the practice of international arbitration. This is because, in the course of international arbitration, partial awards as well as awards on costs can definitely be recognised and enforced by national courts.[421] Therefore, the terms "*resolving all the merits of the dispute*" and "*finishing arbitral proceedings*" as set out in Article 424(2) of the Civil Procedure Code of 2015, should be abolished. As a result, partial awards and awards on costs, in line with the practice of international arbitration, should also be recognised and enforced before Vietnamese jurisdictional courts.

(iv) A petition only for recognition cannot be brought to a Vietnamese court because the current provisions of Vietnamese law only provide for the recognition and enforcement of an award that can be enforced. This notion seems to be quite distant from the practice of international arbitration[422] which also tends to pursue a solution whereby a creditor can lodge a petition before a respective national court for the recognition of a foreign award only,[423] in order to prevent the debtor from initiating a new lawsuit.[424] Accordingly, Vietnamese jurisdictional courts would be able to render decisions only to recognise foreign awards.

[421] Lew/Mistelis/Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 73.

[422] Blackaby/Partasides/Redfern/Hunter, *Redfern and Hunter on International Arbitration* (6th ed., Oxford University Press 2015) para. 11.23.

[423] Kronke/Nacimiento/Otto (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International 2010) 149.

[424] Van Dai Do, *Law on Vietnam Commercial Arbitration: Cases and Commentaries*, Volume 2 (Hong Duc Publishers – Vietnam Lawyer Association 2018) 471 – 474.

D. Time limit in which to file a petition for recognition and enforcement

1. Notion of the time limit

When the debtor to a foreign arbitral award chooses to contest the enforcement, the creditor, in order to exercise their rights and legitimate interests, will take the award to a national court in order to enforce it. One of the most significant features that the creditor has to take into account is whether the time limit in which to file a petition has been exceeded or not.[425] If the time limit has passed, the creditor cannot exercise their legal rights before the desired court.[426]

Although the New York Convention has been admired as the best legal framework for the recognition and enforcement of foreign arbitral awards across the world,[427] it does not cover the whole procedure of recognition and enforcement. The New York Convention allows the national legislation of member states to establish their own procedural instruments. The time limit, also called the statute of limitations, by which a party has to file a petition for the recognition and enforcement of a foreign award is one feature that the New York Convention is silent about.[428] The national court will apply its *lex fori* to determine this time limit.[429] As there is no limit to the number of petitions that can be made by a party under the New York

[425] Nguyen Gia Thien Le, 'Time limit to file petition for the recognition and enforcement of foreign arbitral awards: a comparative perspective' (2017) Volume 35(1) ASA Bulletin 96.

[426] Van Dai Do, 'Time limit for filing a petition for the recognition and enforcement of an award of foreign arbitration in Vietnam (Thời hiệu yêu cầu công nhận và cho thi hành quyết định của trọng tài nước ngoài tại Việt Nam)' (2015) Volume 13 People's Court Journal 16.

[427] Mauro–Rubino Sammartano, *International Arbitration: Law and Practice* (Kluwer Law International 2001) 943.

[428] George A. Bermann (ed), *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts* (Springer 2017) 67; Kronke/Nacimiento/Otto (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International 2010) 127.

[429] Reimar Wolff (ed), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards – Commentary* (C.H.Beck–Hart–Nomos 2012) 199.

Convention,[430] the creditor can submit its petition for the recognition and enforcement to the national courts as often as desired, provided that it is within the time limits.

Notably, pursuant to the spirit of Article III of the New York Convention, a member state cannot impose more onerous conditions, higher fees or charges on the recognition or enforcement of foreign arbitral awards than on the recognition or enforcement of domestic arbitral awards. It is inferred that, under the law of certain member states, the suggested time limit for filing a petition for the recognition and enforcement of foreign arbitral awards cannot be shorter than the time limit within which to file a petition for the recognition and enforcement of domestic arbitral awards in the state.

2. Time limit under the laws of member states

Relating to the time limit in which to file a petition for the recognition and enforcement of the foreign arbitral award, the member states of the Convention are divided into two groups. The jurisdictions in the first group have transparently provided for the time limit in their laws, while the states in the second group have not regulated any articles on this matter.

a) Group 1: Member states that have provisions on a time limit

The time limit in which to file a petition for the recognition and enforcement of a foreign arbitral award is determined by the domestic procedural laws of the member states, so this time limit varies from one jurisdiction to the next.[431] The member states of civil law countries perceive the time limit as a component of substantive law and regulate this matter in their civil codes. Accordingly, the time limit in Article 3:324 of the Dutch Civil Code is ten years; in Article 705(1) of the Romanian Civil Code it is three years; and in Article 156 of the Turkish

[430] Nguyen Gia Thien Le, 'Time limit to file petition for the recognition and enforcement of foreign arbitral awards: a comparative perspective' (2017) Volume 35(1) ASA Bulletin 99.

[431] Nguyen Gia Thien Le, 'Time limit to file petition for the recognition and enforcement of foreign arbitral awards: a comparative perspective' (2017) Volume 35(1) ASA Bulletin 97.

Code of Obligations it is ten years.[432] The time limit in the civil codes of both Georgia and Latvia is also ten years.[433] In Portugal, if the arbitral tribunal applies Portuguese substantive law to resolve the merits, the time limit will be 20 years pursuant to Article 309 of the Civil Code; otherwise, it is determined based on the *lex causae*.[434]

In the other hand, the member states of common law countries conceive the course of the time limit as a part of procedural law,[435] describing it accordingly in their procedural law. The Limitation Act 1963 of India sets out five types of time limits, namely one, two, three, 12 and 30 years. The high courts of India have determined that the prevailing party to a foreign arbitral award has three years in which to apply for its recognition and enforcement. This three– year period starts from the first day that the right to apply for the enforcement comes into force.

In the case *Noy Vallesina Engineering Spa v Jindal Drugs Limited Company,* the High Court in Bombay (currently Mumbai) applied a three–year period when considering a petition for the recognition and enforcement of an award made by an ICC arbitral tribunal. In this case, the court adjudicated that the time limit began from the day when the prevailing party received the award, rather than the day when that award came into force.[436]

[432] George A. Bermann (ed), *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts* (Springer 2017) 728, 791, 974.

[433] Sophie Tkemaladze and Inga Kacevska, 'Procedure and Documents under Articles III – IV of New York Convention on Recognition and Enforcement of Arbitral Awards: Comparative Practice of Latvia and Georgia' (2013) Volume 12 European Scientific Journal 461.

[434] George A. Bermann (ed), *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts* (Springer 2017) 68.

[435] Reimar Wolff (ed), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards – Commentary* (C.H.Beck–Hart–Nomos 2012) 199.

[436] Nguyen Gia Thien Le, 'Time limit to file petition for the recognition and enforcement of foreign arbitral awards: a comparative perspective' (2017) Volume 35(1) ASA Bulletin 102.

In Canada, each province or territory has its own regulation on the time limit.[437] In a case heard by the Court of Appeal in the Province of Alberta,[438] this court applied a two–year time limit set in the Limitation Act of this province. The court determined that this period was rational. The Supreme Court later upheld this decision.[439]

b) Group 2: Member states that do not have any provisions on a time limit

Certain member states, including Brazil, Croatia, Greece, South Korea, Singapore and Switzerland, do not stipulate the feature of a time limit within which the creditor must file for the recognition and enforcement of a foreign arbitral awards.[440] Due to the non–existence of a time limit in those countries, a creditor can bring an award before a jurisdictional court based in those countries for recognition and enforcement at any time he or she wishes.

In the specific case of Germany, two positions are subject to the time limit within which to file for the recognition and enforcement of foreign arbitral awards. The first tends to determine that the time limit will be a 30–year period,[441] based on Article 197(1)(2) of the German Civil Code, while the second argues that there is no time limit at all.[442] In a recent case, the Higher Regional Court of Frankfurt[443] held a declaration of enforceability of an award rendered in Albania. The award was issued in 1993, while the creditor's petition for the recognition and enforcement was lodged with the court in 2016. The time period in this case was more than 23 years, but the court still accepted the creditor's petition.

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[437] Olga Gil Research Services, 'Limitation Periods in Canada's Provinces and Territories' (August 2008).

[438] Yugraneft Corp. v Rexx Management Corp. 2007 ABQB 450.

[439] Yugraneft Corp. v. Rexx Management Corp., 2010 SCC 19, [2010] 1 S.C.R. 649.

[440] George A. Bermann (ed), *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts* (Springer 2017) 68.

[441] Kronke/Nacimiento/Otto (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International 2010) 127.

[442] Reimar Wolff (ed), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards – Commentary* (C.H.Beck–Hart–Nomos 2012) 199; Dennis Solomon, 'Interpretation and Application of the New York Convention in Germany' in George A. Bermann (ed), *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts* (Springer 2017) 374.

[443] Higher Regional Court of Frankfurt 5.12.2016 – 26 Sch 2/16, BeckRS 2016, 117314.

3. Vietnamese law's perceptions

The time limit within which a creditor has to file a petition for the recognition and enforcement of a foreign award in Vietnam has witnessed a significant change from instrument to instrument. The provisions of the three legal instruments – the Ordinance of 1995, the Civil Procedure Code of 2004 (amended in 2011) and the Civil Procedure Code of 2015 – have each treated the matter differently.

a) Ordinance of 1995

The Ordinance of 1995, which was the first legal document on the recognition and enforcement of foreign awards in Vietnam, did not provide for any regulations on a time limit for the creditor to file for recognition and enforcement. Thereupon, it was inferred that there was no time limit under the Ordinance of 1995. It also meant that the creditor of a foreign arbitral award could take this award to a Vietnamese jurisdictional court at any time. In practice, cases handled by Vietnamese courts at this time meant that the creditors did not wait for long, but applied for the recognition and enforcement of foreign awards just months after the awards were rendered.

In a case heard before the Provincial Court of Lam Dong, a Korean company submitted an application and attached the relevant documents to the Ministry of Justice quickly. The award was made in Geneva on 4 April 2001, while the court received the documents on 9 July 2001. The Provincial Court decided to recognise and enforce the respective award without mentioning the time limit.[444]

In another case, this time between a Japanese company (with a subsidiary in Singapore) and a Vietnamese enterprise, the dispute was resolved by foreign arbitration via the enactment of an award on 12 April 2001. On 25 May 2001, the Japanese company filed a petition for the

[444] Decision of 18 December 2001 of the Provincial Court of Lam Dong.

recognition and enforcement of the award with the Ministry of Justice. The Ministry of Justice handled the application form as well as the attached documents, then served them to the Provincial Court of Hanoi. This court declared a decision on the recognition and enforcement of this foreign award. In this decision, the court also did not mention the time limit.[445]

b) Civil Procedure Code of 2004 (amended in 2011)

Similar to the regulations in the Ordinance of 1995, the Civil Code of 2004 did not establish any provisions on a time limit for the creditor to file a petition for the recognition and enforcement of a foreign award in Vietnam. Nevertheless, while the Ordinance of 1995 was absolutely silent on the time limit, the Civil Procedure Code of 2004 stated that the creditor had one year in which to file a petition for the recognition and enforcement of a foreign award in Vietnam. [446]

The term "*the day that the right to petition arises*" caused several contradictions and challenges for the courts to understand and apply, and it was clear the Vietnamese courts did not have a common view on this matter.[447] In comparison to other legislations, the one–year time limit was too short[448] and only the former provisions of Chinese laws had the same limitation.[449] There were suggestions that the time limit for filing a petition for the recognition and enforcement of a foreign arbitral award should be increased during discussions on

[445] Decision No 01/QĐ of 21 September 2001 of the Provincial Court in Hanoi.

[446] Article 159(4) of the Civil Procedure Code of 2004; Nguyen Gia Thien Le, 'Time limit to file petition for the recognition and enforcement of foreign arbitral awards: a comparative perspective' (2017) Volume 35(1) ASA Bulletin 105.

[447] Report No 43/BC–TANDTC of 26 February 2015 on the Summary of 10 years of implementing the Civil Procedure Code of 2004 (amended in 2011) prepared by the Supreme Court.

[448] Van Dai Do, 'Time limit for filing a petition for the recognition and enforcement of an award of foreign arbitration in Vietnam (Thời hiệu yêu cầu công nhận và cho thi hành quyết định của trọng tài nước ngoài tại Việt Nam)' (2015) Volume 13 People's Court Journal 10.

[449] Li Hu, 'Enforcement of Foreign Arbitral Awards and Court Interpretation in the People's Republic of China' (2004) Volume 20(2) Arbitration International 167.

amendments to the Civil Procedure Code. Unfortunately, the Civil Procedure Code amended in 2011 was still silent on the time limit.[450]

In practice, the courts in Vietnam strictly interpreted the term that the right to petition arises on "*the day when the arbitral award is legally valid.*" In a typical case handled by the Provincial Court of Long An, the court received a petition for the recognition and enforcement of a foreign award rendered on 6 February 2013 by an arbitral tribunal of the International Cotton Association. The court refused to recognise the underlying award because it had been submitted to the Ministry of Justice more than one year after the first day on which it became valid.[451] At the appeal stage before the Appellate Court of the Supreme Court in Ho Chi Minh City, the creditor argued that the necessary documents had been lodged with the Ministry of Justice on 25 January 2014. Therefore the time limit, in his view, had not yet ended. However, the Appellate Court of the Supreme Court in Ho Chi Minh City expressed that, although the creditor had submitted the documents for the request for recognition and enforcement on 25 January 2014, the notarised translation of those papers was not included at that time. Thereupon, the day when he fulfilled the application of the documents under the request of the Ministry of Justice would be counted as the official day of application, i.e. 14 February 2014. Accordingly, the Appellate Court upheld the decision of the Provincial Court of Long An and held that the petition of the creditor could not be recognised in Vietnam.[452]

It is obvious that the Appellate Court of the Supreme Court in Ho Chi Minh City was not wrong[453] by applying the time limit of one year set out in Article 159(4) of the Civil

[450] Art 1(22) of Law No 65/2011/QH12 of 29 March 2011 on Amendments of the Civil Procedure Code of 2004 issued by the National Assembly.

[451] Decision of 6 June 2014 of the Provincial Court of Long An.

[452] Decision No 08/2015/QĐKDTM–PT of 6 March 2015 of the Appellate Court of the Supreme Court in Ho Chi Minh City.

[453] Van Dai Do, 'Time limit for filing a petition for the recognition and enforcement of an award of foreign arbitration in Vietnam (Thời hiệu yêu cầu công nhận và cho thi hành quyết định của trọng tài nước ngoài tại Việt Nam)' (2015) Volume 13 People's Court Journal 10.

Procedure Code of 2004.[454] However, the approach that the court followed seems to be too strict and partly insufficient, given the New York Convention's spirit of pro–recognition and pro– enforcement. In another case,[455] the time limit had not run out, so the respective Appellate Court did not present any details on the time limit and took the other features of the award into account.

c) Civil Procedure Code of 2015 and comments

After the creditor to a foreign arbitration receives the award sent by the arbitral tribunal or the arbitration institution, they must find out where the assets of the debtor are located. This means that the creditor needs time to determine the state in which to lodge the petition for recognition and enforcement to the court. Under the provision of the Civil Procedure of 2004, the one–year period was too short[456] for the creditor to exercise their legitimate right to file for the recognition and enforcement of a foreign arbitral award in Vietnam. This insufficient provision significantly limited the rights and interest of the creditor in practice.[457] The short one–year period not only caused several challenges for creditors,[458] but it was also contrary to the philosophy of pro–recognition set out in the New York Convention as well as the practice of international arbitration.

While the Civil Procedure Code was being amended, there was an idea that the new code should extend the time limit for filing a petition for recognition and enforcement up to three

[454] Part 2.2.6 of Report No 43/BC–TANDTC of 26 February 2015 on the Summary of 10 years of implementing the Civil Procedure Code of 2004 (amended in 2011) prepared by the Supreme Court. [457]

[455] Decision No 142/2005/QĐPT of 12 July 2005 rendered by the Appellate Court of Supreme Court in Hanoi.

[456] Anh Tuan Tran, *Academic commentary on the Civil Procedure Code of 2015 (Bình luận khoa học Bộ luật tố tụng dân sự 2015)* (Justice Publisher 2017) 956.

[457] Nguyen Gia Thien Le, 'Recognition and enforcement of foreign arbitral awards (Công nhận và cho thi hành phán quyết của trọng tài nước ngoài)' (2016) Volume 24 Legislative Studies Journal 46.

[458] Nguyen Gia Thien Le, 'Recognition and enforcement of foreign arbitral awards (Công nhận và cho thi hành phán quyết của trọng tài nước ngoài)' (2016) Volume 24 Legislative Studies Journal 46.

years or even five.[459] In additional, the Vietnamese courts interpreted the opaque term "*the day when the right of petition arises*" as the day when the arbitral award came into force. As this interpretation was unclear, it was argued that this term should be amended.

In the process of amending the Civil Procedure Code, the general provisions on recognition and enforcement and the specific provisions on the time limit were taken into account by the legislators. The Civil Procedure Code of 2015 established a workable provision on this time limit. Accordingly, the time limit within which a petitioner must file a request for the recognition and enforcement of a foreign arbitral award in Vietnam is now three years, starting from the day when the award comes into force.[460] This regulation plays an important role,[461] as it clearly indicates the time limit that the petitioner has to take into account. The day when the time limit commences is appropriate[462] and clear for all the parties involved, as well as the court receiving the petition for recognition and enforcement.

In a case handled by the Provincial Court of Binh Thuan, the court calculated exactly that there were ten months and 23 days between the day when the award came into force and the day when the creditor submitted a petition for its recognition and enforcement in Vietnam.[463] The time limit was therefore satisfied and this provincial court granted a decision to recognise and enforce the award in Vietnam.

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[459] Duy Luong Tuong, *Commentaries on the Civil Procedure Code, Arbitration Law and adjudicating practice (Bình Luận Bộ Luật Tố Tụng Dân Sự, Luật Trọng Tài Thương Mại Và Thực Tiễn Xét Xử)* (Justice Publisher 2016) 27.

[460] Article 451(1) of the Civil Procedure Code of 2015.

[461] Anh Tuan Tran, *Academic commentary on the Civil Procedure Code of 2015 (Bình luận khoa học Bộ luật tố tụng dân sự 2015)* (Justice Publisher 2017) 954.

[462] Anh Tuan Tran, *Academic commentary on the Civil Procedure Code of 2015 (Bình luận khoa học Bộ luật tố tụng dân sự 2015)* (Justice Publisher 2017) 955.

[463] Decision No 02/2016/QĐST–KDTM of 11 November 2016 of the Provincial Court in Binh Thuan.

E. Service of Documents

1. Types of submitted documents

Article IV of the New York Convention sets out the fundamental requirements of formalities that the party filing a petition for the recognition and enforcement of a foreign award must fulfil. [464] Accordingly, along with the application, the petitioner must supply a *duly authenticated original award, or a duly certified copy thereof, and the original arbitration agreement, or a duly certified copy thereof. Those documents may be translated into a respective language that the national court can read and understand*. These documents must be supplied in all cases of recognition and enforcement, thereby creating an exhaustive condition,[465] so that the petitioner does not need to provide any other documents.[466]

Notably, the spirit and notion of the submission in this stage are only to show the recognising court that those documents duly exist, and that the arbitration actually took place. Therefore, this submission only serves evidentiary purposes[467] and the legal validity of those documents is not taken into consideration. Pursuant to Article VII of the New York Convention, which enables the member state to apply a more generous and favourable approach to the recognition and enforcement of a certain arbitral award, the court of the recognising country may accept the petition even if the petitioner cannot provide at least one of those documents.[468]

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[464] Böcksteigel/Kröll/Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice* (2nd ed., Kluwer Law International 2015) 145.

[465] Böcksteigel/Kröll/Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice* (2nd ed., Kluwer Law International 2015) 149.

[466] Reimar Wolff (ed), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards – Commentary* (C.H.Beck–Hart–Nomos 2012) 208.

[467] Reimar Wolff (ed), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards – Commentary* (C.H.Beck–Hart–Nomos 2012) 209.

[468] Reimar Wolff (ed), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards – Commentary* (C.H.Beck–Hart–Nomos 2012) 209.

In the case of Vietnam, the provisions on the types of submitted documents via three legal instruments in relation to the recognition and enforcement of foreign arbitral awards in Vietnam, including the Ordinance of 1995, the Civil Procedure Code of 2004 (amended in 2011) and the Civil Procedure of 2015, have had several divergences.

a) Ordinance of 1995

Article 10 of the Ordinance of 1995 reads that the petitioner, which in most cases will be the creditor, seeking the recognition and enforcement of a foreign arbitral award in Vietnam had to submit an application form to the Ministry of Justice.[469] This application form included certain information – the name, address, residence or representative of the creditor or the debtor. If the debtor had no address and no place of residence in Vietnam, then the petitioner had to indicate where the debtor's property could be found in Vietnam.[470] In addition to the information required concerning the creditor, the debtor or the debtor's property, the petitioner also needed to set out its motion carefully in the application form. In the event that the application form was composed in a language other than Vietnamese, it was required that the form be translated into Vietnamese.[471]

Along with the application form, the petitioner was required to attach other documents described in international treaties to which Vietnam was a signatory or member.[472] This provision seemed unclear, it meant that the enforcing courts could interpret that the award had been rendered in a country that had a treaty on legal assistance with Vietnam, or by a foreign arbitration. It was noticed that this provision did not exclude the application of the New York Convention.

[469] Pip Nicholson and Thi Minh Nguyen, 'Commercial Disputes and Arbitration in Vietnam' (2000) Volume 17(5) Journal of International Arbitration 4.

[470] Trung Tin Nguyen, *Recognition and Enforcement of commercial arbitral awards in Vietnam (Công nhận và cho thi hành các quyết định của trọng tài thương mại tại Việt Nam)* (Justice Publisher 2005) 287.

[471] Trung Tin Nguyen, *Recognition and Enforcement of commercial arbitral awards in Vietnam (Công nhận và cho thi hành các quyết định của trọng tài thương mại tại Việt Nam)* (Justice Publisher 2005) 288.

[472] Article 11 of the Ordinance of 1995.

If the international treaties were silent on the attached documents, the petitioner had to submit, along with the application form, an original or certified copy of the foreign award, and an original or certified copy of the original arbitration agreement, complying with Vietnamese law. If these documents were drafted in a language other than Vietnamese, they had to be translated into Vietnamese in compliance with Vietnamese law. Significantly, the arbitration agreement had to be in writing, and it could be mentioned in an underlying contract, arising out of a separate agreement or an exchange of documents.

b) Civil Procedure Code of 2004 (amended in 2011)

Article 364 of the Civil Procedure Code of 2004 stipulated regulations on the application form that a petitioner seeking the recognition and enforcement of a foreign arbitral award in Vietnam must pursue. Accordingly, the application form would cover the name, address or place of residence of both the creditor and the debtor, or its representatives.[473] In the event that the debtor did not have an address or residence in Vietnam, the petitioner had to demonstrate where the debtor's property could be found in Vietnam. In addition to the information on the creditor, the debtor and the enforced property, the petitioner had to carefully present his or her motion in the application form.[474] If the application form was drafted in a language other than Vietnamese, it had to be translated into Vietnamese. Obviously, Article 364 of the Civil Procedure Code of 2004 was a verbatim copy of Article 10 of the Ordinance of 1995. Nevertheless, the regulations on the documents that had to be attached to the application form under the Civil Procedure Code of 2004 had several differences in comparison to the provisions under the Ordinance of 1995.

In the event that the international treaties were silent on the attached documents, the petitioner had to submit, along with the application, a certified copy of the foreign award and a certified

[473] Trung Tin Nguyen, *Recognition and Enforcement of commercial arbitral awards in Vietnam (Công nhận và cho thi hành các quyết định của trọng tài thương mại tại Việt Nam)* (Justice Publisher 2005) 288.

[474] Cong Binh Nguyen, *Textbook on Civil Procedure Law (Giáo trình luật tố tụng dân sự)* (Justice Publisher 2006) 419.

copy of the arbitration agreement. If the documents were written in a language other than Vietnamese, they were to be translated into Vietnamese. Under the Civil Procedure of 2004, the petitioner seeking the recognition and enforcement of an award was unable to submit the original foreign award and the original arbitration agreement.[475] This concept seemed to go strongly against the spirit of the New York Convention, as it created a more onerous condition for the petitioner. When, in 2011, amendments were considered overdue the Civil Procedure Code of 2004, the legislators did not raise any concerns regarding this contradiction, so the provisions continued to exist.

The adjudicating practice of Vietnamese provincial courts under the validity of the Civil Procedure Code of 2004 (amended in 2011) witnessed a strict application of the Article 364 of this Code, under which the courts only accepted petitions for the recognition and enforcement of a foreign award if it was submitted along with a certified copy of the foreign arbitral award and a certified copy of the arbitration agreement.

Although the New York Convention only requires the petitioner to supply an original or certified copy of the foreign arbitral award and an original or certified copy of the arbitration agreement, the adjudicating practice of Vietnamese provincial courts meant that petitioners often applied legal papers in order to confirm their legal status. In a petition for the recognition and enforcement of a foreign award, the creditor submitted an award rendered in Singapore and a contract between the parties including the arbitration clause. In addition, the creditor submitted a document of commercial registration to assert their own legal status.[476]

The jurisdictional courts of Vietnam were rather strict concerning the copies of the arbitration agreement and the foreign award; those documents had to be direct copies of the original documents. Even if the documents were printed from any of the creditor's computers, the

[475] Nguyen Gia Thien Le, 'Recognition and enforcement of foreign arbitral awards' (2016) Volume 24 Legislative Studies Journal 48.

[476] Decision No 156/2014/QĐST–KDTM of 26 February 2014 of the Provincial Court of Ho Chi Minh City.

jurisdictional courts could dismiss them.[477] This point of view seemed to be onerous because, in compliance with the fundamental aim of the New York Convention, the petitioner only had the burden of proof to show the respective courts the existence of a foreign award and an arbitration agreement at the stage of submitting the documents.[478] The application form, the foreign award and the arbitration agreements had to be translated into Vietnamese and certified or authenticated by the relevant Vietnamese authorities, which are normally either public or private notaries, or the local government of a district of a province or city under central authority. The translated versions had to be served along with the application form. If the translated versions were served later, the court could refuse to accept the petition for recognition and enforcement due to it exceeding the time limits.[479]

c) Civil Procedure Code of 2015

The Civil Procedure Code of 2015 has been applauded as an effective legal instrument harmonised with the New York Convention, as it has amended several drawbacks relating to the provision on the recognition and enforcement of foreign awards described in the Civil Procedure Code of 2004 (amended in 2011).[480] The provisions on the content of an application form have been maintained in the Civil Procedure Code of 2015, but the provisions on the attached documents have changed appropriately.

Compared to the Civil Procedure Code of 2004 (amended in 2011), regulations on the documents that have to be attached together with the application under the Civil Procedure Code of 2015 have been broadened to allow original foreign awards as well as original

[477] Decision No 176/2014/QĐKQTM–ST of 4 March 2014 of the Provincial Court of Ho Chi Minh City.

[478] Kronke/Nacimiento/Otto (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International 2010) 164, 168.

[479] Van Dai Do, *Law on Vietnam Commercial Arbitration: Cases and Commentaries (Pháp luật Việt Nam về trọng tài thương mại: Bản án và Bình luận)*, Volume 2 (Hong Duc Publishers – Vietnam Lawyer Association 2018) 298; Decision of 6 June 2014 of the Provincial Court of Long An.

[480] Nguyen Gia Thien Le, 'Recognition and enforcement of foreign arbitral awards' (2016) Volume 24 Legislative Studies Journal 45.

arbitration agreements.[481] This provision reflects the true wording of Article IV of the New York Convention and upholds the due rights and legitimate interests of the petitioner. Pursuant to the Civil Procedure Code of 2015, a petitioner has the right to submit either an original version of the foreign award or a certified copy of it; they can also submit an original version or certified copy of the arbitration agreement to the Vietnamese authorities. The petitioner has to submit the entire award as well as a document including the arbitration agreement.

Moreover, all the documents, including the arbitral award, arbitration agreement and other non–mandatory papers, such as the commercial registration certification and so on, must be translated into Vietnamese, because any documents in a foreign language will not be acknowledged by the Vietnamese courts.

d) Treaties on legal assistance

In the event that a foreign award was rendered in a country that does not have a treaty on legal assistance with Vietnam, the petitioner only needs to submit, along with the application form, the documents listed in Article IV of the New York Convention. However, the situation seems to be more complicated when a foreign award is issued in a country that has signed a treaty on legal assistance with Vietnam.

Due to the range of regulations described in treaties on legal assistance between Vietnam and other countries, certain differences among the provisions on the recognition and enforcement of foreign arbitral awards rendered in those countries are inevitable. Treaties between Vietnam and parties such as Cuba, Poland, Belarus, Russia, China, France, Ukraine, Algeria, Kazakhstan and Cambodia have either not regulated the recognition and enforcement of foreign arbitral awards, or simply make reference to the New York Convention. Therefore, when arbitral awards are made in these countries, the creditor to an award must duly serve the

[481] Article 453 of the Civil Procedure Code of 2015.

original or a certified copy of the arbitral award as well as the original or a certified copy of the arbitration agreement together with the application form.[482]

On the other hand, treaties on legal assistance between Vietnam and the Czech Republic, Slovakia, Bulgaria, Hungary, Laos, Mongolia and North Korea have provisions regulating the recognition and enforcement of foreign awards.[483] Generally, those regulations have several contradictions and challenges, including:[484]

(i) those treaties merge the recognition and enforcement of a foreign arbitral award and the recognition and enforcement of foreign decisions or judgments;
(ii) the petitioner has to provide a document that confirms the validity of the foreign award;
(iii) the petitioner has to prove that the debtor was duly and legally summoned .

In their essence, the recognition and enforcement of foreign arbitral awards and the recognition and enforcement of foreign decisions or judgments have totally divergent procedures, so merging of such regulations into the same provisions would seem to be inappropriate. More significantly, it is unreasonable for those treaties to force the petitioner, in most cases the creditor, to prove the validity of the foreign award and the fact that the debtor

[482] Nguyen Gia Thien Le and Thi Thuy Linh Nguyen, 'Recognition and enforcement of foreign arbitral awards in Vietnam: A perspective of the Treaties on Legal Assistance (Công nhận và cho thi hành phán quyết của trọng tài nước ngoài tại Việt Nam – Nhìn từ các hiệp định tương trợ tư pháp)' (2019) Volume 1 People's Court Journal 25.
[483] Nguyen Gia Thien Le and Thi Thuy Linh Nguyen, 'Recognition and enforcement of foreign arbitral awards in Vietnam: A perspective of the Treaties on Legal Assistance (Công nhận và cho thi hành phán quyết của trọng tài nước ngoài tại Việt Nam – Nhìn từ các hiệp định tương trợ tư pháp)' (2019) Volume 1 People's Court Journal 26.
[484] Judicial Scientific Institute of Vietnamese Supreme Court, 'Theoretic and practical matters on the recognition and enforcement of foreign courts' judgment and foreign arbitral award (Những vấn đề lý luận và thực tiễn của công nhận và cho thi hành tại Việt Nam bản án, quyết định dân sự của tòa án nước ngoài, quyết định của trọng tài nước ngoài)' (2009) Bulletin of Judicial Science, 83.

was summoned legally.[485] Those provisions can contradict Article IV and Article V of the New York Convention because, under the pro–recognition and pro–enforcement spirit of the convention, the creditor does not have to prove any documents other than the documents described in Article IV.[486]

Under the principle of the more favourable right, which is set out in Article VII of the New York Convention, international conventions or treaties on the legal assistance between countries can only be applied by national courts if those conventions or treaties are less onerous and more friendly to the recognition and enforcement of foreign awards in comparison to the New York Convention.[487] Although the Vietnamese provincial courts have not yet handled any cases relating to the suggestion of the recognition and enforcement of arbitral awards rendered inside the Czech Republic, Slovakia, Bulgaria, Hungary, Laos, Mongolia and North Korea, the Vietnamese courts should not apply these provisions of treaties on legal assistance between Vietnam and such countries.

2. Role of the Ministry of Justice

In the area of international arbitration, it is typically the higher level courts, normally the courts of appeals or the provincial courts, that have the authority to receive the application form and attached documents served by a petitioner that has filed for the recognition and enforcement of a foreign award. In the particular circumstance of Germany, for example, only the respective higher regional courts with jurisdiction over the place where the debtor resides or has its headquarters has the authority to accept petitions for the recognition and enforcement of foreign arbitral awards.[488] If the property or the headquarters of the debtor is

[485] Duy Luong Tuong, *Commentaries on the Civil Procedure Code, Arbitration Law and adjudicating practice (Bình Luận Bộ Luật Tố Tụng Dân Sự, Luật Trọng Tài Thương Mại Và Thực Tiễn Xét Xử)* (Justice Publisher 2016) 41, 42.

[486] Kronke/Nacimiento/Otto (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International 2010) 187 – 188.

[487] Reimar Wolff (ed), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards – Commentary* (C.H.Beck–Hart–Nomos 2012) 451, 452.

[488] Article 1062 of German Civil Procedure Code.

unidentified or not located in Germany, then the Higher Regional Court of Berlin (*Kammergericht*) is the competent court.[489]

The direct way in which a petitioner submits the application form and attached documents to a Higher Regional Court is more convenient in several ways. As there is no intermediate authority, the jurisdictional court receiving the materials served by the petitioner will also play the role of the adjudicating authority. This feature helps to save time in handling the case and makes the procedure of considering a petition for the recognition and enforcement of a foreign arbitral award be perceived as a "*real judicial procedure*".

In other specific countries, like Vietnam, the recognition and enforcement of foreign arbitral awards has, in its essence, become to be viewed as a semi–judicial procedure or as an administrative–judicial procedure. This is because the Ministry of Justice, which is seen as an administrative organ, also takes part in the recognition and enforcement of foreign arbitral awards.

a) Administrative role of the Ministry of Justice

According to the provisions of the Ordinance of 1995, the Ministry of Justice was the administrative body that received application forms and attached documents lodged by petitioners.[490] This was maintained in the Civil Procedure of 2004 (amended in 2011),[491] which established that the petitioner could not serve the application form and attached documents directly to courts with their jurisdiction in Vietnam.[492]

[489] Böcksteigel/Kröll/Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice* (2nd ed., Kluwer Law International 2015) 447.

[490] Article 10(1) of the Ordinance of 1995.

[491] Article 364(1) of the Civil Procedure Code of 2004.

[492] Cong Binh Nguyen, *Textbook on Civil Procedure Law (Giáo trình luật tố tụng dân sự)* (Justice Publisher 2006) 409.

Nevertheless, a significant and innovative change was brought in under the Civil Procedure Code of 2015. Article 451(1) of the Civil Procedure Code of 2015 stipulates that the petitioner only has to submit the application form and attached documents to the Ministry of Justice if the award is rendered in a country that has a treaty on legal assistance with Vietnam.[493] If not, the petitioner is able to serve both the application form and the attached documents to the Vietnamese jurisdictional provincial courts.

The international treaties in which Vietnam has taken part include the New York Convention and the individual treaties on legal assistance between Vietnam and other countries. While the New York Convention has made way to national law in relation to the procedure of the recognition and enforcement, treaties on legal assistance can be split into two underlying groups.

The first one group involves treaties between Vietnam and Bulgaria, Mongolia (if the debtor does not have a residence or place of business in Vietnam), North Korea, China, France, Ukraine, Algeria, Kazakhstan and Cambodia. The relevant regulations are not displayed clearly in those treaties, but with reference to the other articles of certain treaties, it could be inferred that if an award is made in these countries, the petitioner has to submit the application form and the attached documents to the Ministry of Justice.

On the other hand, the second group includes treaties between Vietnam and Cuba, Poland, Belarus, the Czech Republic, Slovakia, Hungary and Mongolia (if the debtor does has a residence or place of business in Vietnam). When an award is made in any of these countries, the petitioner can lodge the application form and attached documents directly with a provincial court.

[493] Nguyen Gia Thien Le and Thi Thuy Linh Nguyen, 'Recognition and enforcement the foreign arbitral awards in Vietnam: A perspective of the Treaties on Legal Assistance (Công nhận và cho thi hành phán quyết của trọng tài nước ngoài tại Việt Nam – Nhìn từ các hiệp định tương trợ tư pháp)' (2019) Volume 1 People's Court Journal 27.

If an award is issued in a country other than the countries listed in the two groups mentioned above, such as Germany, Switzerland, Singapore etc., the petitioner can also serve the application form and attached documents to a jurisdictional provincial court.

The provisions establishing which authorities are entitled to receive the application form and the attached documents could lead to contradictions. It is also possible that they could extend the time of handling the case, as well as lead to an inequality between awards due to the place of arbitration. From practical experience, the provincial courts in Vietnam have considered awards rendered in Paris (France)[494] and Hong Kong (China).[495]

b) Role of the Ministry of Justice in practical cases

Despite never having been a judicial authority in the procedure of recognising and enforcing foreign arbitral awards in Vietnam, the Ministry of Justice has played an important role as a body receiving application forms and attached documents served by petitioners.[496] The practical cases handled by the Vietnamese jurisdictional provincial courts have clarified that this authority decided on the tasks of receiving documents and transferring information.[497]

In a case heard before the Provincial Court of Lam Dong,[498] the Ministry of Justice sent the court the application form and the attached documents it had received from a South Korean enterprise. The court accepted all of the documents without any requirement of additional papers from the Ministry of Justice or from the petitioner. The court then granted a decision recognising and enforcing the foreign underlying award.

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[494] Decision No 78/QĐ–XĐTT of 24 April 2001 of the Provincial Court of Ho Chi Minh City.

[495] Decision No 69/2013/QĐPT–KDTM of 15 March 2013 of the Appellate Court of the Supreme Court in Ho Chi Minh City.

[496] Duy Luong Tuong, *Commentaries on the Civil Procedure Code, Arbitration Law and adjudicating practice (Bình Luận Bộ Luật Tố Tụng Dân Sự, Luật Trọng Tài Thương Mại Và Thực Tiễn Xét Xử)* (Justice Publisher 2016) 48 – 49.

[497] Cong Binh Nguyen, *Textbook on Civil Procedure Law (Giáo trình luật tố tụng dân sự)* (Justice Publisher 2006) 420.

[498] Decision of 18 December 2001 of the Provincial Court in Lam Dong.

Pursuant to the Civil Code of 2015 of Vietnam, any legal person of full capacity or any natural person can become a legal representative of another legal person or natural person.[499] This means that a legal person can submit a petition on behalf of another legal person. However, under the provisions of the Civil Procedure Code of 2004,[500] only a natural person, including the prevailing party to a foreign award or a legal representative of a legal person, can submit a petition for the recognition and enforcement of a foreign arbitral award in Vietnam. Thereupon, a legal person cannot submit a petition for the recognition and enforcement of a foreign arbitral award on behalf of another legal person.

In a case relating to an intellectual property dispute between a Russian company and a Dutch company, the Vietnamese law firm representing the Russian company filed a petition for the recognition and enforcement of a foreign award in Vietnam. The Provincial Court of Hanoi adjudicated that the Vietnamese law firm could not sign the form applying for recognition and enforcement. In addition, the Russian company, via the representative of the Vietnamese law firm, had failed to submit any evidence demonstrating that the debtor had a residence in Vietnam. Finally, the court decided to stay the procedure. Notably, the Ministry of Justice, having received the documents sent by the Vietnamese law firm on behalf of its Russian client, had neither examined the content nor checked whether or not the application was consistent with Vietnamese law.[501]

There have been several cases in which the Ministry of Justice failed to take into consideration the current status of the creditor to a foreign award; the Ministry of Justice merely received the application form together with the summited documents, regardless of the existence of the parties. In a notable case[502] brought before the Provincial Court of Hung Yen, the court ordered the Vietnamese Embassy in Indonesia to collect information concerning the

[499] Article 134 of the Civil Code 2015.
[500] Article 344(1) of the Civil Procedure Code of 2004.
[501] Decision No 07/2013/QĐST–TTTM of 3 April 2013 of the Provincial Court of Hanoi.
[502] Decision No 03/2007/ST–KDTM of 10 August 2007 of the Provincial Court of Hung Yen.

creditor's business. After three months of examination, the Vietnam Embassy in Indonesia responded that the debtor did not exist and was not registered at the Indonesian Chamber of Commerce and Industry. Obviously, the Ministry of Justice had not checked the information of the creditor in advance.

In another case,[503] the Ministry of Justice received a request for the recognition and enforcement of an award rendered by a tribunal of the China International Economic and Trade Arbitration Commission. It turns out that the debtor had been dissolved under Vietnamese law, but the Ministry of Justice did not possess this information. Additionally, there was a case[504] in which the Ministry of Justice received a petition for the recognition and enforcement of an award issued in Russia. Although the debtor did not have a residence or place of business in Vietnam, the Ministry of Justice still accepted the creditor's application without any requirement of an additional submission.

In certain circumstances, the Ministry of Justice not only received the application form and attached documents served by the petitioner, but also required that the petitioner meet other requirements. A foreign company submitted the essential documents to the Ministry of Justice, but those documents had not been translated and notarised. The Ministry of Justice then requested the translated and notarised copies of those papers. Despite playing an active role in this case, the requirement of the Ministry of Justice did lead to the time limit for filing the petition for the recognition and enforcement of a foreign award in Vietnam being exceeded.[505]

The role of the Ministry of Justice takes place either before the court starts to handle the case, or after the hearing session is held. In the procedure of deliberating on the petition for the

[503] Decision No 171/2009/QĐ–PT of 26 November 2009 of the Appellate Court of the Supreme Court in Hanoi.
[504] Decision No 07/2013/QĐST–TTTM of 3 April 2013 of the Provincial Court of Hanoi.
[505] Decision No 08/2015/QĐKDTM–ST of 6 March 2015 of the Appellate Court of the Supreme Court in Ho Chi Minh City.

recognition and enforcement of a foreign award, if the Ministry of Justice obtains any information relating to the validity and legal status of the foreign award, the Ministry of Justice will inform the respective court of the information without delay. In practice, the Provincial Court of Binh Thuan suspended the procedure of examining the recognition and enforcement of foreign award after the Ministry of Justice sent this court a practice note which indicated that the underlying foreign award had been set aside in the country of origin.[506]

c) Assessment and proposition

The common practice of international arbitration shows that only a competent court of the recognising country participates in the procedure of recognising and enforcing foreign arbitral awards. The presence of an administrative authority, such as the Ministry of Justice in the case of Vietnam, is a rare and unpopular circumstance. In Germany, only the higher regional courts have jurisdiction over petitions for the recognition and enforcement of foreign arbitral awards. The German Ministry of Justice and Consumer Protection has not yet played any role in this judicial procedure.

Article III of the New York Convention enables signatory states to incorporate the procedure for the recognition and enforcement of foreign arbitral awards into their own procedural laws.[507] This implies that the circumstance whereby Vietnamese law establishes the role of the Ministry of Justice seems to be consistent with Article III of the New York Convention. However, the role played by the Ministry of Justice in the judicial procedures for the recognition and enforcement of foreign arbitral awards could lead to several difficulties. The fundamental function of this authority has been to take part in the procedure as a *transporter of documents* or *information*,[508] although in a modest number of cases it has examined the

[506] Decision No 01/2013/QĐST–KDTM of 18 September 2013 of the Provincial Court of Binh Thuan.

[507] Kronke/Nacimiento/Otto (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International 2010) 117.

[508] Nguyen Gia Thien Le, 'Recognition and Enforcement of Foreign Arbitral Awards in Vietnam: Current Perspectives and Typical Cases' (2015) Volume 18(3) International Arbitration Law Review,

forms as well as the attached documents, or even requested additional documents. The Ministry of Justice does not have the competence to advise the provincial courts on whether to recognise and enforce a certain foreign arbitral award or whether to refuse the petition. Moreover, the participation of the Ministry of Justice has tended to more or less unnecessarily prolong the procedure,[509] because the petitioner has to submit the application form as well as the attached documents to the Ministry of Justice, rather than directly to a provincial jurisdictional court of Vietnam.

The Vietnamese legislators comprehensively understood this contradiction and tried to amend it in the process of drafting the Civil Procedure Code of 2015. Accordingly, the prevalent tendency supported by the legislator is that the petitioner can obviously submit the application form and the attached documents to a provincial court of Vietnam directly.[510] The petitioner only submits the application form and the attached documents to the Ministry of Justice if the foreign arbitral award was rendered in countries that have treaties on legal assistance with Vietnam, such as Bulgaria, Mongolia (if the debtor does not have a residence or place of business in Vietnam), North Korea, China, France, Ukraine, Algeria, Kazakhstan or Cambodia. Nevertheless, under the more favourable approach and the philosophy of pro–recognition of the New York Convention, the Vietnamese provincial courts should directly accept the submission for the recognition and enforcement of a foreign arbitral award from a petitioner, irrespective of where the arbitration took place.

[509] Nguyen Gia Thien Le, 'Recognition and enforcement of foreign arbitral awards (Công nhận và cho thi hành phán quyết của trọng tài nước ngoài)' (2016) Volume 24 Legislative Studies Journal, 47.

[510] Anh Tuan Tran, *Academic commentary on the Civil Procedure Code of 2015 (Bình luận khoa học Bộ luật tố tụng dân sự 2015)* (Justice Publisher 2017) 957.

F. Supervisory role of the Procuracy

1. Provisions of Vietnamese law

The common practice of international arbitration is for only jurisdictional courts to take part in the procedure of recognising and enforcing foreign arbitral awards, meanwhile the procuracies do not have any function in this procedure. In the case of Germany, the procuracy agency has nothing to do with the procedure of recognising and enforcing a foreign arbitral award, or with the procedure of recognising and enforcing a foreign judgment of another country's court. Nevertheless, there have been certain other countries that have clearly provided a role for the procuracy in those procedures. Vietnam is a typical example.

Under Vietnamese law, the procuracy is involved in the recognition and enforcement procedure in order to exercise its constitutional functions.[511] Those functions include supervising the procedure and proposing an opinion.[512] Notably, the procuracy does not have the authority to decide whether a petition for the recognition and enforcement of a foreign award can be recognised and enforced, or whether it should be refused, as this is the exclusive competence of the courts. Although the procuracy does not decide on the final outcome of the petition, the fact that it has a function at all, means that it has some influence over the decision of the court.[513]

According to the introduction of the Ordinance of 1995, Vietnamese law governs the functions and roles of the procuracy in some detail. Under the Civil Procedure Code of 2004 (amended in 2011) and the Civil Procedure Code of 2015, the core provisions on the appearance of the procuracy have been steadily maintained. The roles and functions of the

[511] Aticle 107(1) of the Constitution 2013.

[512] Article 21 of the Civil Procedure Code of 2015.

[513] Nguyen Gia Thien Le, 'Recognition and enforcement of foreign arbitral awards (Công nhận và cho thi hành phán quyết của trọng tài nước ngoài)' (2016) Volume 24 Legislative Studies Journal 49 – 50.

procuracy take place either at the hearing in the first instance, the hearing in the appeal stage, the hearing in the cassation stage, or the hearing in the re–opening stage.

a) In the first instance stage

(i) Prior to the first instance hearing

Prior to the hearing at the first instance stage, after the provincial court receives the application form along with the attached documents, whether sent by the Ministry of Justice or the petitioner directly, it is responsible for serving a copied file of those papers to the procuracy of the same level,[514] meaning the provincial procuracy.[515]

The provincial procuracy has to take into consideration the file, including the application form and the attached documents, and should offer its opinion relating to the petition for the recognition and enforcement of the foreign arbitral award.[516] In the event that the jurisdictional procuracy determines that there is a lack of evidence, or that the court should additionally summon witnesses or any concerned persons or organisations, the procuracy will send its suggestion to the court. When facing suggestions served by the provincial procuracy, the jurisdictional court is not obliged to follow any point of view set in those suggestions.[517] Accordingly, the court will consider any concerns raised by the procuracy *ex officio*.

[514] Cong Binh Nguyen, *Textbook on Civil Procedure Law (Giáo trình luật tố tụng dân sự)* (Justice Publisher 2006) 423.

[515] Article 13(1) of the Ordinance of 1995; Article 365(2) of the Civil Procedure Code of 2004 (amended in 2011); Article 457(1) of the Civil Procedure Code of 2015.

[516] Vietnamese Supreme Court – US AIDS, 'Training Summary Record of Workshop on New points of the Civil Procedure Code of 2015 and the New York Convention 1958 on Recognition and enforcement of foreign arbitral awards (Kỷ yếu tập huấn Những quy định mới của Bộ luật tố tụng dân sự 2015 và Công ước New York 1958 về Công nhận và cho thi hành phán quyết trọng tài nước ngoài)' (Vietnamese Supreme Court, December 2016) 23.

[517] In practice, there was a case in which the Provincial Procuracy of Hung Yen suggested that the Provincial Court of Hung Yen should postpone the procedure due to the absence of the petitioner, but the court refused the provincial procuracy's suggestion, see: Decision No 03/2007/ST–KDTM of 10 August 2007 of the Provincial Court of Hung Yen.

(ii) In the hearing at the first instance stage

The role of the provincial procuracy opens up an important procedural point. Under the strict provisions of the Ordinance of 1995 and the Civil Procedure Code of 2004 (amended in 2011), if the provincial procuracy did not appear at the first instance hearing, the respective court had to postpone the procedure.[518] Nevertheless, this legal feature has come under some criticism from commentators, because this provision leads to an unequitable and inappropriate treatment of the petitioner.[519] The absence of the procuracy, irrespective of whether there was any justified reason for failing to be present, could not be seen as a procedural mistake of the petitioner, when the petitioner was acting in good faith in that particular situation. The decision to postpone the procedure, thereby prolonging the procedure and causing potential disadvantages to the petitioner, would contradict the spirit of pro–enforcement and pro–arbitration.[520]

Under the provisions of the Civil Procedure Code of 2015, in the event that the petitioner fails to appear at the first instance hearing, without any justified reason, the court must postpone the procedure[521] in order to guarantee the legitimate procedural rights of the petitioner. However, if the petitioner fails to appear at the second hearing, without any justified reason, then the court will adjudicate that the petitioner has withdrawn the application and will then stay the procedure of the recognition and enforcement of the foreign arbitral award.[522] On the other hand, if the debtor fails to appear at the hearing of the first instance and does not have a justified reason for the absence, the competent court will postpone the procedure. However, if the debtor fails to appear at the second hearing after being summoned by the court, then the

[518] Article 15(2) of the Ordinance of 1995; Article 369(2) of the Civil Procedure Code of 2004 (amended in 2011); Article 458(2) of the Civil Procedure Code of 2015; see also: Cong Binh Nguyen, *Textbook on Civil Procedure Law (Giáo trình luật tố tụng dân sự)* (Justice Publisher 2006) 423.

[519] Quang Chuc Tran, 'Recognition and Enforcement of Foreign Arbitral Awards in Vietnam' (2005) Volume 22(6) Journal of International Arbitration 493.

[520] Nguyen Gia Thien Le, 'Recognition and enforcement of foreign arbitral awards' (2016) Volume 24 Legislative Studies Journal 49, 50.

[521] Article 458(3) of the Civil Procedure Code of 2015.

[522] Article 458(3) of the Civil Procedure Code of 2015.

court deliberates that the party has waived its right to object. The debtor's failure to attend the hearing does not affect the entire procedure, the court will therefore continue the hearing and will not postpone the procedure.[523]

The drafters of the Civil Procedure Code of 2015 understood the contradiction relating to the appearance of the provincial procuracy at the first instance hearing, so they proposed a more liberal approach to this concern. Accordingly, in the event that the provincial procuracy fails to appear at the first instance hearing for any reason, the court will maintain the procedure and will not postpone the procedure for the recognition and enforcement of a foreign arbitral award. This is a more equitable solution and goes some way towards protecting the petitioner more effectively.[524]

At the hearing itself, the provincial procuracy exercises its functions by assessing the procedural features, including factors such as the competence of the provincial court, the legal compliance of the procedure, the serving of documents by the provincial court, the presence or absence of the parties and the possibility to postpone the procedure.[525]

Regarding the substantive features of the case, the provincial procuracy gives its opinion about the facts, content, applicable law and other matters relating to the arbitration procedure. The procuracy has the possibility to question both the petitioner and the debtor about any matters concerning the procedure. However, the procuracy only poses questions and avoids entering into any arguments with the parties.

[523] Cong Binh Nguyen, *Textbook on Civil Procedure Law (Giáo trình luật tố tụng dân sự)* (Justice Publisher 2006) 424.

[524] Nguyen Gia Thien Le, 'Recognition and enforcement of foreign arbitral awards' (2016) Volume 24 Legislative Studies Journal 49, 50.

[525] Nguyen Gia Thien Le, 'Recognition and enforcement of foreign arbitral awards (Công nhận và cho thi hành phán quyết của trọng tài nước ngoài)' (2016) Volume 24 Legislative Studies Journal 49.

One of the most fundamental functions of the provincial procuracy at the first instance hearing is presenting its own opinion on the possibility of the recognition and enforcement of the foreign arbitral award, and then its suggestion as to whether the competent court should recognise and enforce, or refuse to recognise the foreign award.[526] The court will decide whether or not to consider the procuracy's suggestion, and has full discretion on accepting or dismissing the suggestions.

At the end of the hearing at the first instance stage, the provincial court will, having heard all of the suggestions of the provincial procuracy and the parties, make a decision on whether the petition for the recognition and enforcement of the foreign award can be recognised and enforced in Vietnam. After 15 days,[527] the court will send its decision to the procuracy and the parties to the case.

b) In the appeal stage

(i) Prior to the appeal hearing

If a certain party is not satisfied with any of the points set out in the decision of the first instance provincial court, it is permitted to lodge an appeal in front of one of three Vietnamese Higher Courts – the Higher Court in Hanoi, the Higher Court in Da Nang and the Higher Court in Ho Chi Minh City. In the past, the Appellate Courts of the Supreme Court in Hanoi and Ho Chi Minh City were in charge of handling those appeal petitions.

Under Vietnamese law, the procuracies also have the right to launch an appeal.[528] After receiving the decision of the provincial court on whether or not to recognise and enforce the foreign award, the provincial procuracy or the higher procuracy has the right to appeal this court decision in the event that these procuracies find that the court applied the procedural

[526] Article 45(4) of the Civil Procedure Code of 2004 (amended in 2011); Article 58(4) of the Civil Procedure Code of 2015.

[527] Article 460(2) of the Civil Procedure Code of 2015.

[528] Cong Binh Nguyen, *Textbook on Civil Procedure Law (Giáo trình luật tố tụng dân sự)* (Justice Publisher 2006) 417.

provisions inappropriately.[529] Those procuracies then send their appeal motions to a higher court at the same level as the higher procuracy. The appeal motion consists of the opinions, comments and criticism of the relevant procuracies. The higher court cannot deny the appeal suggestion made by those procuracies and must therefore open a hearing.

For instance, if the Provincial Court of Binh Duong issues a decision refusing a petition for the recognition and enforcement of a foreign award in the Binh Duong Province. The Provincial Procuracy of Binh Duong, or the Higher Procuracy in Ho Chi Minh City has the authority to appeal the decision of the Provincial Court in Binh Duong. After receiving the appeal motion of the relevant procuracies, the Higher Court in Ho Chi Minh City will have to open a hearing in the appeal stage.

(ii) In the hearing at the appeal stage

The Civil Procedure Codes have regulated the appearance of the parties and the relevant procuracies at the hearing in some detail. If a party appeals against the provincial court's first instance decision, this party has to appear before the higher court at the appeal stage. If the appealing party is absent the first time after being summoned by the court, the court will postpone the appeal procedure. If the appealing party fails to appear a second time without a justified explanation, the court will automatically stay the procedure. In this case, the court will determine that the appealing party has withdrawn its appeal petition.[530] In practice, there was a case in which the Higher Court in Ho Chi Minh City stayed the proceedings for the recognition and enforcement of an award rendered by a tribunal of the London Maritime Arbitrators Association because the appealing party had failed to appear for a second time without giving a reason.[531]

[529] Article 461(2) of the Civil Procedure Code of 2015.
[530] Article 426(4)(b) of the Civil Procedure Code of 2015.
[531] Decision No 16/2018/QĐ–PT of 14 May 2018 of the Higher Court in Ho Chi Minh City.

On the other hand, a situation in which the relevant procuracies do not show up has not been clearly governed by the law. There are two points of view regarding this circumstance.[532] The first viewpoint states that the non–attendance of the procuracies, in all cases, will lead to the postponement of the appellate hearing. The second reveals that the absence of the procuracies will only result in the postponement of the appeal hearing in the event that the appeal was brought by the procuracy itself, rather than a party.

If the procuracy fails to appear a second time, despite being summoned by the court, it could be construed that this organ withdraws its appeal, in which case the court issues a decision to stay the appeal procedure. The second viewpoint has played an important role as an appropriate and equitable solution,[533] because it would be transparently unequal and unreasonable for the courts to postpone the appeal hearing due to the absence of the procuracies in the situation where this organ has not exercised its right to appeal. The legitimate rights and interests of the appealing party have to be guaranteed by the court, so if this party shows up at the hearing of the appeal stage, the court has to maintain the hearing, regardless of the presence of the procuracies. If the procuracies exercise the right to appeal the provincial courts' first instance decisions, their appearance is essential because they have to go before the court in order to present their opinion relating to the appeal motion.

The functions of procuracies in the appeal stage include giving an opinion relating to the appeal motion, in the event that they exercise their right to appeal, giving an opinion relating to the appeal made by a certain party, and supervising the competence of a higher court and the course of the appeal proceedings themselves. It is clear that the higher court has its own jurisdiction to determine whether the suggestions made by the procuracies could be taken into

[532] Duy Luong Tuong, *Commentaries on the Civil Procedure Code, Arbitration Law and adjudicating practice (Bình Luận Bộ Luật Tố Tụng Dân Sự, Luật Trọng Tài Thương Mại Và Thực Tiễn Xét Xử)* (Justice Publisher 2016) 71 – 86.

[533] Duy Luong Tuong, *Commentaries on the Civil Procedure Code, Arbitration Law and adjudicating practice (Bình Luận Bộ Luật Tố Tụng Dân Sự, Luật Trọng Tài Thương Mại Và Thực Tiễn Xét Xử)* (Justice Publisher 2016) 71 – 86.

consideration or not. Like in the first instance stage, the higher court takes into account the procuracies' suggestions *ex officio*. At the end of the appeal hearing, the jurisdictional higher court will render a decision, which includes its acceptance or rejection of the appeal motion made by the parties to the appeal or by the procuracies.

Theoretically, either the higher procuracy, which is at the same level as the higher court rendering an appellate decision at the appeal stage, or the Supreme Procuracy would be able to lodge another appeal through the cassation procedure or the re–opening stage, in order to resist the higher court's appellate decision. The Supreme Court is the only competent court that has jurisdiction over the cassation procedure or the re–opening stage.

The cassation procedure will only take place if:

(i) the conclusion of the appeal decision is incompatible with the objective merits of the cases, which thereby damages the legitimate rights and interests of the parties involved;

(ii) there are serious procedural violations that prevent the parties from executing their procedural rights and obligations, which, as a result, endangers their legitimate rights and interests as set out under the law;

(iii) there are mistakes in the application of the law leading to incorrect decisions having been made, thus harming the legitimate rights and interests of the involved parties or infringing upon public benefits, state benefits and the legitimate rights and interests of the third parties.[534]

The re–opening stage will take place when:[535]

(i) important details of the case were newly discovered, which the involved parties could not have known in the course of resolving the case;

[534] Article 326(1) of the Civil Procedure Code of 2015.

[535] Article 352 of the Civil Procedure Code of 2015.

(ii) there are grounds to prove that the conclusions of the expert witnesses and the translations of interpreters were flawed, or that evidence had been falsified;

(iii) it is demonstrated that the judges and/or procurators intentionally diverted the case files or deliberately made unlawful conclusions;

(iv) the judgments, courts decisions or decisions of state agencies that the court relied on in order to resolve the case had already been annulled.

2. Practical cases

Case law issued by the Vietnamese jurisdictional courts have stated that the procuracies must exercise their constitutional rights at either the first instance stage or the appeal stage. However, in practice, there has not yet been a case in which the procuracies have exercised their exclusive rights to appeal under the cassation procedure or the re–opening procedure.

a) In the first instance stage

In the first instance stage, the most frequently used function of the procuracies is giving an opinion on the adjudication of the petition for the recognition and enforcement of a foreign arbitral award. For instance, in a case handled by the Provincial Court of Ho Chi Minh City,[536] the Provincial Procuracy of Ho Chi Minh City expressed in detail its assessment relating to the procedure. The procuracy analysed whether the Provincial Court had the jurisdiction to hear the petition for the recognition and enforcement of the foreign award in Vietnam. The procuracy also determined that the judges and the parties had properly followed the provisions of the Civil Procedure Code of 2004 (amended in 2011).

In addition to supervising the legal aspects of the procedure in the first instance hearing, the procuracies often offer their opinion on the case and on the petition for the recognition and enforcement of the foreign arbitral award. There have been cases, for example, where the procuracies have issued a brief opinion on the petition for the recognition and enforcement

[536] Decision No 177/2014/QĐST–KDTM of 5 March 2014 of the Provincial Court of Ho Chi Minh City.

and then advised the court to recognise and enforce this petition. For example, the Provincial Procuracy of Can Tho stated that there were no grounds to refuse the petition for the recognition and enforcement of an award made by an arbitral tribunal of the Singapore International Arbitration Centre. It then suggested that the Provincial Court of Can Tho recognise and enforce this petition.[537]

Similarly, in a case in which an award issued by an arbitral tribunal of the International Cotton Association was being considered for recognition and enforcement before the Provincial Court of Ho Chi Minh City, the Provincial Procuracy of Ho Chi Minh City only made the suggestion that the court should recognise and enforce the award, but without offering any analysis of the case.[538]

The provincial court then takes into account the suggestion made by the provincial procuracy *ex officio*. This leads to a situation where it is possible for the provincial court to reach a different conclusion about the recognition and enforcement of foreign arbitral awards to that of the provincial procuracy. While there have been several cases where the provincial court and the provincial procuracy have agreed on the recognition and enforcement of a certain foreign arbitral award,[539] there have been other cases where the Provincial Court made divergent decisions different to those made by the provincial procuracies. For example, the Provincial Court of Binh Duong received a petition for the recognition and enforcement of a foreign arbitral award. At the time that the petitioner sent the application form and the attached documents to the Ministry of Justice, the debtor was dissolved and had ceased its operations in Vietnam. Although the Provincial Procuracy of Binh Duong suggested that the Provincial Court of Binh Duong should recognise and enforce this petition, the Provincial

[537] Decision No 01/2009/QĐST–KDTM of 31 December 2009 of the Provincial Court of Can Tho.

[538] Decision No 177/2014/QĐST–KDTM of 5 March 2014 of the Provincial Court of Ho Chi Minh City.

[539] Decision No 01/2009/QĐST–KDTM of 31 December 2009 of the Provincial Court of Can Tho; Decision No 177/2014/QĐST–KDTM of 5 March 2014 of the Provincial Court of Ho Chi Minh City; Decision No 03/2007/ST–KDTM of 10 August 2007 of the Provincial Court of Hung Yen.

Court of Binh Duong rejected the suggestion, because all of the debtor's properties had already been transferred to another third party.[540]

Sometimes the provincial procuracies exercise their functions to supervise the procedure of the recognition and enforcement of foreign arbitral awards in Vietnam by giving suggestions such as proposing that the provincial court postpone the procedure or collect more evidence. Those suggestions are taken into consideration by the court hearing the case, which then determines them *ex officio*. In a specific case brought before the Provincial Court of Hung Yen, the Provincial Procuracy of Hung Yen suggested that the Provincial Court of Hung Yen should postpone the proceedings and collect more evidence. The court replied that the essential documents served by the parties were sufficient in order to resolve the petition for the recognition and enforcement of the foreign arbitral award. The court ended up rejecting the procuracy's suggestion.[541]

b) In the appeal stage

In spite of having the right to launch an appeal against a decision rendered by a provincial court in the first instance stage, the case law of Vietnamese courts does not appear to have any cases in which the procuracies exercised that right. Only the parties who have been dissatisfied with the contents described in the first instance decision have submitted appeals to the higher courts.

In order to exercise their supervising role, the procuracies have tended to express their opinions on appeal petitions. However, some opinions offered by the procuracies relating to the appeals have not been totally accurate. In an appeal procedure heard before the Higher Court in Ho Chi Minh City, the procuracy stated that the substantive applicable law for the contract was Vietnamese law and the applicable procedural law for the arbitral proceedings

[540] Decision No 09/2016/QĐST–KDTM of 20 September 2016 of the Provincial Court of Binh Duong.
[541] Decision No 03/2007/ST–KDTM of 10 August 2007 of the Provincial Court of Hung Yen.

was English law; however, the arbitration was governed by the Rules of Singapore International Arbitration Centre, which consequently led to a controversial situation. Obviously, the applicable law, in both substantive and procedural aspects, was not problematic and was commonly found in the field of international arbitration. So, the statement of the procuracy was not persuasive.[542]

Over the course of giving opinions on the appeal petitions made by parties dissatisfied with the first instance decisions, the procuracies have normally disagreed with the appeal petitions and have suggested that the courts should uphold the first instance decisions issued by the provincial courts. For instance, the procuracies suggested that the Appellate Court of Supreme Court in Ho Chi Minh City[543] and the Appellate Court of Supreme Court in Hanoi[544] refuse appeal petitions.

3. Analyses and propositions

Although some commentators have expressed the opinion that the role of the procuracies has been exaggerated,[545] the procuracies have exercised the constitutional functions set out in the Vietnamese Constitution.[546] Furthermore, the role of the procuracies in the procedure of recognising and enforcing foreign arbitral awards does not go against to the principles of the New York Convention, because Article III of the Convention allows the recognising country to set its own procedure for recognition and enforcement.

The supervising function of the procuracies has certainly established a minimum standard that the jurisdictional courts have to comply with in order to guarantee an appropriate legal

[542] Decision No 33/2016/QĐPT–KDTM of 8 August 2016 of the Higher Court in Ho Chi Minh City.

[543] Decision No 171/2009/QĐ–PT of 26 November 2009 of the Appellate Court of the Supreme Court in Ho Chi Minh City; Decision No 15/2014/QĐPT–KDTM of 23 April 2014 of the Appellate Court of the Supreme Court in Ho Chi Minh City.

[544] Decision No 142/2005/QĐPT of 12 July 2005 of the Appellate Court of the Supreme Court in Hanoi.

[545] Quang Chuc Tran, 'Recognition and Enforcement of Foreign Arbitral Awards in Vietnam' (2005) Volume 22(6) Journal of International Arbitration 493.

[546] Article 137 of the Constitution 1992 and Article 107 of the Constitution 2013.

application in the procedure of the recognition and enforcement of foreign arbitral awards. Although the Civil Procedure Code of 2015 includes several advantageous provisions on the role and appearance of the procuracies in comparison to the Civil Procedure Code of 2004 (amended in 2011), the absence of procuracies or the exercising of supervising functions and the appeal right through the procuracies is still likely to prolong the procedure of recognising and enforcing a foreign arbitral award, which can affect the legitimate rights and interests of the petitioner.

G. Grounds to refuse the recognition and enforcement of foreign awards

1. Notion of Article V of the New York Convention

Article V has been one of the most pivotal provisions of the New York Convention.[547] This article establishes the particular grounds on which the courts of the enforcing country can refuse the recognition and enforcement of foreign arbitral awards.[548] It is suggested that the specific grounds described in Article V of the Convention are exclusive.[549] Therefore, only foreign arbitral awards falling within the ambit of those grounds[550] can be refused for the recognition and enforcement before a national court. Some additional grounds, such as *forum non conveniens* and the *manifest disregard of the law*[551] under the law in the United States, can also be used to refuse the petition for the recognition and enforcement of a foreign award. However, this situation has been rare in practice.

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[547] Marike Paulsson, *The 1958 New York Convention in Action* (Kluwer Law International 2016) 157.

[548] Blackaby/Partasides/Redfern/Hunter, *Redfern and Hunter on International Arbitration* (6th ed., Oxford University Press 2015) para. 11.55.

[549] Kronke/Nacimiento/Otto (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International 2010) 209.

[550] Blackaby/Partasides/Redfern/Hunter, *Redfern and Hunter on International Arbitration* (6th ed., Oxford University Press 2015) para. 11.57.

[551] Reimar Wolff (ed), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards – Commentary* (C.H.Beck–Hart–Nomos 2012) 246 – 248.

According to Article V, the "*recognition and enforcement of the award may be refused…*" Some courts of member countries, such the French courts,[552] have interpreted this to mean that a recognising court can ignore the existence of those grounds and hold to recognise and enforce a foreign arbitral award, even if the grounds listed in Article V exist.

This tendency is not supported in Germany because, according to the prevailing view, German courts have to refuse the recognition and enforcement of a foreign award if the award has breached at least one of the grounds listed in Article V.[553] There are various reasons for this point of view.[554] Firstly, irrespective of the terms "*may*" or "*must*", the point of view leaves the recognition courts in Germany no room for discretion.[555] Secondly, the drafters' main purpose behind this article was to standardise and harmonise specific grounds for the refusal for the recognition and enforcement. The German courts do not need to grant further additional discretion. Finally, whenever a domestic award falls within at least one of the grounds for being set aside, which are essentially the same as the grounds depicted in Article V of the New York Convention, this award will undoubtedly be set aside. Therefore, if the German courts do not refuse to recognise an award falling within the grounds set out in Article V, it can obviously lead to a discrepancy between a foreign award and a domestic award.

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[552] Robert C. Bird, 'Enforcement of Annulled Arbitration Awards: A Company Perspective and an Evaluation of a New York Convention' (2012) Volume 37(4) North Carolina Journal of International Law and Commercial Regulation 1020 – 1021.

[553] Federal Court of Justice, 25.10.1983 BGHZ 46, 365; Higher Regional Court of Dusseldorf 21.07.2004 – VI Sch(Kart) 01/02.

[554] Reimar Wolff (ed), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards – Commentary* (C.H.Beck–Hart–Nomos 2012) 265; Böcksteigel/Kröll/Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice* (2nd ed., Kluwer Law International 2015) 457.

[555] Dennis Solomon, 'Interpretation and Application of the New York Convention in Germany' in George A. Bermann (ed), *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts* (Springer 2017) 342.

The Vietnamese courts follow the same direction as the German jurisdictional courts – refusing to recognise and enforce a foreign arbitral award if there is at least one ground for refusal as listed in Article V of the New York Convention.[556]

The general principle of *non révision au fond* (*no review of merit*) has been applied extensively when the courts of member states examine petitions for the recognition and enforcement of foreign arbitral awards, although there is no provision in the New York Convention relating exactly to this principle. In the procedural law of some respective countries, like Vietnam, this provision is clearly written into a particular provision.[557] Accordingly, in the practice of the recognition and enforcement of foreign arbitral awards, Vietnamese jurisdictional courts have often expressed in their decisions that the Vietnamese courts would not review the merits of the dispute; they only examined and assessed the submitted documents applied by the petitioner.[558]

Meanwhile in other member countries, like Germany, procedural law does not govern this principle transparently, meaning that the jurisdictional courts apply it *ex officio*.[559] The

[556] For example, in decisions of the Provincial Court of Ho Chi Minh City and the Provincial Court of Binh Thuan, those courts briefly held that the petitions for recognition and enforcement of foreign arbitral award should be accepted due to the non–existence of any grounds listed in Article V of the New York Convention, see Decision No 177/2014/QĐST–KDTM of 5 March 2014 of the Provincial Court of Ho Chi Minh City and Decision No 02/2016/QĐST–KDTM of 11 November 2016 of the Provincial Court of Binh Thuan.

[557] Article 15(4) of the Ordinance of 1995; Article 369(4) of the Civil Procedure Code of 2004 (amended in 2011) and Article 458(4) of the Civil Procedure Code of 2015.

[558] Decision No 04/2012/VKDTM of 17 September 2012 of the Provincial Court of Hanoi; Decision No 117/2014/QĐ–PT of 7 August 2014 of the Appellate Court of the Supreme Court in Hanoi; Decision No 05/2017/QĐKDTM–ST of 21 July 2017 of the Provincial Court of Hanoi; Decision No 84/2017/KDTM–PT of 30 March 2017 of the Higher Court in Hanoi; Decision No 142/2005/QĐPT of July 2005 of the Appellate Court of the Supreme Court in Hanoi; Decision No 127/2013/QĐKDTM– PT of 3 July 2013 of the Appellate Court of the Supreme Court in Ho Chi Minh City.

[559] Reimar Wolff (ed), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards – Commentary* (C.H.Beck–Hart–Nomos 2012) 244.

recognising court only reviews the merits of the case when it finds that the application of the substantive law by the arbitral tribunal is contrary to the substantive public policy.[560]

2. Burden of proof

a) Principles of proving evidence

In all types of proceedings relating to civil and commercial matters, there are a total of three principles, those being: "*actori incumbit probatio*", "*collaboration*" and "*sua ponte*".[561] The principle of *actori incumbit probatio* requires the applicant to apply evidence to support their argument in the case, while the principle of collaboration means that both the applicant and the defendant have the obligation to submit evidence. In the case of the principle of *sua ponte*, the adjudicating organ, including both the court and arbitration, will exercise its discretion to investigate the evidence used to support the case.

The procedure of adjudicating a petition for the recognition and enforcement of foreign arbitral awards includes three more principles. Under the principle "*actori incumpit probatio*", the petitioner for the recognition and enforcement of a foreign arbitral award has to fill out and submit the application form and the attached documents, including the arbitration agreement[562] and the foreign arbitral award as set out in Article II of the New York Convention. Submitting those documents is the minimum requirement that the petitioner must satisfy.

Nevertheless, it is a more contentious matter whether the petitioner has to prove the validity of the arbitration agreement, or only prove that it was concluded. Each member country has its own method of dealing with this question. In the case of Germany, the prevailing viewpoint is

[560] Reimar Wolff (ed), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards – Commentary* (C.H.Beck–Hart–Nomos 2012) 245.

[561] Mojtaba Kazazi, *Burden of Proof and Related Issues: A Study of Evidence Before International Tribunals* (Kluwer Law International 1996) 370 – 378.

[562] Gary B. Born, *International Arbitration: Law and Practice* (2nd ed., Kluwer Law International 2015) §17.05 para. 27.

that the petitioner only bears the burden of pleading, rather than the burden of proof.[563] This viewpoint construes that the petitioner is only responsible for proving the existence and the conclusion of the arbitration agreement; on the other hand, the resisting party will bear the responsibility of proving the invalidity of the arbitration agreement.[564]

Article V of the New York Convention is subdivided into several exclusive grounds for refusal, including the invalidity of the arbitration agreement, the parties' inability to conclude the arbitration agreement, flaws in the arbitral procedure, the arbitral tribunal exceeding its competence, the non–binding nature of the arbitral award, the non–arbitrability of the merits and a violation of public policy. The domestic court will bear the burden of proof when the grounds for refusal fall within two cases, involving the non–arbitrability of the merits and a violation of public policy. The other grounds falling within cases, including invalidity of the arbitration agreement, the parties' inability to conclude the arbitration agreement, flaws in the arbitral procedure, the arbitral tribunal exceeding competence, and the non–binding nature of the arbitral award.[565]

b) Concept of Vietnamese procedural law and case law

Although the spirit of the burden of proof has been established in Article V of the New York Convention without contest, this spirit has come under criticism when transplanted into Vietnamese procedural law. Three legal instruments implemented in Vietnam relating to the

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[563] Dennis Solomon, 'Interpretation and Application of the New York Convention in Germany' in George A. Bermann (ed), *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts* (Springer 2017) 349; Böcksteigel/Kröll/Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice* (2nd ed.,
Kluwer Law International 2015) 458; Higher Regional Court of Frankfurt, 26.06.2006, 26 Sch 28/05,
IRAX 2008, 517, para 14; Higher Regional Court of Munich, 11.07.2011 – 34 Sch 15/10, SchiedsVZ 2011, 337, para 38 – 39.

[564] Dennis Solomon, 'Interpretation and Application of the New York Convention in Germany' in George A. Bermann (ed), *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts* (Springer 2017) 349; Böcksteigel/Kröll/Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice* (2nd ed., Kluwer Law International 2015) 458; Higher Regional Court of Celle, 04.09.2003, 8 Sch 11/02, SchiedsVZ 2004, 165, paras 21 – 22; Higher Regional Court of Munich, 12.10.2009, 34 Sch 20/08, SchiedsVZ 2009, 340, para 24.

[565] Böcksteigel/Kröll/Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice* (2nd ed., Kluwer Law International 2015) 458.

recognition and enforcement of foreign arbitral awards have had divergent viewpoints on the burden of proof.

The Ordinance of 1995, which verbatim transplanted the provisions of the New York Convention into Vietnamese law, governed that the resisting party to the recognition and enforcement would be responsible for proving the existence of grounds for refusal.[566] Article 16(1) of this Ordinance read that "*the foreign arbitral award will not be recognised and enforced if the debtor, whether a legal entity or a natural person, has appropriate evidence for the court to determine…*" This provision, in spite of using a different wording from the New York Convention, maintained the imminent philosophy of the Convention.

Unfortunately, the approach and provisions of the Civil Procedure Code of 2004 (amended in 2011) were silent on the burden of proof, thus further deviating from the original wording of the New York Convention.[567] Article 370(1) of the Civil Procedure Code of 2004 (amended in 2011) only stipulated that "*the foreign arbitral award will not be recognised and enforced when it falls within following circumstances…*" Due to the lack of regulations on the burden of proof, several contradictions arose in the practice of the recognition and enforcement of foreign arbitral awards before Vietnamese courts.[568]

(i) Debtors bear the burden of proof

Although the Civil Procedure Code of 2004 (amended in 2011) did not provide any provisions on the burden of proof, several jurisdictional provincial courts determined at the first instance stage that the burden of proof belonged to the debtor or the resisting party to the recognition

[566] Trung Tin Nguyen, 'On the recognition and enforcement of foreign arbitral award under the New York Convention 1958 (Về công nhận và cho thi hành quyết định của trọng tài nước ngoài theo Công ước New York 1958)' (2002) Volume 5 State and Law Journal 28.

[567] Nguyen Gia Thien Le, 'Recognition and enforcement of foreign arbitral awards (Công nhận và cho thi hành phán quyết của trọng tài nước ngoài)' (2016) Volume 24 Legislative Studies Journal 51.

[568] Part 2.2.6 of Report No 43/BC–TANDTC of 26 February 2015 on the Summary of 10 years of implementing the Civil Procedure Code of 2004 (amended in 2011) prepared by the Supreme Court.

and enforcement of a foreign award under the Vietnamese procedural law. This determination was a partly inappropriate adjudication because the legal basis must, in this situation, be the New York Convention rather than Civil Procedure Code of 2004 (amended in 2011).

In a procedure for the recognition and enforcement of an arbitral award rendered by a tribunal of the Singapore International Arbitration Centre before the Provincial Court of Ho Chi Minh City, a Vietnamese debtor claimed that it had not obtained information about the appointment of an arbitrator served by the arbitration centre, but failed to show any evidence to support the claim.[569] Similarly, a Vietnamese debtor was unable to prove that he or she had not received the procedural documents served by the arbitral tribunal of the Court of Arbitration of the German Coffee Association.[570] In another case, a Vietnamese company could not prove that it had not received the procedural documents sent by the arbitral tribunal of the International Cotton Association.[571]

At the appeal stage, the appellate courts of the Supreme Court had the same tendency as the provincial courts to lay the burden of proof on the debtors. In the case law of the Appellate Court of the Supreme Court in Ho Chi Minh City, this court faced the common situation where debtors claimed they had not received the procedural documents served by the arbitral institutions such as the International Cotton Association,[572] Singapore Commodity Exchange Limited[573] and Singapore International Arbitration Centre.[574] However, they all failed to show any evidence in order to support their claims.

[569] Decision No 1375/2012/QĐKDTM–ST of 11 September 2012 of the Provincial Court of Ho Chi Minh City.
[570] Decision No 1491/2012/QĐKDTM–ST of 28 September 2012 of the Provincial Court of Ho Chi Minh City.
[571] Decision No 177/2014/QĐST–KDTM of 5 March 2014 of the Provincial Court of Ho Chi Minh City.
[572] Decision No 52/2014/QĐKDTM–PT of 9 September 2014 of the Appellate Court of the Supreme Court in Ho Chi Minh City.
[573] Decision No 73/2007/QĐKDTM–PT of 27 July 2007 of Appellate Court of Supreme Court in Ho Chi Minh City.
[574] Decision No 87/2013/QĐKDTM–PT of 14 August 2013 of Appellate Court of Supreme Court in Ho Chi Minh City.

It is notable that, in some cases, the provincial courts and the Appellate Courts of the Supreme Court determined that the burden of proof belonged to the debtors rather than the creditors or petitioners. Although there was no clear provision on the burden of proof in the Civil Procedure Code of 2004 (amended in 2011), this Code did not prevent the creditors from exercising their procedural right to submit evidence. The Civil Procedure Code of 2004 (amended in 2011) obviously guaranteed the creditor's right to submit evidence.[575] The creditors either used this procedural right at the first instance stage[576] or the appeal stage[577] in order to motion for the recognition and enforcement of foreign arbitral awards. The creditor often attempted to prove that the debtor had indeed obtain the procedural documents served by the arbitral institutions. For instance, in a case heard before the Provincial Court of Ho Chi Minh City, the creditor proved that the necessary procedural documents had been sent to the debtor through various means, including the express mail service, email and in other ways by the Singapore International Arbitration Centre.[578]

In recent cases, some Vietnamese jurisdictional courts have applied the provisions of the Civil Procedure Code of 2015 to determine that the debtor indisputably had the burden of proof. In a case heard by the Provincial Court of Hai Phong, the court adjudicated that the Vietnamese debtor could not prove that it had not received the procedural documents served by the Jiaozuo Arbitration Committee (Henan, China), so it could not raise this ground for refusal.[579]

[575] Article 58(2) of the Civil Procedure Code of 2004 (amended in 2011).

[576] Decision No 1375/2012/QĐKDTM–ST of 11 September 2012 of Provincial Court of Ho Chi Minh City; Decision No 177/2014/QĐST–KDTM of 5 March 2014 of Provincial Court of Ho Chi Minh City.

[577] Decision No 73/2007/QĐKDTM–PT of 27 July 2007 of Appellate Court of Supreme Court in Ho Chi Minh City; Decision No 87/2013/QĐKDTM–PT of 14 August 2013 of Appellate Court of Supreme Court in Ho Chi Minh City.

[578] Decision No 1375/2012/QĐKDTM–ST of 11 September 2012 of Provincial Court of Ho Chi Minh City; Decision No 87/2013/QĐKDTM–PT of 14 August 2013 of Appellate Court of Supreme Court in Ho Chi Minh City.

[579] Decision No 01/2017/QĐKDTM–ST of 7 September 2017 of Provincial Court of Hai Phong.

(ii) Petitioners bear the burden of proof

Due to the ambiguity of the Civil Procedure Code of 2004 (amended in 2011) on the burden of proof, several provincial courts and Appellate Courts of the Supreme Court held that the party bearing the burden of proof was the creditor rather than the debtor. The burden of proof of the creditor was normally ruled out due to two circumstances, including the capacity of the debtor's representative and the circumstance that the debtor had received the procedural documents served by the arbitration institutions.

In a case brought before the Provincial Court of Long An, the court held that the creditor could not provide any evidence to show that the debtor had been summoned appropriately, so the court decided to refuse the petition for the recognition and enforcement of the award made by an arbitral tribunal of the International Cotton Association.[580] Analogously, when dealing with a petition for the recognition and enforcement of another award rendered by a respective arbitral tribunal of the International Cotton Association, the Provincial Court of Binh Duong also refused to recognise the award because the creditor could not demonstrate any proof indicating that the debtor had been summoned appropriately and duly.[581]

At the appeal stage, when the Appellate Court of the Supreme Court in Ho Chi Minh City faced a motion for the recognition and enforcement of an arbitral award rendered by an arbitral tribunal of the Hong Kong International Arbitration Centre, this court required that the creditor prove that the debtor's representative did not have sufficient capacity to sign a commercial contract, including an arbitration agreement.[582]

It goes without saying that the rulings in the above cases of the Provincial Court of Long An, the Provincial Court of Binh Duong as well as the Appellate Court of the Supreme Court in

[580] Decision No 01/2013/QTST–KDTM of 27 May 2013 of Provincial Court of Long An.

[581] Decision No 02/2013/QĐKDTM–ST of 23 May 2013 of the Provincial Court of Binh Duong.

[582] Decision No 69/2013/QĐPT–KDTM of 15 March 2013 of the Appellate Court of the Supreme Court in Ho Chi Minh City.

Ho Chi Minh City were contrary to the actual wording of the provisions under Article V of the New York Convention. The determinations and deliberations of those courts reversed the burden of proof, thus leading to many challenges for creditors in practice. The Supreme Court alleged this challengeable circumstance in the important Practice Note No 246/TANDTC–KT of 25 July 2014 on handling petitions for the recognition and enforcement of foreign commercial awards. In addition, Report No 43/BC–TANDTC of 26 February 2015 on the Summary of 10 years of implementing the Civil Procedure Code of 2004 (amended in 2011) also repeated this contradictory situation.

In order to overcome the challenges relating to the recognition and enforcement of foreign arbitral awards described in the Civil Procedure Code of 2004 (amended in 2011), Vietnamese legislators tried to amend those contradictions when composing a new Civil Procedure Code. The Civil Procedure Code of 2015 reverts to the original provisions of the New York Convention, especially as far as Article V is concerned, regarding the grounds for a refusal and the burden of proof.[583] Accordingly, Article 459(1) of the Civil Procedure Code of 2015 reads that the provincial courts will not recognise or enforce a foreign arbitral award when it has been deemed that the evidence provided by the debtors resisting the application for recognition is well–grounded, and that the arbitral award in question falls within one of the respective cases. Although the provision uses different wording, it correctly reflects the real notion of Article V of the New York Convention, which places the burden of proof on the debtor to the arbitral award.[584]

Given the unquestionably clear provision of the Civil Procedure Code of 2015, it is surprising that some Vietnamese courts, at both first instance and appellate levels, still consider that the creditor rather than the debtor bears the burden of proof. In a case brought before the

[583] Nguyen Gia Thien Le, 'Recognition and enforcement of foreign arbitral awards (Công nhận và cho thi hành phán quyết của trọng tài nước ngoài)' (2016) Volume 24 Legislative Studies Journal 51.

[584] Nguyen Gia Thien Le, 'Recognition and enforcement of foreign arbitral awards (Công nhận và cho thi hành phán quyết của trọng tài nước ngoài)' (2016) Volume 24 Legislative Studies Journal 51.

Provincial Court of Can Tho,[585] the court determined that an arbitral award made by the Swiss Chambers' Arbitration Institution (SCAI) between a Singaporean creditor and a Vietnamese debtor could not be recognised and enforced in Vietnam. The reasons for this non–recognition were that, firstly, the creditor had not proven that the debtor had received the procedural documents served by the SCAI, and, secondly, it failed to submit a certificate from the Swiss authority confirming the validity of the arbitral award. Although those observations were absolutely contrary to the core legal viewpoint of the Civil Procedure Code of 2015, as well as the New York Convention, the Higher Court in Ho Chi Minh City improperly upheld the first instance court's decision and determined to not recognise the SCAI's award.[586]

(iii) Courts collect evidence

Under Article V of the New York Convention, national courts can exercise their judicial rights to collect evidence *ex officio* in the event that the court suspects that a certain foreign arbitral award goes against the provisions on arbitrability as well as the public order in the recognising country.

In Vietnam, procedural instruments including both the Civil Procedure Code of 2004 (amended in 2011)[587] and the Civil Procedure Code of 2015[588] have transparently read that the Vietnamese national courts have the judicial right to collect evidence based on their own motions. The respective courts can also collect evidence based on the suggestion of the procuracy rather than their own initiatives.[589] However, it is notable that the procuracies' suggestions have only been optional, and the jurisdictional courts can either take those suggestions into consideration or reject them.

[585] Decision No 01/2017/QĐKDTM–ST of 29 December 2017 of the Provincial Court of Can Tho.
[586] Decision No 25/2018/QĐKDTM–PT of 28 June 2018 of the Higher Court in Ho Chi Minh City.
[587] Article 81 of the Civil Procedure Code of 2004 (amended in 2011).
[588] Article 6(2) and Article 48(3) of the Civil Procedure Code of 2015.
[589] Article 85(3) of the Civil Procedure Code of 2004 (amended in 2011) and Article 58(3) of the Civil Procedure Code of 2015.

In contrast to the notion of Article V(2) of the New York Convention, the case law issued in both the first instance stage and the appeal stage by the Vietnamese provincial courts as well as the Appellate Courts of the Supreme Court has indicated that Vietnamese courts tend to collect evidence at their own discretion in two scenarios: concerning the procedure[590] and concerning the capacity of the parties in the procedure for recognition and enforcement.[591]

The Provincial Court of Ho Chi Minh City has exercised its judicial rights several times to collect evidence from international shipping services such as FedEx[592] and DHL[593] in order to show that the debtors had in fact received the procedural documents served by the institutions. In one particular case, the Appellate Court of the Supreme Court in Ho Chi Minh City asked FedEx for evidence showing that the debtors had received the procedural document served by the arbitral tribunal of the International Cotton Association.[594]

In cases heard before the Provincial Court of Hanoi,[595] this court sent practice notes to the Planning and Investment Department of Hanoi in order to collect operating information about the Vietnamese debtors to foreign arbitral awards. In another case, the Provincial Court of Hung Yen served ordered the Consular Department of Vietnam's Ministry of Foreign Affairs to submit information about the Indonesian creditor to a foreign arbitral award.[596] In the same case, the Provincial Procuracy of Hung Yen also sent a suggestion about collecting evidence

[590] Decision No 52/2014/QĐKDTM–PT of 9 September 2014 of the Appellate Court of the Supreme Court in Ho Chi Minh City; Decision No 177/2014/QĐST–KDTM of 5 March 2014 of the Provincial Court of Ho Chi Minh City; Decision No 156/2014/QĐST–KDTM 26 February 2014 of the Provincial Court of Ho Chi Minh City.

[591] Decision No 05/2015/KDTM–ST of 25 December 2015 of the Provincial Court of Hanoi; Decision No 05/2017/QĐKDTM–ST of 21 July 2017 of the Provincial Court of Hanoi; Decision No 03/2007/ST– KDTM 10 August 2007 of the Provincial Court of Hung Yen.

[592] Decision No 177/2014/QĐST–KDTM of 5 March 2014 of the Provincial Court of Ho Chi Minh City.

[593] Decision No 156/2014/QĐST–KDTM 26 February 2014 of the Provincial Court of Ho Chi Minh City.

[594] Decision No 52/2014/QĐKDTM–PT of 9 September 2014 of the Appellate Court of the Supreme Court in Ho Chi Minh City.

[595] Decision No 05/2015/KDTM–ST of 25 December 2015 of the Provincial Court of Hanoi; Decision 05/2017/QĐKDTM–ST of 21 July 2017 of the Provincial Court of Hanoi.

[596] Decision No 03/2007/ST–KDTM of 10 August 2007 of the Provincial Court of Hung Yen.

to the Provincial Court of Hung Yen. After considering all the evidence before it, this respective court refused the procuracy's suggestion.

3. Exclusive grounds

a) Incapacity of the parties and invalidity of the arbitration agreement

Under Article V(1)(a) of the New York Convention, a petition for the recognition and enforcement of a foreign arbitral award may be refused if the arbitration agreement was invalid, or if one of the parties lacked the capacity to conclude the arbitration agreement.[597] This provision has been transplanted into all three legal instruments, namely the Ordinance of 1995, the Civil Procedure Code of 2004 (amended in 2011) and the Civil Procedure Code of 2015.[598]

(i) General rules

Generally, the parties – whether natural persons or legal persons – have to possess the capacity to enter into a commercial contract. Analogously, an arbitration agreement also requires the parties' capacity, [599] which has also been called *subjective arbitrability* or *arbitrability ratione personae*.[600] An arbitration agreement concluded by a party without the appropriate capacity[601] can form the grounds for the refusal to recognise and enforce an award before a respective national court of the recognising country. In accordance with the wording

[597] Kronke/Nacimiento/Otto (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International 2010) 218.

[598] Article 16(1)(a) of the Ordinance of 1995; Article 370(1)(a) and Article 370(1)(b) of the Civil Procedure Code of 2004 (amended in 2011); Article 459(1)(a) and Article 459(1)(b) of the Civil Procedure Code of 2015.

[599] Kronke/Nacimiento/Otto (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International 2010) 218.

[600] John Savage and Emmanuel Gaillard, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) para. 534.

[601] Sébastien Besson and Jean–François Poudret, *Comparative Law of International Arbitration* (Stephen Berti and Annette Ponti trs, 2nd ed., Sweet & Maxwell–Schulthess 2007) 831.

of the New York Convention, the capacity of a party has to be determined under the "law applicable to them," which leads to the choice–of–law rule.[602]

Pursuant to German law, the capacity of a natural person to enter into an arbitration agreement is governed by the law of the country of which this natural person is a citizen,[603] while the capacity of a legal entity to enter into an arbitration agreement is determined by the law where it has its registered office, or where it is incorporated for parties that are enterprises from other EU member states.[604] Under Vietnamese law, like German law, the legal capacity of a natural person to enter into an arbitration agreement is provided for by the law of the country of which this natural person is a citizen,[605] while the legal capacity of a legal person is governed by the law of the place where it registered.[606]

In the practical field of international arbitration, there are three types of law used to determine the validity of an arbitral agreement involving the law agreed to by the parties, the law of the seat of arbitration and the law of the underlying contract. In relation to the arbitration agreement, there is a principle called *favorem validitatis*, which is in favour of the validity of arbitration agreement in the event that a pathological agreement was made by the parties.[607]

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[602] Reimar Wolff (ed), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards – Commentary* (C.H.Beck–Hart–Nomos 2012) 273.

[603] Article 7(1) of Introductory Act to the Civil Code.

[604] Böcksteigel/Kröll/Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice* (2nd ed., Kluwer Law International 2015) 463.

[605] Article 673(1) of the Civil Code 2015.

[606] Article 676(1) of the Civil Code 2015.

[607] Peter Tzeng, 'Favoring Validity: The Hidden Choice of Law Rule for Arbitration Agreements Article' (2016) Volume 27(3) American Review of International Arbitration 340, 341.

(ii) Typical cases and analyses

Subjective arbitrability, or the capacity to enter into an arbitration agreement, has rarely been used as grounds for refusal before German courts.[608] On the contrary, Vietnamese courts have applied these grounds in several cases when refusing motions for the recognition and enforcement of foreign arbitral awards in Vietnam.

Pursuant to the pro–arbitration spirit of the German courts, if a party does not raise an objection to the lack of capacity of the other party during the arbitral procedure, it is precluded from raising these grounds again at the stage of recognition and enforcement under the principle of *venire contra factum proprium*.[609] This principle has been pivotal and widely used in the field of international arbitration; however, the Vietnamese courts seem to be partly reluctant to apply it. The capacities of the parties to enter into arbitration agreements include the signatures of the parties, the existence of the parties, the capacity of the company's director and the legal representative.

* Signature of the parties

In a case brought before the Appellate Court of the Supreme Court in Hanoi[610] and the Appellate Court of the Supreme Court in Ho Chi Minh City,[611] the creditor was a Swiss company and the debtors were Vietnamese companies. Under the creditor's company regulations, the company had several representatives that could jointly sign commercial contracts. A representative of the creditor signed the commercial contracts, which included arbitration agreements, with the debtors individually rather than jointly with the other representatives. At the stage of recognition and enforcement, the creditor submitted notarised translations of the provisions of Swiss law clearly stating that a representative of a Swiss

[608] Böcksteigel/Kröll/Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice* (2nd ed., Kluwer Law International 2015) 145.

[609] Böcksteigel/Kröll/Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice* (2nd ed., Kluwer Law International 2015) 464.

[610] Decision No 33/2016/KDTM–QĐ of 11 April 2016 of the Higher Court in Hanoi.

[611] Decision No 117/2014/QĐ–PT of 7 August 2014 of the Appellate Court of the Supreme Court in Hanoi.

company entering into a contract without authorisation can be authorised later. Unfortunately, the Appellate Court of the Supreme Court in Hanoi and the Appellate Court of the Supreme Court in Ho Chi Minh City refused to check the creditor's submissions and adjudicated that, under Vietnamese law, the creditor's representatives could not have concluded the commercial contracts, including arbitration agreements, with the debtors. Thus, the courts refused to recognise the awards rendered by the arbitral tribunals of the International Cotton Association.

In another case heard by the Provincial Court of Nam Dinh, the court refused to recognise an award issued by an arbitral tribunal of the International Cotton Association because the underlying contract between the creditor and the debtor was made without the signature of the debtor, and the debtor raised this issue in the arbitration procedure. At the appeal stage, the Appellate Court of the Supreme Court in Hanoi[612] followed the same notion and upheld the first instance decision of the Provincial Court of Nam Dinh.

Although the authentic signatures of the parties must be proven in the documents containing arbitration agreements, as the Higher Regional Court of Koblenz determined in a decision,[613] the applicable law concerning the validity of the arbitration agreement also plays a significant role, because the form of the arbitration agreement can be determined under it. In the first two cases mentioned above, the decisions of the Appellate Court of the Supreme Court in Hanoi and the Appellate Court of the Supreme Court in Ho Chi Minh City were unpersuasive because those courts applied Vietnamese law rather than Swiss law, which was the applicable law for the creditor when determining the signing–contract ability of the creditors. The application of Vietnamese substantive law in order to determine the legal capacity of a foreign party was an inappropriate adjudicating conduct, and this challengeable attitude was also considerably warned against in Practice Note No 246/TANDTC–KT of 25 July 2014 of the

[612] Decision No 01/2015/DSPT–QĐ of 13 January 2015 of the Appellate Court of the Supreme Court in Hanoi.
[613] Decision of the Higher Regional Court of Koblenz 31.01.2012 – 2 Sch 12/10.

Supreme Court on handling petitions for the recognition and enforcement of foreign commercial awards.

On the other hand, in a case brought before the Provincial Court of Nam Dinh and then appealed before the Appellate Court of the Supreme Court in Hanoi, the courts did not determine which law would be applicable for assessing the validity of the arbitration agreement. If, under this applicable law, the debtor would not be permitted to enter into the arbitration agreement, then the courts can hold that the award will not be recognised and enforced. This solution seems harmonised with the principle of *favorem validitatis*, which is widely used in other pro–arbitration jurisdictions like in Germany.[614]

* Existence of the parties

Quite obviously the parties have to validly exist at the time of concluding the arbitration agreement,[615] so the disappearance of one of the parties could form grounds for a refusal to recognise and enforce the foreign arbitral award. In the practice of the procedure of recognising and enforcing foreign arbitral awards, the Provincial Court of Hung Yen[616] refused to recognise a petition for the recognition and enforcement of a foreign award made in Indonesia because the creditor did not exist in reality, based on proof submitted by the Vietnamese debtor. Practice Note No 1689/CV–LS–HPH of the Department of Consulate of Ministry of Foreign Affairs confirmed that the creditor had not registered at the Indonesian Chamber of Commerce. The decision of the Provincial Court of Hung Yen was indisputably appropriate and persuasive.

[614] Higher Regional Court of Schleswig 30.03.2000, RIW 2000, 706 (707); Federal Court of Justice 21.09.2005, SchiedsVZ 2005, 306 (307); Federal Court of Justice, 30.09.2010, SchiedsVZ 2010, 332f; Higher Regional Court of Munich, SchiedsVZ 2009, 340–343; Higher Regional Court of Frankfurt 27.08.2009 – 26 SchH 03/09.
[615] Jens–Peter Lachmann, *Handbuch für die Schiedsgerichtspraxis* (Verlag Dr Otto Schmidt 2008) para. 2554.
[616] Decision No 03/2007/ST–KDTM of 10 August 2007 of the Provincial Court of Hung Yen.

* Capacity of the company's director

In a procedure of considering a petition for the recognition and enforcement of an award rendered by an arbitral tribunal of the International Cotton Association heard before the Provincial Court of Ho Chi Minh City,[617] the Vietnamese debtor invoked the circumstance that, under Article 32(3) of the internal company regulations: "*the director is in charge of conducting the business plan and investment project agreed by the Board of Managers… the director cannot sign sales contracts for an amount exceeding VND 15 billion.*" Nevertheless, the respective court refused this statement because it adjudicated that: "*pursuant to Article 116(3)(a) of the Law on Enterprises, the director decides on the everyday business operation of the company without a resolution of the Board of Managers. This means that the debtor's director, in this case, had full capacity to conclude the contract with the Swiss creditor.*" Furthermore, this court also expressed that, because the parties to the dispute agreed on applying English law for governing the merits, this applicable law will also cover the validity of the arbitration agreement. The Provincial Court of Ho Chi Minh City then held to recognise and enforce the petition of the Swiss creditor. National courts normally experience this solution when determining whether the applicable law to the underlying contract also covers the arbitration agreement.[618]

Despite being silent on the usage of the *principle of separability*, the solution of the Provincial Court of Ho Chi Minh City was appropriate. The decision of the Provincial Court of Ho Chi Minh City would have been more precise and persuasive if this court had held that, even though the debtor's director did not have the capacity to conclude the underlying commercial contract between the parties, he still had enough capacity to conclude the arbitration agreement because the validity of the underlying contract and the validity of the arbitration agreement were absolutely separate.

[617] Decision No 177/2014/QĐST–KDTM of 5 March 2014 of the Provincial Court of Ho Chi Minh City.
[618] Böcksteigel/Kröll/Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice* (2nd ed., Kluwer Law International 2015) 464.

In Germany, some higher regional courts, such as the Higher Regional Court of Dresden[619] and the Higher Regional Court of Saarbruecken,[620] have directly applied the principle of separability when recognising the validity of arbitration agreements. Some higher regional courts, such as the Higher Regional Court of Hamburg, have even confirmed that the termination of the underlying contract would not automatically cause the termination of the arbitration agreement.[621]

In a similar situation, in which a petition for the recognition and enforcement of an arbitral award made by an arbitral tribunal of the International Cotton Association was brought before the Appellate Court of the Supreme Court in Hanoi,[622] the debtor pointed out that the debtor's chairman, who was also the director, did not have the authority to conclude two commercial contracts, including an arbitration agreement, with the Swiss creditor. Therefore, in the debtor's view, the foreign award could not be recognised and enforced due to the lack of the debtor's capacity. Surprisingly, instead of applying and interpreting those provisions, as the Provincial Court of Ho Chi Minh had done,[623] the Appellate Court of the Supreme Court in Hanoi allowed the notion made by the debtor and held to not recognise and enforce the foreign award. The bifurcated approach of divergent courts to cases with the same content leads to two opposite solutions.

* Capacity of the company's legal representative

In the area of international arbitration, there is a *group of companies theory*. According to this theory, a company in a certain group will be bound by an arbitration agreement concluded

[619] Higher Regional Court of Dresden 18.02.2009 – 11 Sch 07/08.

[620] Higher Regional Court of Saarbruecken 30.05.2011, SchiedsVZ 2012, 4.

[621] Higher Regional Court of Hamburg 12.03.1998, IPRspr 1999, No 178; Böcksteigel/Kröll/Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice* (2nd ed., Kluwer Law International 2015) 467.

[622] Decision No 33/2016/KDTM–QĐ of 11 April 2016 of the Higher Court in Hanoi.

[623] Decision No 177/2014/QĐST–KDTM of 5 March 2014 of the Provincial Court of Ho Chi Minh City.

between another company in this group and a third party company.[624] German law rejects the application of this theory because it goes beyond the ordinary principles of contract interpretation.[625] Vietnamese law absolutely follows the same notion as German law in this event.

As for the representative of a company, the Higher Regional Court of Munich adjudicated in a certain case that if a representative of a party lacks representative ability, the arbitral agreement concluded by this representative is invalid.[626] Vietnamese courts have strictly applied this approach.

In a decision of the Appellate Court of the Supreme Court in Ho Chi Minh City,[627] the court assessed that, under the internal company regulations of the Vietnamese debtor, a director of the debtor's subsidiary could not sign a contract for an amount exceeding VND 2 billion. Additionally, the debtor's director did not authorise the subsidiary director to conclude the underlying contract. The court, therefore, held that the commercial contract, including the arbitration agreement, signed between the director of a debtor's subsidiary and the creditor was invalid. The court then refused to recognise an award made by an arbitral tribunal of the International Chamber of Commerce.

In another case, a pathological arbitration clause in a commercial contract between a Vietnamese company and a foreign company read that "… *the dispute arising out of this contract will be resolved by Swiss International Arbitration Centre.*" However, the pathological clause did not include significant content, such as the language of the procedure,

[624] Gary B. Born, *International Arbitration: Law and Practice* (2nd ed., Kluwer Law International 2015) §5.01 para. 5.

[625] Böcksteigel/Kröll/Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice* (2nd ed., Kluwer Law International 2015) 468.

[626] Higher Regional Court of Munich 19.01.2009 – 34 Sch 04/08.

[627] Decision No 142/2005/QĐPT of 12 July 2005 of the Appellate Court of the Supreme Court in Ho Chi Minh City.

the place of arbitration, the applicable law for the procedure and the number of arbitrators in the arbitral tribunal. Due to the ambiguity of the arbitration agreement, the parties to this agreement had to negotiate for more detailed content. The evidence demonstrated that, although the debtor's counsel was authorised to attend the arbitral procedure, he was not authorised to negotiate with the creditor on the further contents of the arbitration agreement. When the creditor filed a petition for the recognition and enforcement of a foreign arbitral award before the Provincial Court of Dong Nai,[628] the provincial court refused to recognise and enforce the respective award because the debtor's counsel did not have the formal authorisation issued by the debtor to negotiate with the creditor on particular matters of the arbitration agreement. It was also notable that the Swiss International Arbitration Centre did not exist in reality, but the court was silent on the validity of the arbitration institution when adjudicating its decision.

In a number of cases, Vietnamese courts insisted that the individual playing the role of business representative,[629] the company's deputy director[630] or the company's subsidiary deputy director[631] was not allowed to conclude commercial contracts, including an arbitration agreement, with other companies without the formal authorisation of the company. In one rare decision of the Appellate Court of the Supreme Court in Ho Chi Minh City,[632] this court accepted the validity of an arbitral agreement, even though the debtor's representative was not authorised to sign the underlying contract with the creditor. The court held this position because, three months after the contract was concluded, the debtor sent a fax to the creditor in order to authorise this representative.

[628] Decision No 17/2014/QĐST–KDTM of 11 August 2014 of the Provincial Court of Dong Nai.
[629] Decision No 59/KTPT of 4 June 1998 of the Appellate Court of the Supreme Court in Hanoi.
[630] Decision No 1491/2012/QĐKDTM–ST of 28 September 2012 of the Provincial Court of Ho Chi Minh City; Decision No 01/2017/QĐKDTM–ST of 29 December 2017 of the Provincial Court of Can Tho; Decision No 25/2018/QĐKDTM–PT of 28 June 2018 of the Higher Court in Ho Chi Minh City.
[631] Decision No 54/2015/VKDTM–PT of 22 May 2015 of the Appellate Court of the Supreme Court in Hanoi.
[632] Decision No 145/2013/QĐKDTM–PT of 12 August 2013 of the Appellate Court of the Supreme Court in Ho Chi Minh City.

In general, Vietnamese courts, including provincial courts and appellate courts of the Supreme Court, have been rather strict in considering the validity of an arbitration agreement. In some cases the courts did not apply the doctrine of *favorem validitatis* to favour the effectiveness of arbitration agreements. As for the authorisation of companies, the Vietnamese courts have tended to interpret the validity of arbitration agreements by taking a strict approach.

For instance, in a case heard before the Provincial Court of Dong Nai,[633] the fact that the Vietnamese debtor authorised its counsel to take part in the arbitration procedure could be inferred as the debtor's permission for the counsel to negotiate with the other party on specific matters of the arbitration agreement. Finally, the Vietnamese courts have rarely applied the doctrine of separability. The courts have frequently tied the validity of an underlying contract with the validity of the arbitration agreement, even though those validities are to be strictly separated.

b) Irregularities in the arbitration procedure

(i) General rules

Article V(1)(b) of the New York Convention sets out minimum standards for a fair arbitral procedure, including the basic features of due process.[634] Equal treatment and the right to be heard are two cornerstones of a fair and due procedure.[635] These two fundamental principles are applied to all arbitration procedures, irrespective of whether the arbitration procedure is ad hoc or institutional. These fundamental principles consist of two circumstances, those being the *improper notice of appointing an arbitrator or the arbitration procedure* and the *ability of*

[633] Decision No 17/2014/QĐST–KDTM of 11 August 2014 of the Provincial Court of Dong Nai.

[634] Reimar Wolff (ed), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards – Commentary* (C.H.Beck–Hart–Nomos 2012) 279; Böcksteigel/Kröll/Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice* (2nd ed., Kluwer Law International 2015) 469.

[635] Marike Paulsson, *The 1958 New York Convention in Action* (Kluwer Law International 2016) 229.

a party to present its case.[636] These defects can be assessed before the recognising court via the application of *lex arbitri, lex fori* or the international best standard.[637]

Article V(1)(d) of the New York Convention indicates the possibility of not recognising a foreign arbitral award if there are defects in relation with *the composition of the arbitral tribunal or the arbitral procedure* and those *defects are not compatible with the applicable law chosen by the party or the law of the origin country*. When the applicable law agreed on by the parties to a certain dispute cannot be harmonised with the law of the country of origin, the law agreed on by the parties will be more prevailing under the principle of favouring the party autonomy.[638]

Notably, in the event that procedural defects are rejected by the national courts of the country of origin or the country where the arbitration is based, it could lead to the denial of considering the same defects before the courts of the country enforcing the award.

*The principle of causality (*or *the principle of causal nexus)*[639] is often applied in these situations; indeed, several courts of arbitration–friendly countries, such as Germany, require that any defects that may have occurred in the arbitration procedure will affect the outcome of the dispute in advance.[640] Thereupon, the court has been inclined to recognise and enforce a foreign arbitral award in the event that the procedural flaws did not have any effect on the

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[636] International Council for Commercial Arbitration, *ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges* (Permanent Court of Arbitration 2011) 89.

[637] Reimar Wolff (ed), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards – Commentary* (C.H.Beck–Hart–Nomos 2012) 283.

[638] Böcksteigel/Kröll/Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice* (2nd ed., Kluwer Law International 2015) 479.

[639] Dennis Solomon, 'Interpretation and Application of the New York Convention in Germany' in George A. Bermann (ed), *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts* (Springer 2017) 342; Böcksteigel/Kröll/Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice* (2nd ed., Kluwer Law International 2015) 479.

[640] Reimar Wolff (ed), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards – Commentary* (C.H.Beck–Hart–Nomos 2012) 287.

final result. Both the higher regional courts and the Federal Court of Justice in Germany have followed this approach.[641]

Additionally, *the principle of good faith*[642] and the doctrine of *venire contra factum proprium*[643] are also applied. It has been construed that if the debtor fails to raise any objections to a certain matter in the arbitration procedure, the same objection cannot be raised in the stage of recognition and enforcement.[644]

This has been one of the most frequent grounds[645] raised by the resisting party, namely the debtor, in an attempt to encourage the recognising court of a certain country to refuse the petition for the recognition and enforcement of a foreign arbitral award. As a result, the burden of proof relating to these grounds has been placed on the party resisting the recognition and enforcement.

(ii) Typical cases and analyses

* non–existence of an arbitration procedure

In the procedure of considering a petition for the recognition and enforcement of a foreign award made by an arbitral tribunal of the Badan Arbitrase Nasional Indonesia, the debtor submitted a declaratory note of the chairman of this arbitration institution confirming that the arbitration procedure had not been conducted by the institution. This declaratory note was the

[641] Federal Court of Justice, SchiedsVZ 2009, 126, 127; Federal Court of Justice, NJW 1986, 3027, 3028; Higher Regional Court of Hamburg, RIW 1991, 152; Higher Regional Court of Stuttgart, RIW 1988, 480, 483.

[642] Higher Regional Court of Berlin, 10.08.2006, 20 Sch 7/04, SchiedsVZ 2007, 108, para 94. [645] Marike Paulsson, *The 1958 New York Convention in Action* (Kluwer Law International 2016) 162 – 163.

[643] Marike Paulsson, *The 1958 New York Convention in Action* (Kluwer Law International 2016) 162 – 163.

[644] Reimar Wolff (ed), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards – Commentary* (C.H.Beck–Hart–Nomos 2012) 288.

[645] Reimar Wolff (ed), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards – Commentary* (C.H.Beck–Hart–Nomos 2012) 280.

evidence on the basis of which the Provincial Court of Hung Yen[646] based its refusal to allow the recognition and enforcement of the award.

* improper notice of the arbitration institution or the arbitral tribunal

The improper notice of the arbitration institution or the arbitral tribunal has been a popular reason for the Vietnamese jurisdictional courts refusing to allow a petition for the recognition and enforcement of a foreign arbitral award in Vietnam.

In a case brought before the Provincial Court of Ho Chi Minh City,[647] the Vietnamese debtor company declared that it had not received any procedural documents served by the arbitral tribunal based in Singapore. After collecting additional evidence *ex officio*, the court held that all of the document services had been properly served, and that the debtor was at fault for not obtaining the procedural documents. Finally, the Provincial Court of Ho Chi Minh City accepted the petition for recognition and enforcement. The Higher Regional Court of Berlin used the same approach when faced with a petition for recognition and enforcement brought before it.[648]

In other cases,[649] the Vietnamese courts have determined that a subsidiary of a company, especially of a Vietnamese company, had to have the appropriate authorisation from the company in order to attend the arbitration procedure. If it did not, the award would not be recognised and enforced due to an inadequate procedure. The courts did not clarify whether the company had to know about the subsidiary's attendance at the arbitration procedure. The second concern was that the courts applied Vietnamese procedural law rather than the

[646] Decision 03/2007/ST–KDTM of 10 August 2007 of the Provincial Court of Hung Yen.

[647] Decision No 156/2014/QĐST–KDTM of 26 February 2014 of the Provincial Court of Ho Chi Minh City.

[648] Higher Regional Court of Berlin 17.04.2008 – 20 Sch 02/08.

[649] Decision No 15/2014/QĐPT–KDTM of 23 April 2014 of the Appellate Court of the Supreme Court in Ho Chi Minh City; Decision No 127/2013/QĐKDTM–PT of 3 July 2013 of the Appellate Court of the Supreme Court in Ho Chi Minh City; Decision No 54/2015/VKDTM–PT of 22 May 2015 of the Appellate Court of the Supreme Court in Hanoi.

arbitration rules of the arbitration institution or *lex arbitration* when determining whether the arbitration procedure was appropriate or not.

When a party cannot attend the arbitral procedure by itself, it can appoint or authorise a legal representative or a counsel to take part in the procedure.[650] This situation has been common in the practice of international arbitration, as well as in the adjudicating experience of German courts.[651] However, the counsel may only act with the party's authorisation while attending the arbitral procedure. If the counsel performs outside of that authorisation and the arbitration tribunal or the arbitration institution serves the procedural documents to the counsel rather than the authorising company, then the foreign award might not be recognised and enforced. German courts have tended to follow this tendency.[652]

The Provincial Court of Dong Nai in Vietnam has also followed the same notion as the German courts. In a case heard before this court, the parties to the dispute concluded a pathological arbitration clause lacking several fundamental elements, such as the language of arbitration, the place of arbitration, the applicable law and the number of arbitrators. The Vietnamese debtor company authorised a Swiss lawyer to attend the arbitration procedure in Switzerland. The court adjudicated that the procedural documents had not been served to the debtor's address, and so the Swiss counsel was not allowed to negotiate for more content without the consent of the authorising Vietnamese debtor's company.[653]

There have been occasions on which the deputy director of a company attended the arbitration procedure rather than the director, and where the director was not informed about the procedure at all. The arbitral tribunal sent the procedural documents to the mailing address of

[650] Böcksteigel/Kröll/Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice* (2nd ed., Kluwer Law International 2015) 470.
[651] Higher Regional Court of Munich 07.05.2008 – 34 Sch 26/07.
[652] Higher Regional Court of Frankfurt 22.10.2009 – 26 Sch 5/09.
[653] Decision 17/2014/QĐST–KDTM of 11 August 2014 of the Provincial Court of Dong Nai.

the deputy director without notifying the director. This situation appeared in a case handled by the Appellate Court of the Supreme Court in Ho Chi Minh City.[654] This court refused to recognise and enforce an award made by an arbitral tribunal of the Hong Kong International Arbitration Centre. In this decision, the court placed the burden of proof on the creditor rather than the debtor.

* loss of the objection right

Pursuant to the spirit of good faith, or the principle of *venire contra factum proprium*, a party will lose its right to invoke certain grounds at the stage of the recognition and enforcement of a foreign award if this party did not raise the same grounds during the arbitration procedure itself. Vietnamese courts have followed this approach more or less strictly. In a typical case,[655] the Provincial Court of Ho Chi Minh City did not consider the resisting grounds argued by a Vietnamese debtor company that had refused to attend the arbitration procedure held in the United States. The respective court held that the arbitration agreement had undisputable validity, and that the Vietnamese debtor's refusal to take part in the arbitration procedure followed the arbitration rules of Judicial Arbitration and Mediation Services and constituted an action against the principle of good faith. The award, therefore, should be recognised and enforced in Vietnam. Relating to the principle of good faith, German courts have also followed the same approach as the Vietnamese courts.[656]

* violation of the right to be heard

The right to be heard has been a fundamental right of the parties in arbitration procedures. It covers many detailed rights, such as the right to present submissions,[657] the right to

[654] Decision No 69/2013/QĐPT–KDTM of 15 March 2013 of the Appellate Court of the Supreme Court in Ho Chi Minh City.

[655] Decision No 05/2015/KDTM–ST of 25 December 2015 of the Provincial Court of Ho Chi Minh City.

[656] Higher Regional Court of Naumburg 21.02.2002, NJW–RR 2003, 71 (72).

[657] Higher Regional Court of Munich 22.06.2009 – 34 Sch 26/08.

demonstrate arguments or to comment on facts, the right to offer evidence and so on.[658] In these procedural rights, the right to submit evidence is a core element. German courts have been very protective of these rights of parties, after determining that an unreasonable dismissal of a party's submission regarding the offering of evidence would constitute a violation of the right to be heard.[659] Notably, based on the principle of competence–competence of the arbitral tribunal, the tribunal does not need to take into consideration or reject any evidence submitted by the parties. The German courts will, thereupon, not refuse to recognise and enforce an award made where the tribunal did not consider certain evidence in advance.[660]

In the reality of adjudicating on petitions for the recognition and enforcement of a foreign arbitral award, a Vietnamese court[661] had one specific case in which they refused to recognise and enforce an award made by an arbitral tribunal of the International Commercial Arbitration Court at the Russian Chamber of Commerce and Industry because the tribunal refused to consider the legally certified copies served by the Vietnamese debtor company. The tribunal's refusal significantly violated the debtor's right to be heard, as well as reversing the arbitration rules of this arbitration institution, which allowed the parties to submit certified copies.

* appointment of an arbitrator

The parties' right to appoint an arbitrator, construed as a private judge[662] to resolve the dispute, has been highly fundamental. The appointment of an arbitrator enables the parties to trust the arbitration procedure, because the qualification of the arbitration proceedings is

[658] Böcksteigel/Kröll/Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice* (2nd ed., Kluwer Law International 2015) 470.

[659] Böcksteigel/Kröll/Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice* (2nd ed., Kluwer Law International 2015) 474; Higher Regional Court of Cologne 03.06.2003 – 9 Sch 6/03 (domestic award); Higher Regional Court of Cologne 26.11.2002 – 9 Sch 20/02 (domestic award).

[660] Higher Regional Court of Munich 15.12.1999, RPS 2/2000, 16 (18).

[661] Decision No 59/KTPT of 4 June 1998 of the Appellate Court of the Supreme Court in Hanoi.

[662] Huy Dau Nguyen, *Civil Procedural Law of Vietnam (Luật tố tụng dân sự Việt Nam)* (Ministry of Justice 1962) 225.

vitally affected by the qualifications of the arbitrators. A violation of the parties' right to appoint the arbitrators can, therefore, form the grounds for a refusal of the recognition and enforcement of a foreign arbitral award.

According to the rules of most arbitration institutions, the parties to the dispute will have some time to choose and appoint the arbitrators. If the set time passes and the parties cannot choose the arbitrators to serve at their arbitration procedure, the arbitration institution or arbitration court will then appoint the arbitrators for the parties. This notion is absolutely persuasive because the parties are in agreement at the beginning stage of the procedure, and even at the time of concluding the commercial contract on applying the arbitration rules of an arbitration institution. Therefore, the parties cannot raise an objection relating to the appointment of an arbitrator at the stage of the recognition and enforcement before a national court. The Higher Regional Court of Dresden followed this approach strictly.[663] Additionally, the case where the parties are obliged to choose the arbitrators listed from the permanent list of an arbitration institution has not constituted grounds for a refusal to recognise a foreign arbitral award.[664]

In the practice of handling petitions for the recognition and enforcement of foreign arbitral awards, the Vietnamese courts have faced cases in which the arbitration institutions have appointed arbitrators without the consent of the Vietnamese debtor companies. The Vietnamese courts [665] have unhesitatingly refused petitions for the recognition and enforcement of awards based on the notion that the appointments by the arbitration institutions violated the debtors' procedural rights to choose the arbitrators. Instead of refusing directly, the Vietnamese courts should have taken the arbitration rules of the arbitration institution into consideration. If the rules allowed for the institution to appoint the arbitrator

[663] Higher Regional Court of Dresden 20.10.1998 – 11 Sch 04/98.

[664] Higher Regional Court of Frankfurt 27.8.2009 – 26 SchH 03/09.

[665] Decision No 04/2012/VKDTM of 17 September 2012 of the Provincial Court of Hanoi; Decision No 69/2013/QĐPT–KDTM of 15 March 2013 of the Appellate Court of the Supreme Court in Ho Chi Minh City.

without the consent of the parties, the Vietnamese courts should not have referred to the appointments as grounds for the refusal of the recognition and enforcement.

Lex arbitri, or the rules of the arbitration institution, plays a vital role for the national courts when determining the appropriateness of an arbitration procedure, especially when the arbitration takes place overseas. If the arbitration rules of a certain institution allow for a deputy director or a certain representative, such as the counsel, of a company to attend the arbitration procedure, then the recognising court has to follow the provisions of the arbitration rules completely. The procedure of serving documents or appointing an arbitrator is established pursuant to the relevant *lex arbitri* or the arbitration rules. The German courts have regularly and precisely applied these approaches, whereas the Vietnamese courts have not followed the same path. In the event that the Vietnamese courts had taken the same approach as the German courts, several foreign arbitral awards would not have been rejected.[666]

One of the most contradictory notions that the Vietnamese courts have applied has been placing the burden of proof on the creditor[667] rather than the debtor, as depicted in Article V(1) of the New York Convention. When the debtor bears the burden of proof, it is necessary to prove that the flaws or irregularities that occurred during the arbitration procedure had a significantly distorting effect on the outcome of the dispute resolved by the arbitral tribunal.[668]

[666] Duy Luong Tuong, *Commentaries on the Civil Procedure Code, Arbitration Law and adjudicating practice (Bình Luận Bộ Luật Tố Tụng Dân Sự, Luật Trọng Tài Thương Mại Và Thực Tiễn Xét Xử)* (Justice Publisher 2016) 112.

[667] Duy Luong Tuong, *Commentaries on the Civil Procedure Code, Arbitration Law and adjudicating practice (Bình Luận Bộ Luật Tố Tụng Dân Sự, Luật Trọng Tài Thương Mại Và Thực Tiễn Xét Xử)* (Justice Publisher 2016) 111.

[668] Böcksteigel/Kröll/Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice* (2nd ed., Kluwer Law International 2015) 229.

c) *Ultra petita* or excess of competence

(i) General rules

Article V(1)(c) of the New York Convention reads that a petition for the recognition and enforcement of a foreign arbitral award can be refused due to specific circumstances named *ultra petita* or *exceeding an arbitral tribunal's competence*.[669] This provision relates to Article V(1)(a) of the Convention, which not only requires the arbitration agreement to be valid, but also regulates the limitation of the arbitral tribunal's competence.[670] The grounds of *ultra petita* or the excess of competence have not been popular for a refusal of recognition and enforcement. Significantly, the debtor has seldom raised these grounds successfully.[671]

Pursuant to the vital principle of *non révision au fond*,[672] the recognising national court will not review the disputed merits resolved by the arbitral tribunal in advance. The mission of the recognising court in this case is only to check whether the arbitral tribunal has exceeded its competence or adjudicated beyond the scope of the parties' claims.[673] Therefore, even if the arbitral tribunal wrongly applies the substantive law, it does not constitute grounds for refusal.[674]

The requests of the parties are depicted in the term of reference. If the arbitral tribunal exceeds those requests and does not amend the term of the reference later, the grounds of *ultra petita*

[669] Böcksteigel/Kröll/Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice* (2nd ed., Kluwer Law International 2015) 476.

[670] Kronke/Nacimiento/Otto (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International 2010) 259.

[671] Blackaby/Partasides/Redfern/Hunter, *Redfern and Hunter on International Arbitration* (6th ed., Oxford University Press 2015) para. 10.37.

[672] Marike Paulsson, *The 1958 New York Convention in Action* (Kluwer Law International 2016) 168.

[673] Reimar Wolff (ed), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards – Commentary* (C.H.Beck–Hart–Nomos 2012) 324.

[674] Böcksteigel/Kröll/Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice* (2nd ed., Kluwer Law International 2015) 478.

might be raised.[675] Notably, in the circumstances that the award can be separated into different parts, only the parts where the tribunal exceeded its competence cannot be recognised, while the parts compatible with the arbitral tribunal's competence or the scope of term of reference can be normally recognised and enforced.[676]

In specific cases, such as a situation whereby the arbitral tribunal corrects the amount of the dispute,[677] the arbitral tribunal can determines the interest at its own discretion, pursuant to the applicable law,[678] or will adjudicate on both contractual and tort claims pursuant to the applicable law.[679] The German jurisdictional courts, such as the Higher Regional Court of Stuttgart, the Higher Regional Court of Hamburg and the Higher Regional Court of Cologne, have held that those events do not form grounds for a refusal to recognise and enforce foreign arbitral awards.

According to Article V(1) of the New York Convention, it is the debtor rather than the creditor that bears the burden of proof and must show a causality between exceeding the competence and the final outcome of the dispute.

A case of *infra petita* in which the arbitral tribunal does not resolve all of the dispute brought before it cannot fall within the concept of Article V(1)(c).[680] As the New York Convention is totally silent on this case, the recognising national court should, in accordance with the spirit

[675] Stein/Jonas/Schlosser, *Kommentar zur Zivilprozessordnung: ZPO* (22nd ed., C.H.Beck 2002) § 1061 paras 116 et seq.
[676] Karl Heinz Schwab and Gerhard Walter, *Schiedsgerichtsbarkeit* (C.H.BECK–Helbing & Lichtenhahn 2005) ch. 24, para. 15.
[677] Higher Regional Court of Stuttgart 06.12.2000.
[678] Higher Regional Court of Hamburg 30.07.1998, RPS 1/1999, 13 (16).
[679] Higher Regional Court of Cologne 19.12.2001 – 11 U 52/01.
[680] Karl Heinz Schwab and Gerhard Walter, *Schiedsgerichtsbarkeit* (C.H.BECK–Helbing & Lichtenhahn 2005) ch. 24, para. 15.

of pro–recognition of the New York Convention, recognise and enforce the foreign arbitral award.[681]

(ii) Typical cases and analyses

Relating to *ultra petita*, the Vietnamese courts have experienced several peculiar cases. In a first instance stage of adjudicating a petition for the recognition and enforcement of an arbitral award made in Switzerland, the Vietnamese debtor company raised the objection that the arbitration agreements had only been described in two contracts – No SGL/TLS 06/11 and No SGL/TLS 07/11 – both signed on 13 October 2011, and that the payment transaction, carried out by opening a letter of credit in a commercial bank in Vietnam, was not affected by the arbitration agreement. Furthermore, the debtor also stated that, under Article 4 of UCP 600, *a letter of credit by its nature is a separate transaction from the sale or another contract on which it may be based*. According to the debtor's argument, the arbitral tribunal had exceeded its competence when considering matters relating to the letter of credit. The Appellate Court of the Supreme Court in Ho Chi Minh City finally agreed with this statement and held that the foreign arbitral award was not to be recognised and enforced in Vietnam.[682]

In the appeal stage of another case, the Appellate Court of the Supreme Court in Ho Chi Minh City handled a petition for the recognition and enforcement of a foreign award made by the International Cotton Association.[683] The Vietnamese debtor company claimed that there had been an arbitration agreement between the parties in commercial contract No 315510070 signed on 16 March 2011. Then, on 24 June 2011, the parties signed contract No 315510087 amending the delivery time and the number of goods provided for in contract No 315510070 in advance. However, this contract did not regulate any provisions on the arbitration

[681] Reimar Wolff (ed), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards – Commentary* (C.H.Beck–Hart–Nomos 2012) 326.

[682] Decision No 17/2014/QĐST–KDTM of 11 August 2014 of the Provincial Court in Dong Nai.

[683] Decision No 52/2014/QĐKDTM–PT of 9 September 2014 of the Appellate Court of the Supreme Court in Ho Chi Minh City.

agreement. Therefore, the debtor stated that the arbitral tribunal was unable to consider the content of contract No 315510087. Refusing the argument of the debtor, the court held that, due to the amending function of contract No 315510087, it was impossible to separate the contents of the underlying contract from contract No 315510070. With that in mind, the arbitral tribunal had appropriately taken into consideration both contracts in order to issue the award. Accordingly, the award was to be recognised and enforced in Vietnam.

The decision of the Appellate Court of the Supreme Court in Ho Chi Minh City seemed to be persuasive because it was in favour of arbitration and the recognition of the foreign award. On the other hand, the decision of the Provincial Court of Dong Nai was less inappropriate. Although the court was correct on agreeing with the debtor's notion about the application of the arbitration agreement to the letter of credit, it did not recognise and enforce the parts of the award relating to the rights and obligations of the parties pursuant to the underlying contract signed on 13 October 2011. This approach totally deviated from the spirit and wording pursuant to Article V(1)(c) of the New York Convention.

d) Binding validity of a foreign award

(i) General rules

A foreign arbitral award cannot be recognised and enforced before a national court if it is not binding. Under the spirit of the Geneva Convention,[684] which was seen as the predecessor of the New York Convention, a creditor had to prove that the award was enforceable in the country of origin.[685] This requirement led to the "*double exequatur*",[686] a complex procedure in which the recognising court of a certain country would recognise and enforce a foreign judgment, confirming the binding nature of the foreign award rather than recognising and

[684] Convention on the Execution of Foreign Arbitral Awards signed in Geneva on 26 September 1927.

[685] Marike Paulsson, *The 1958 New York Convention in Action* (Kluwer Law International 2016) 9.

[686] Blackaby/Partasides/Redfern/Hunter, *Redfern and Hunter on International Arbitration* (6th ed., Oxford University Press 2015) para. 11.87, 1.210.

enforcing the award itself. Fortunately, this spirit was eliminated in the New York Convention, which in itself was a huge achievement.[687]

Although the doctrine of double exequatur has been commonly applied in some countries,[688] including in Germany in the past,[689] since 2009 the German courts have resisted taking the doctrine into consideration. The Federal Court of Justice refused to apply the doctrine of double exequatur based on the reason that the double exequatur would evade or even disable grounds for a refusal pursuant to Article V of the New York Convention.[690] In reality, Vietnamese courts have never faced a situation relating to double exequatur. However, when those courts handle this situation they can refer to the judicial experience of German courts as a best practice.

There are two approaches to determine the binding nature of a foreign arbitral award: the *autonomous approach* and the *approach according to the country of origin's law*.[691] A foreign arbitral award is considered to be autonomously binding. The arbitral award is only not binding if the arbitral tribunal clearly states this in a decision or an award issued during the arbitral procedure.[692] The second approach is that the binding nature of an arbitral award will be determined under the law of the country of origin. Accordingly, an award set aside or suspended before a national court in the country of origin could be considered an invalid award.[693] This approach was established in the 1950s when the Convention was drafted and

[687] Marike Paulsson, *The 1958 New York Convention in Action* (Kluwer Law International 2016) 195.
[688] Such as the United States, see: Seetransport Wiking Trader v. Navimpex Centrala, 793 F. Supp. 444 (S.D.N.Y. 1992).
[689] Federal Court of Justice, 27.03.1984 – IX ZR 24/83.
[690] Federal Court of Justice, 02.07.2009 – IX ZR 152/06.
[691] Kronke/Nacimiento/Otto (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International 2010) 311.
[692] John Savage and Emmanuel Gaillard, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) para. 1678.
[693] Kronke/Nacimiento/Otto (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International 2010) 313.

signed, and the territorial approach was not dominant, like it is today.[694] If the parties choose the model of the arbitration institution, the arbitration rules of the divergent institution play a vital role in specifying the binding notion of a certain award.[695]

Some countries, particularly Italy, have admired the doctrine of *lodo irrituale*, which is translated into English as an informal award. The German courts considered that this type of award is only a contractual relationship and does not satisfy the qualifications of an award under the New York Convention.[696] Although the Vietnamese jurisdictional courts have never yet faced a case involving the recognition and enforcement of *lodo irrituale*, the position of the German courts while resolving this situation can be seen as a best practice for Vietnamese courts.

Interestingly, when faced with an informal award made in Los Angeles, the Higher Regional Court of Munich[697] held that the award should be recognised and enforced because it had been confirmed by the Superior Court of the State of California. Transparently, this solution of the Higher Regional Court of Munich did in fact apply the principle of double exequatur.[698]

As opposed to the Geneva Convention, the New York Convention regulates that the burden of proof regarding the binding nature of a foreign arbitral award lies on the debtor or the resisting party to the recognition and enforcement of this respective award. This innovation

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[694] Kronke/Nacimiento/Otto (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International 2010) 313.

[695] Kronke/Nacimiento/Otto (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International 2010) 314.

[696] Federal Court of Justice, 08.11.1981 – III ZR 42/80.

[697] Higher Regional Court of Munich 22.11.2002, 4Z Sch 13/02, SchiedsVZ 2003, 142, paras 47–48.

[698] Dennis Solomon, 'Interpretation and Application of the New York Convention in Germany' in George A. Bermann (ed), *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts* (Springer 2017) 332.

has been admired by the international arbitration community and is predominantly applied by national courts.[699]

(ii) Typical cases and analyses

In a case brought before the Appellate Court of the Supreme Court in Ho Chi Minh City,[700] the court argued that the award issued by an arbitral tribunal of the Court of Arbitration of the German Coffee Association was binding because the Vietnamese company debtor did not appeal to the Higher Regional Court of Hamburg to set aside the award within the due time for an appeal as provided for in the German Civil Procedure Code. The Appellate Court of the Supreme Court in Ho Chi Minh City then upheld the decision of the Provincial Court of Ho Chi Minh City to recognise and enforce the award in Vietnam.

In another case,[701] the Provincial Court of Binh Thuan postponed the procedure for recognising and enforcing an award made in Russia by an arbitral tribunal because the award was being considered in a setting aside procedure before a Russian higher court. The Provincial Court of Binh Thuan decided to wait for the result of the setting aside procedure in Russia. If the Russian court had annulled the award, the Vietnamese provincial court would have stayed the procedure of recognition and enforcement, because the foreign arbitral award would no longer be valid and binding. In the event that the Russian court refused to set aside the award, the Vietnamese provincial court would have rendered the decision to continue adjudicating the petition for recognition and enforcement.

Under the German perspective, although it is possible for a foreign award to be set aside before the national court of the country of origin, this possibility does not diminish the

[699] United Nations Commission on International Trade Law, *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (United Nations 2016) 214, 215.

[700] Decision No 145/2013/QĐKDTM–PT of 12 August 2013 of the Appellate Court of the Supreme Court in Ho Chi Minh City.

[701] Decision No 04/2013/QĐST–DS of 17 June 2013 of the Provincial Court of Binh Thuan.

binding nature of the foreign award.[702] However, the German court still waits for the outcome of any setting aside procedure in the country of origin. If the award is subsequently annulled, the German courts will grant a decision to stay the procedure of recognition and enforcement.[703] It is clear that the German courts take the same attitude as the Vietnamese courts when faced with this situation.

After a national court in the country of origin annuls the award, the recognising court will issue a decision refusing the recognition and enforcement of this foreign award. Vietnamese courts have followed this notion strictly. The Provincial Court of Binh Thuan[704] resisted recognising and enforcing a foreign award rendered in Russia because a Russian jurisdictional higher court had set aside the award in advance. Similarly, the recognition and enforcement of an annulled foreign award is not applied in Germany. This is the dominant opinion of both the arbitration community and the national courts.[705] Furthermore, under Article 1061(3) of the German Civil Procedure Code, a German court's decision to grant the recognition and enforcement of a foreign award can be set aside if the award, after being recognised, is subsequently annulled by a jurisdictional national court in the country of origin.

e) Arbitrability of the dispute

(i) General rules

"*Objective arbitrability*", "*arbitrability ratione materiae*"[706] or simply *arbitrability* can also be raised as grounds for resisting a petition for the recognition and enforcement of a foreign

[702] Musielak/Voit, *Zivilprozessordnung: ZPO* (Verlag Franz Vahlen 2018) § 1061 para. 18.

[703] Higher Regional Court of Celle 20.11.2003; 547 (554); Higher Regional Court of Berlin 06.05.2002 (23/29 Sch 21/01); Higher Regional Court of Schleswig 16.06.2008 – 16 Sch 2/07.

[704] Decision No 01/2013/QĐST–KDTM of 18 September 2013 of the Provincial Court of Binh Thuan.

[705] Böcksteigel/Kröll/Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice* (2nd ed., Kluwer Law International 2015) 484.

[706] John Savage and Emmanuel Gaillard, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) para. 533.

arbitral award.[707] Arbitrability is determined by the *lex fori*, or the national law of the recognising court, irrespective of the applicable substantive law to the merit, applicable substantive law to the arbitration agreement, the applicable procedural law of the arbitration procedure[708] or even the *lex arbitri*.[709]

Due to its localised nature, the scope of the term arbitrability differs from country to country.[710] Over time, the concept of arbitrability has changed from a restrictive attitude to a more arbitration–friendly approach.[711] In some countries, disputes relating to the relationship between a company and its shareholders, administrative acts, agency agreements, bankruptcy, competition law, securities transactions, consumer contracts, tort law, real estate, insurance and so on are not arbitrable.[712]

In a comparison of German and Vietnamese regulations, the notion of the term arbitrability displays both similarities as well as differences. The common regulation set forth in both countries' law states that a dispute arising out of a commercial or economic interest between the parties can definitely be resolved by arbitration.[713] However, in contrast to German law, Vietnamese law has restricted the possibility of using arbitration to resolve civil disputes. In Germany, the use of arbitration to resolve cases regarding divorce and succession disputes has

[707] Kronke/Nacimiento/Otto (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International 2010) 348.
[708] Böcksteigel/Kröll/Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice* (2nd ed., Kluwer Law International 2015) 486.
[709] Kronke/Nacimiento/Otto (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International 2010) 349.
[710] Homayoon Arfazadeh, 'Arbitrability under the New York Convention: the Lex Fori Revisited' (2001) Volume 17(1) Arbitration International 73.
[711] Kronke/Nacimiento/Otto (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International 2010) 348.
[712] Kronke/Nacimiento/Otto (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International 2010) 349 – 364.
[713] Article 2(1) of Vietnamese Law on Commercial Arbitration, Article 1030(1) of German Civil Procedure Code.

been popular and effective.[714] Thanks to the wide scope of arbitrability under German law, there has not yet been a case in which a petition for the recognition and enforcement of a foreign award was refused based on the grounds of non–arbitrability.[715] On the contrary, Vietnamese courts have refused several petitions for the recognition and enforcement of foreign arbitral awards due to the non–arbitrability of the disputes.

(ii) Typical cases and analyses

In a quite controversial case, the Provincial Court of Ho Chi Minh City held to recognise and enforce an award rendered in Queensland (Australia) in the first instance stage.[716] In the appeal stage, heard before the Appellate Court of the Supreme Court in Ho Chi Minh City, this court reversed all of the reasons described in the first instance decision because the court determined that the disputed merit was not arbitrable under Vietnamese law.[717] This court then refused to recognise the underlying arbitral award. The court's notion in this case was narrow and contrary to the practice of international arbitration, in that it determined that construction is a non–commercial business.

In another case, an award rendered by an arbitral tribunal of the Singapore International Arbitration Centre resolved a dispute between a foreign company creditor and a Vietnamese company debtor. The Higher Court in Ho Chi Minh City[718] adjudicated that the reason why the Vietnamese debtor could not perform its obligation governed in the contract was its failure to achieve the administrative qualifications of the Department of Planning and Investment in Ho Chi Minh City. The dispute relating to the failure to achieve the administrative

[714] Böcksteigel/Kröll/Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice* (2nd ed., Kluwer Law International 2015) 97, 102.

[715] Dennis Solomon, 'Interpretation and Application of the New York Convention in Germany' in George A. Bermann (ed), *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts* (Springer 2017) 364 – 365.

[716] Decision No 82/QĐ–XĐTT of 23 May 2002 of the Provincial Court of Ho Chi Minh City.

[717] Decision No 02/PTDS of 21 January 2003 of the Appellate Court of the Supreme Court in Ho Chi Minh City.

[718] Decision No 33/2016/QĐPT–KDTM of 8 August 2016 of the Higher Court in Ho Chi Minh City.

qualifications had not obtained arbitrability, so the court refused to recognise the foreign award. In this case, the notion of the court was unpersuasive because, although the dispute arose out of achieving administrative qualifications rather than a concrete commercial dispute, the dispute transparently related to the underlying commercial contract between the parties, so that the award was potentially arbitrable.

Nevertheless, there have been other pro–recognition decisions in which the Provincial Court of Hanoi and the Provincial Court of Ho Chi Minh City held that, when the Vietnamese company debtor did not raise an objection concerning arbitrability,[719] and when the dispute regarded the sale of goods,[720] then the petition for recognition and enforcement could be recognised and enforced in Vietnam.

f) Fundamental principles of law or public policy

(i) General rules

According to the terminology of arbitrability, the *fundamental principles of law* and *public policy* are viewed from the point of view of a recognising country, irrespective of the applicable substantive law of the arbitration agreement, the applicable substantive law of the merits, the applicable procedural law of the arbitration procedure or the *lex arbitri*.[721] This is a very localised term. The Geneva Convention used both terms – the fundamental principles of law and public policy – to describe certain grounds for refusing the recognition and enforcement of a foreign award.[722] However, the New York Convention did not use the term fundamental principles of law and only uses the term public policy.[723] While arbitration–developed jurisdictions only accept the term public policy, some specific countries, such as Vietnam, are still in favour of the term fundamental principles of law.

[719] Decision No 05/2015/KDTM–ST of 25 December 2015 of the Provincial Court of Hanoi.

[720] Decision No 1491/2012/QĐKDTM–ST of 28 September 2012 of the Provincial Court of Ho Chi Minh City.

[721] Kronke/Nacimiento/Otto (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International 2010) 369.

[722] Article 1(e) of the Geneva Convention.

[723] Article V(2)(b) of the New York Convention.

There have been two dissenting types of public policies: *international public policy* and *national public policy*. International public policy consists of universal standards condemned as objections of terrorism, drug trafficking, fraud of international commerce, [724] money laundering and so on, while national public policy is a truly domestic concept that differs from country to country. The term international public policy must be understood as a narrow notion. [725] In an arbitration–friendly jurisdiction like Germany, only international public policy,[726] which is narrower than national public policy,[727] can be invoked when a German court refuses the petition for the recognition and enforcement of a foreign arbitral award. Notably, the violation of public policy as grounds for a refusal is based on the recognition and enforcement of a certain foreign award rather than the award itself.[728]

Pursuant to the judicial experience of German courts, public policy as grounds to refuse the recognition and enforcement has been divided into two main aspects, those being the *substantive public policy* and the *procedural public policy*. Under the substantive public policy, although German courts do not consider the disputed merits due to the principle of *non révision au fond*, these courts look at the award in order to guarantee that the recognition and enforcement will not conflict with the public policy.[729] The violation of German basic economic law,[730] such as the law on price,[731] the law on currency,[732] the law on imports and

[724] Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes: Law and Practice* (Oxford University Press 2007) 889.

[725] Karl Heinz Schwab and Gerhard Walter, *Schiedsgerichtsbarkeit* (C.H.BECK–Helbing & Lichtenhahn 2005) ch. 30, para. 21.

[726] Böcksteigel/Kröll/Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice* (2nd ed., Kluwer Law International 2015) 49.

[727] Böcksteigel/Kröll/Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice* (2nd ed., Kluwer Law International 2015) 488; Higher Regional Court of Munich 20.11.2003, IHR 2004, 81.

[728] Böcksteigel/Kröll/Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice* (2nd ed., Kluwer Law International 2015) 489.

[729] Higher Regional Court of Hamburg 12.03.1998, IPRspr 1999, No 178; Higher Regional Court of Cologne 15.02.2000 – 9 Sch 13/99; Federal Court of Justice 15.07.1999, BGHZ 142, 204 (206).

[730] Böcksteigel/Kröll/Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice* (2nd ed., Kluwer Law International 2015) 489.

[731] Federal Court of Justice 12.05.1958, BGHZ 27, 249 (255).

[732] Imperial Court 28.03.1924, RGZ 108, 139 (142 seq.)

exports,[733] and the national and European law on competition[734] can lead to violations of public policy. Even the violation of a particular provision depicted in an article of the Civil Code relating to the principle of good faith also constitutes grounds for refusal.[735] On the other hand, some circumstances regarding third party funding,[736] higher legal costs than the litigation costs in Germany,[737] interest on late payments,[738] higher interest in comparison to German law[739] and higher attorney fees in comparison to the provisions under German law[740] have not been construed as violations of public policy.

As for the procedural public policy, the common opinion in Germany is that Article V(2)(b) does not exclude Article V(1)(b)[741] and Article V(1)(d). If the arbitration procedure is found not to be compatible with the mandatory rules of German arbitration law, it does not lead to a violation of procedural public policy;[742] however, an arbitration procedure made in a foreign country only causes a violation of public policy if it is considered to have deviated far from the German procedural provisions and is not considered as having been an equitable process. [743] Therefore, specific situations, such as the unreasonable refusal to consider

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[733] Karl Heinz Schwab and Gerhard Walter, *Schiedsgerichtsbarkeit* (C.H.BECK–Helbing & Lichtenhahn 2005) ch. 24, para. 43.

[734] Higher Regional Court of Dusseldorf 21.07.2004 – VI Sch(Kart) 01/02; Higher Regional Court of Dresden 20.04.2005, SchiedsVZ 2005, 210 (212); see also European Court of Justice, Eco Swiss China Time limited vs. Benetton International NV, 01.06.1999, C–126/97, ECR 1999, I–3055; Jens–Peter Lachmann, *Handbuch für die Schiedsgerichtspraxis* (Verlag Dr Otto Schmidt 2008) para. 1217.

[735] Böcksteigel/Kröll/Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice* (2nd ed., Kluwer Law International 2015) 490.

[736] Higher Regional Court of Berlin 27.05.2002 – 23 Sch 06/02.

[737] Higher Regional Court of Dresden 13.01.1999 – 11 Sch 06/98.

[738] Higher Regional Court of Hamburg 30.07.1998, RPS 1/1999, 13 (17).

[739] Higher Regional Court of Dresden 13.01.1999 – 11 Sch 06/98; Higher Regional Court of Hamburg, 26.01.1989, RIW 1991, 152 (154).

[740] Higher Regional Court of Dresden 13.01.1999 – 11 Sch 06/98.

[741] Böcksteigel/Kröll/Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice* (2nd ed., Kluwer Law International 2015) 491.

[742] Federal Court of Justice 18.01.1990, BGHZ 110, 104 (106 et seq.)

[743] Böcksteigel/Kröll/Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice* (2nd ed., Kluwer Law International 2015) 491; Federal Court of Justice 15.05.1986, BGHZ 98, 70 (73 et seq.); Federal Court of Justice 23.02.2006, SchiedsVZ 2006, 161 (164); Higher Regional Court of Bremen 30.09.1999, RPS 2/2000, 18 (20); Higher Regional Court of Brandenburg 02.09.1999, RPS 1/2001, 21

evidence,[744] procedural fraud,[745] threatening of witnesses,[746] an objection to the appointment of arbitrators,[747] the partiality and dependence of arbitrators[748] and so on, can lead to the refusal of recognition of foreign arbitral awards. Despite the wording of Article V(2) of the New York Convention, German courts, in the course of procedural public policy, lay the burden of proof on the resisting party to the recognition and enforcement process,[749] and the party's objection has to be raised within due time.[750]

(ii) Cases and analyses

There have been several cases where Vietnamese courts[751] have granted decisions in favour of the recognition and enforcement of certain foreign awards due to the reason that the awards did not violate the fundamental principles of Vietnamese law. Nonetheless, in those cases the jurisdictional courts did not indicate why the awards did not comply with such fundamental principles. In other cases, however, Vietnamese courts have clearly adjudicated on the reasons for the refusal of recognition and enforcement.

In a case heard before the Provincial Court of Hanoi,[752] the court argued that the applicable substantive law was Vietnamese law, including the Constitution, statutes and lower administrative instruments. Therefore, a construction in Vietnam, without being checked and taken over, was contrary to the fundamental principles of Vietnamese law consisting of the

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(22).

[744] Higher Regional Court of Cologne 23.04.2004, SchiedsVZ 2005, 163 (165).

[745] Higher Regional Court of Munich 20.11.2003, IHR 2004, 81 (83).

[746] Higher Regional Court of Hamburg 03.02.2012 – 6 Sch 2/11.

[747] Böcksteigel/Kröll/Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice* (2nd ed., Kluwer Law International 2015) 493.

[748] Federal Court of Justice 03.07.1975, JZ 1976, 245 (247).

[749] Higher Regional Court of Dresden 20.10.1998 – 11 Sch 04/98.

[750] Higher Regional Court of Munich 20.11.2003, IHR 2004, 81 (83).

[751] Decision No 03/2015/QĐST–KDTM of 25 September 2015 of the Provincial Court of Hanoi; Decision No 1375/2012/QĐKDTM–ST of 11 September 2012 of the Provincial Court of Ho Chi Minh City.

[752] Decision No 07/2014/QĐST–KDTM of the Provincial Court of Hanoi.

Constitution, the Law on Instructions and other decrees enacted by the Vietnamese Government. This case was also the first time a Vietnamese court offered a definition of the term fundamental principles of law, although the scope of this definition was too broad and too unclear.

In another case relating to substantive public policy, the Appellate Court of the Supreme Court in Hanoi[753] refused to recognise and enforce an award made by an arbitral tribunal of The Grain and Feed Trade Association (GAFTA). The reason for the non–recognition and non–enforcement was that the arbitral tribunal had applied the *principle of punitive damages* rather than the *principle of compensatory damages* when evaluating the damages of the creditor. Punitive damages were not governed in Article 307 of the Vietnamese Civil Code of 2005, so if the court had recognised the award, this recognition would have contrasted with the fundamental principles of Vietnamese law. Some commentators in Vietnam have criticised this decision based on the argument that the Appellate Court of the Supreme Court in Hanoi was not persuasive.[754] In another situation, when faced with an award rendering a punitive damage payment, the German Federal Court of Justice[755] arrived at the same solution as the Vietnamese court.

As for the procedural public policy, the Appellate Court of the Supreme Court in Hanoi[756] upheld the first instance decision of the Provincial Court of Hanoi and ruled that the petition for the recognition and enforcement of an award issued by an arbitral tribunal of the Arbitration Court of the International Commercial Arbitration Court at the Russian Chamber of Commerce and Industry was not recognised and enforced because the arbitral tribunal had

[753] Decision No 51/2011/KD–TMPT of 24 March 2011 of the Appellate Court of the Supreme Court in Hanoi.

[754] Van Dai Do, *Law on Vietnam Commercial Arbitration: Cases and Commentaries (Pháp luật Việt Nam về trọng tài thương mại: Bản án và Bình luận)*, Volume 2 (Hong Duc Publishers – Vietnam Lawyer Association 2018) 741; Duy Luong Tuong, *Commentaries on the Civil Procedure Code, Arbitration Law and adjudicating practice (Bình Luận Bộ Luật Tố Tụng Dân Sự, Luật Trọng Tài Thương Mại Và Thực Tiễn Xét Xử)* (Justice Publisher 2016) 482, 484.

[755] Federal Court of Justice 04.06.1992, BGHZ 118, 312 (338 et seq.).

[756] Decision No 59/KTPT of 4 June 1998 of the Appellate Court of the Supreme Court in Hanoi.

refused to take documents notarised by Vietnamese state notaries into consideration. The arbitral tribunal's refusal conflicted with the arbitration rules of the Arbitration Court of the International Commercial Arbitration Court at the Russian Chamber of Commerce and Industry, and obviously contrasted with the Vietnamese fundamental principles.

Before the Council of Judges of the Vietnamese Supreme Court enacted Resolution No 01/2014/NQ–HĐTP of 20 March 2014, on Guidelines for the law on Commercial Arbitration, no common official concept of the term 'fundamental principles' was known under Vietnamese law.[757] Therefore, both the appellate courts of the Supreme Court and the provincial courts arbitrarily defined and inappropriately applied this term in the practice of adjudication. The situation changed with the introduction of Article 14(2)(đ) of Resolution No 01/2014/NQ– HĐTP. This provision stated that the fundamental principles of Vietnamese law are the effective basic rules for the formulation and implementation of Vietnamese Law. The court considering the petition for the recognition and enforcement of a certain foreign award in Vietnam must determine whether the award violates any basic rules, and how those rules would have affected the outcome of the dispute. Significantly, the courts only hold to refuse the recognition and enforcement of a foreign award when the arbitral tribunal has not considered such rules, and the award seriously infringes on the interests of the State, legitimate rights and interests of the parties or a third person.

In comparison with the German notion of public policy, the definition of fundamental principles of Vietnamese law tends to cover domestic public policy rather than international public policy. Additionally, the scope of the term 'fundamental principles of Vietnamese law' seems to be unclear and can cause several difficulties for Vietnamese courts when applying it in practice.

[757] Thong Anh Phan, 'The relationship between the court and the arbitration in arbitral procedure (Mối quan hệ giữa tòa án và trọng tài trong quá trình tố tụng trọng tài)' (LL.M Thesis, Ho Chi Minh City University of Law 2006) 57 – 58.

Conclusion

Based on the legal interpretation and a case law analysis of the two fundamental legal methodologies, Chapter I of the dissertation draws a brief picture of the development of arbitration law in Vietnam from the feudal period to the modern–day. Modern legal instruments enacted by the Vietnamese authorities, such as Decree 116/CP, the Ordinance of 2003 and the Arbitration Law of 2010, have been taken into detailed account. Not only were written statutes closely analysed and deliberated, but also case law with a wide range of facts where these legal instruments have been applied.

From a certain perspective, while Decree 116/CP established a private mechanism of commercial arbitration for the first time, the Ordinance of 2003 was the first law–level statute that officially governed all matters of arbitration.[758] Due to the inefficient development of the arbitration regime at those times, both Decree 116/CP and the Ordinance of 2003 contained several shortcomings. Decree 116/CP displayed certain deficiencies consisting in the lack of any enforcement mechanism for arbitral awards,[759] the ambiguity of provisions on the arbitration procedure,[760] no guarantee of autonomies of the parties to the dispute[761] and incompetent judicial support by the courts of arbitration.[762] In addition, the Ordinance of 2003 contained contradictions, such as an unclear definition of the term arbitrability,[763] strict provisions on the forms of the arbitration agreement,[764] the inability of the arbitral tribunal to grant interim measures[765] and the simple mechanism to set aside the arbitral award.[766]

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[758] Thong Anh Phan, 'Some ideas on the implement of the Ordinance on Commercial Arbitration (Một số ý kiến về việc triển khai pháp lệnh trọng tài thương mại)' (2003) Volume 9 Democracy and Law Journal 16.

[759] Judgment No 01/DSST of 18 January 2002 of the Provincial Court of Ninh Thuan.

[760] Judgment No 158/PTDS of 11 July 2002 of the Appellate Court of the Supreme Court in Ho Chi Minh City.

[761] Judgment No 39/KTST of 10 September 1998 of the Provincial Court of Ho Chi Minh City.

[762] Judgment No 21/KTST of 2 February 2000 of the Provincial Court of Ho Chi Minh City.

[763] Decision No 02/2008/QĐST–KDTM of 20 May 2008 of the Provincial Court of Hanoi.

[764] Decision No 02/2008/QĐST–KDTM of 20 May 2008 of the Provincial Court of Hanoi.

[765] Decision No 03/KT–QĐTT of 15 October 2004 of the Provincial Court of Hanoi; Decision No 02/2008/QĐST–KDTM of 20 May 2008 of the Provincial Court of Hanoi.

[766] Decision No 02/2008/QĐST–KDTM of 20 May 2008 of the Provincial Court of Hanoi; Decision No 07/2009/QĐ–GQYC of 18 December 2009 of the Provincial Court of Hanoi; Decision No 421/2006/KDTM–ST

The current statute on arbitration (the Arbitration Law of 2010) adopted provisions from the Model Law and was expected to make Vietnam a more attractive place for arbitration.[767] This legal instrument has had several advantageous and applauded viewpoints on the course of arbitration, including a wide definition of commercial activities,[768] a wide range of forms of arbitration agreements,[769] the protection of consumer rights,[770] regulations on the nationalities and qualifications of arbitrators, the power of the tribunal to grant interim measures and the

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of 24 August 2006 of the Provincial Court of Ho Chi Minh City; Decision No 116/2007/PT–KDTM of 23 and 29 May 2007 of the Provincial Court in Hanoi.

[767] Tri Uc Dao, 'Fundamental matters of Law on commercial arbitration (Những vấn đề cơ bản của Luật trọng tài thương mại)' (2009) Volume 1 State and Law Journal 7.

[768] Decision No 01/2016/QĐ–GQKN of 25 January 2016 of the District Court of Pleiku, Gia Lai Province; Judgment No 419/2014/KDTM–PT of 26 March 2014 of the Provincial Court of Ho Chi Minh City; 03/2; Judgment No 54/2013/KDTM–ST of 15 October 2013 of the District Court of Tan Binh, Ho Chi Minh City; Judgment No 1663/2013/KDTM–PT of 23 December 2013 of the Provincial Court of Ho Chi Minh City; Decision 526/2013/KDTM–QĐ of 15 May 2013 of the Provincial Court of Ho Chi Minh City; Decision No 979/2016/QĐ–PQTT of 21 September 2016 of the Provincial Court of Ho Chi Minh City; Decision No 1222/2014/QĐ–PQTT of 14 October 2014 of the Provincial Court of Ho Chi Minh City; Decision No 1655/2012/QĐST–KDTM of 15 November 2012 of the Provincial Court of Ho Chi Minh City; Decision No 01/2016/QĐ–PQTT of 15 March 2016 of the Provincial Court of Hanoi; Decision No 09/2016/QĐ–PQTT of 14 December 2016 of the Provincial Court of Hanoi; Decision No 817/2016/QĐ–PQTT of 25 August 2016 of the Provincial Court of Ho Chi Minh City; Decision No 105/2014/KDTM–ST of 19 September 2014 of District Court of Phu Nhuan, Ho Chi Minh City; Decision No 810/2017/QĐ–PQTT of 29 June 2017 of the Provincial Court of Ho Chi Minh City; Decision No 03/2016/QĐ–GQKN of 10 May 2016 of the Provincial Court of Hanoi.

[769] Decision No 01/2016/QĐ–GQKN of 25 January 2016 of the District Court of Pleiku, Gia Lai Province; Decision No 979/2016/QĐ–PQTT of 21 September 2016 of the Provincial Court of Ho Chi Minh City; Decision No 1222/2014/QĐ–PQTT of 14 October 2014 of the Provincial Court of Ho Chi Minh City; Judgment No 20/2012/HC–PT of 6 June 2012 of the Appellate Court of the Supreme Court in Ho Chi Minh City; Judgment No 419/2014/KDTM–PT of 26 March 2014 of the Provincial Court of Ho Chi Minh City; Decision No 817/2016/QĐ–PQTT of 25 August 2016 of the Provincial Court of Ho Chi Minh City; Judgment No 54/2013/KDTM–ST of 15 October 2013 of the District Court of Tan Binh, Ho Chi Minh City; Judgment No 1663/2013/KDTM–PT of 23 December 2013 of the Provincial Court of Ho Chi Minh City; Decision No 105/2014/KDTM–ST of 19 September 2014 of District Court of Phu Nhuan, Ho Chi Minh City; Decision No 03/2016/QĐ–GQKN of 10 May 2016 of the Provincial Court of Hanoi; Decision No 810/2017/QĐ–PQTT of 29 June 2017 of the Provincial Court of Ho Chi Minh City; Decision 526/2013/KDTM–QĐ of 15 May 2013 of the Provincial Court of Ho Chi Minh City; Decision No 1598/2012/KDTM–QĐ of 31 October 2012 of the Provincial Court of Ho Chi Minh City;

Decision No 09/2016/QĐ–PQTT of 14 December 2016 of the Provincial Court of Hanoi; Decision No 01/2016/QĐ–PQTT of 15 March 2016 of the Provincial Court of Hanoi.

[770] Decision No 608/2014/DS–ST of 16 September 2014 of District Court of Binh Tan, Ho Chi Minh City.

supportive roles of the national courts.[771] Nevertheless, this law also had some disadvantages, especially the inability to appeal against a decision of a jurisdictional court on the matter of setting aside arbitral awards.[772] These significant flaws led to the challenging situation whereby several arbitral awards were set aside unpersuasively.[773] As seen from the statistics collected by the Supreme Court, the Provincial Courts in Hanoi and Ho Chi Minh City, the Ministry of Justice as well as the arbitration institutions, there are a total of 21 arbitration centres in Vietnam, with at least 496 arbitrators.[774] From 2011 to 31 December 2015, these Vietnamese arbitration centres handled 1,831 cases and rendered 1,549 arbitral awards.[775] This amount is really modest, constituting just one per cent[776] of the number of cases handled by the national courts.

[771] Decision No 1112/2015/QĐ–CĐTTV of 30 September 2015 of the Provincial Court of Ho Chi Minh City; Decision No 1655/2012/QĐST–KDTM of 15 November 2012 of the Provincial Court of Ho Chi Minh City; Decision No 03/2016/QĐ–GQKN of 10 May 2016 of the Provincial Court in Hanoi; Decision No 526/2013/KDTM–QĐ of 15 May 2013 of the Provincial Court of Ho Chi Minh City; Decision No 1065/2013/QĐKDTM–ST of 6 September 2013 of the Provincial Court of Ho Chi Minh City; Decision No 1222/2014/QĐ–PQTT of 14 October 2014 of the Provincial Court of Ho Chi Minh City; Decision 03/2014/QĐ–TTTM of 18 February 2014 of the Provincial Court of Hanoi; Decision No 03/2013/QĐ–BPKCTT of 22 February 2013 of the Provincial Court of Hanoi; Decision No 21/2012/QĐ–BPKCTT of 17 February 2012 of the Provincial Court of Ho Chi Minh City; Decision No
1254/2013/QĐ–BPKCTT of 17 October 2013 of the Provincial Court of Ho Chi Minh; Decision No 228/2014/QĐ–HBBPKCTT.

[772] Practice Note No 810/UBTVQH13–TP of 26 December 2014 of the Standing Committee of the National Assembly; Practice Note No 07/TANDTC–KHXX of 13 January 2015 of the Supreme Court.

[773] Decision No 1536/2012/QĐKDTM–ST of 12 October 2012 of the Provincial Court of Ho Chi Minh City; Decision No 10/2013 of 30 May 2013 of the Provincial Court in Hanoi; Decision No 1252/2014/KDTM–QĐ of 21 October 2014 of the Provincial Court of Ho Chi Minh City; Decision No 10/2014/QĐ–PQTT of 2014 of the Provincial Court of Hanoi; Decision No 1655/2012/QĐST–KDTM of 15 November 2012 of the Provincial Court of Ho Chi Minh City; Decision No 1598/2012/KDTM– QĐ of 31 October 2012 of the Provincial Court of Ho Chi Minh City; Decision 01/2013/QĐ.HĐQTT of 26 March of the Provincial Court of Can Tho.

[774]Statistics of the Legal Aid Department of the Ministry of Justice, http://bttp.moj.gov.vn/qt/Pages/trong–tai–tm.aspx (accessed on 15 May 2019).

[775] Ministry of Justice, 'Report No 74/BC–BTP of 8 April 2016 of the Ministry of Justice on Summary of 4–year implementation of the Arbitration Law (Báo cáo số 74/BC–BTP ngày 8/4/2016 của Bộ Tư pháp về việc sơ kết 04 năm Luật trọng tài thương mại)' (2016).

[776] Judicial Academy, 'Training arbitration profession in the Judicial Academy – Theoretical basis, pratice and operative solution (Đào tạo nghiệp vụ trọng tài thương mại tại Học viện Tư pháp – Cơ sở lý luận, thực tiễn và giải pháp triển khai)' (Institutional Study Project, Judicial Academy 2017) Chapter I, Part 1.2.

The Vietnamese Government has been determined to do its best to strengthen the competitiveness of arbitration in Vietnam. A draft decision approving a project to enhance the line–up of arbitrators, the arbitration centres and the orientation of one or more pilot arbitration centres with international competitive capability in the term of 2018 to 2023 has been composed and is waiting to be enacted. Hopefully, along with the efforts of the Vietnamese Government, as well as the arbitration centres and arbitrators, the arbitration mechanism in Vietnam will develop steadily and sustainably.

Chapter II is the most important part of the dissertation. It concentrates on the recognition and enforcement of foreign arbitral awards in Vietnam. A brief history of the matter is presented through an analysis of legal instruments, including the Ordinance of 1995, the Civil Procedure Code of 2004 (amended in 2011) and the Civil Procedure Code of 2015, as well as the case law of the Vietnamese jurisdictional courts. Specific features relating to the recognition and enforcement of foreign arbitral awards, such as the legal sources of the recognition and enforcement of foreign arbitral awards, the definition of a foreign arbitral award, the time limit in which to file a petition for the recognition and enforcement of a foreign arbitral award, the service of documents, the supervisory role of the procuracy, as well as the grounds for refusing the recognition and enforcement of a foreign arbitral award are carefully discussed, based on a comparison between the Vietnamese and the German statues and case law.

(i) In Germany, because Article 1061 of the German Civil Procedure Code directly refers to the New York Convention, there are two legal sources for the recognition and enforcement of foreign arbitral awards, namely the New York Convention and treaties on legal assistance. Given that the New York Convention would be applied in most cases,[777] the treaties on legal

[777] Federal Court of Justice, 08.11.1981 – III ZR 42/80; Federal Court of Justice, 25.10.1983 BGHZ 46, 365; Federal Court of Justice, 27.03.1984 – IX ZR 24/83; Federal Court of Justice, NJW 1986, 3027, 3028; Federal Court of Justice 15.05.1986, BGHZ 98, 70 (73 et seq.); Higher Regional Court of Stuttgart, RIW 1988, 480, 483; Higher Regional Court of Dresden 20.10.1998 – 11 Sch 04/98; Higher Regional Court of Hamburg 26.01.1989, RIW 1991, 152 (154); Federal Court of Justice 18.01.1990, BGHZ 110, 104 (106 et seq.);

assistance are rarely applied.[778] On the other hand, according to Vietnamese legal sources of the recognition and enforcement of foreign arbitral awards, there are three types of sources that can be applied to cases in which a party applies for the recognition and enforcement of a foreign arbitral award. Those are, in turn, the New York Convention, the treaties on legal assistance between Vietnam and other countries, and the Civil Procedure Code. The New

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Higher Regional Court of Hamburg, RIW 1991, 152; Federal Court of Justice 04.06.1992, BGHZ 118, 312 (338 et seq.); Higher Regional Court of Hamburg 12.03.1998, IPRspr 1999, No 178; Higher Regional Court of Hamburg 30.07.1998, RPS 1/1999, 13 (16); Higher Regional Court of Dresden 13.01.1999 – 11 Sch 06/98; Federal Court of Justice 15.07.1999, BGHZ 142, 204 (206); Higher Regional Court of Brandenburg 02.09.1999, RPS 1/2001, 21 (22); Higher Regional Court of Bremen 30.09.1999, RPS 2/2000, 18 (20); Higher Regional Court of Munich 15.12.1999, RPS 2/2000, 16 (18); Higher Regional Court of Cologne 15.02.2000 – 9 Sch 13/99; Higher Regional Court of Schleswig 30.03.2000, RIW 2000, 706 (707); Higher Regional Court of Stuttgart 06.12.2000; Higher
Regional Court of Cologne 19.12.2001 – 11 U 52/01; Higher Regional Court of Naumburg 21.02.2002, NJW–RR 2003, 71 (72); Higher Regional Court of Berlin 06.05.2002 – 23/29 Sch 21/01; Higher Regional Court of Berlin 27.05.2002 – 23 Sch 06/02; Higher Regional Court of Cologne 26.11.2002 – 9 Sch 20/02; Higher Regional Court of Munich 22.11.2002, 4Z Sch 13/02, SchiedsVZ 2003, 142, paras 47–48; Higher Regional Court of Cologne 03.06.2003 – 9 Sch 6/03; Higher Regional Court of Celle
04.09.2003 – 8 Sch 11/02, SchiedsVZ 2004, 165, paras 21 – 22; Higher Regional Court of Celle 20.11.2003; 547 (554); Higher Regional Court of Munich 20.11.2003, IHR 2004, 81 (83); Higher regional Court of Cologne 23.04.2004, SchiedsVZ 2005, 163 (165); Higher Regional Court of Dusseldorf 21.07.2004 – VI Sch(Kart) 01/02; Higher Regional Court of Dresden 20.04.2005, SchiedsVZ
2005, 210 (212); Federal Court of Justice 21.09.2005, SchiedsVZ 2005, 306 (307); Federal Court of Justice 23.02.2006, SchiedsVZ 2006, 161 (164); Higher Regional Court of Frankfurt 26.06.2006, 26 Sch 28/05, IRAX 2008, 517, para 14; Higher Regional Court of Berlin, 10.08.2006, 20 Sch 7/04,
SchiedsVZ 2007, 108, para 94; Federal Court of Justice, 18.01.2007 – III ZB 35/06; Higher Regional
Court of Karlsruhe 14.09.2007 – 9 Sch 2/07; Higher Regional Court of Berlin 17.04.2008 – 20 Sch 02/08; Higher Regional Court of Munich 07.05.2008 – 34 Sch 26/07; Higher Regional Court of Schleswig 16.06.2008 – 16 Sch 2/07; Federal Court of Justice, SchiedsVZ 2009, 126, 127; Higher
Regional Court of Munich, SchiedsVZ 2009, 340 – 343; Higher Regional Court of Munich 19.01.2009 – 34 Sch 04/08; Higher Regional Court of Dresden 18.02.2009 – 11 Sch 07/08; Higher Regional Court of Munich 22.06.2009 – 34 Sch 26/08; Federal Court of Justice, 02.07.2009 – IX ZR 152/06; Higher Regional Court of Frankfurt 27.08.2009 – 26 SchH 03/09; Federal Court of Justice, 30.09.2010, SchiedsVZ 2010, 332f ; Higher Regional Court of Munich, 12.10.2009 – 34 Sch 20/08, SchiedsVZ 2009, 340, para 24; Higher Regional Court of Frankfurt 22.10.2009 – 26 Sch 5/09; Higher Regional Court of Saarbruecken 30.05.2011, SchiedsVZ 2012, 4; Higher Regional Court of Munich 11.07.2011 – 34 Sch
15/10, SchiedsVZ 2011, 337, para 38 – 39; Higher Regional Court of Munich 14.11.2011 – 34 Sch 10/11, SchiedsVZ 2012, 43, para 37; Higher Regional Court of Koblenz 31.01.2012 – 2 Sch 12/10; Higher Regional Court of Hamburg 03.02.2012 – 6 Sch 2/11; Higher Regional Court of Munich 21.06.2012 – 34 Sch 7/12; Higher Regional Court of Frankfurt 5.12.2016 – 26 Sch 2/16, BeckRS 2016, 117314.

[778] Dennis Solomon, 'Interpretation and Application of the New York Convention in Germany' in George A. Bermann (ed), *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts* (Springer 2017) 335; Böcksteigel/Kröll/Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice* (2nd ed., Kluwer Law International 2015) 47.

York Convention has long been the supreme legal instrument for Vietnamese courts in the examination of petitions for the recognition and enforcement of foreign arbitral awards. Treaties on legal assistance between Vietnam and other countries are only applied if their provisions are more favourable than the basic regulations of the New York Convention. The New York Convention and the treaties on legal assistance prevail over Vietnamese domestic laws in the course of the recognition and enforcement of foreign arbitral awards. Therefore, the provisions of the Civil Procedure Code have to make way for the regulations set out in the New York Convention, as well as those of the treaties on legal assistance.

(ii) An analysis of the definition of a foreign arbitral award is one of the achievements of this dissertation. Since Vietnam ratified the New York Convention in 1995, all of the legal instruments of Vietnam have used the term "award of foreign arbitration" rather than the term "foreign arbitral award". That is because Vietnamese law follows the nationality approach rather than the territorial approach.[779] Under Vietnamese law, any award rendered by foreign arbitration will be seen as an "award of foreign arbitration", regardless of the place of arbitration. This notion of Vietnamese law can lead to the difficult circumstance of deciding whether an award issued outside of Vietnam by an arbitral tribunal constituted under Vietnamese law is a domestic or a foreign arbitral award.[780] German law follows the doctrine of the territorial approach, meaning that any arbitral award rendered outside of Germany will be determined as a foreign arbitral award.[781] In addition, under the current legal position of the Vietnamese Civil Procedure Code, a partial award or an award on cost would be difficult to recognise and enforce before the provincial courts of Vietnam. This tendency is contrary to the practice of international arbitration, in which the national courts are competent to

[779] Trung Tin Nguyen, 'On the recognition and enforcement of foreign arbitral award under the New York Convention 1958 (Về công nhận và cho thi hành quyết định của trọng tài nước ngoài theo Công ước New York 1958)' (2002) Volume 5 State and Law Journal 25.

[780] Nguyen Gia Thien Le, 'Recognition and Enforcement of Foreign Arbitral Awards in Vietnam: Current Perspectives and Typical Cases' (2015) Volume 18(3) International Arbitration Law Review.

[781] Article 1025(1) and Article 1025(4) of the German Civil Procedure Code.

recognise and enforce a partial award or an award on costs. German courts follow this practice.[782]

(iii) The time limit in which to file a petition for the recognition and enforcement of foreign arbitral awards in Vietnam is a matter that has been amended several times throughout the history of Vietnamese law. The Ordinance of 1995 and the Civil Procedure Code of 2004 (amended in 2011) were absolutely silent on the time limit for a creditor to request the recognition and enforcement of a foreign arbitral award in Vietnam. In the era of the Ordinance of 1995, the Vietnamese provincial courts pointed out that a creditor often submitted petitions for the recognition and enforcement of a foreign arbitral award months after the day on which the award was issued.[783] On the other hand, while applying the regulations of the Civil Procedure Code of 2004 (amended in 2011), the jurisdictional courts of Vietnam referred to a one–year period in which the creditor should submit a petition.[784] This very short period led to the regrettable situation whereby some arbitral awards were not recognised.[785] Fortunately, the problem of the time limit was resolved when the National Assembly passed the Civil Procedure Code of 2015.[786] In this statute, the time limit in which to file a petition for the recognition and enforcement of a foreign arbitral award was extended to three years starting from the day when the award comes into force.[787] This extension of the time limit will establish more or less a friendly mechanism for the recognition and enforcement of foreign arbitral awards in Vietnam.

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[782] Federal Court of Justice, 18.01.2007 – III ZB 35/06; Thüringer Oberlandesgericht: Zum Umfang der Überprüfungskompetenz des Vollstreckungsgerichts nach erfolglosem Aufhebungsverfahren im Ursprungsstaat (2008) 1 SchiedsVZ 44.

[783] Decision No 01/QĐ of 21 September 2001 of the Provincial Court in Hanoi; Decision of 18 December 2001 of the Provincial Court of Lam Dong.

[784] Decision No 142/2005/QĐPT of 12 July 2005 rendered by the Appellate Court of the Supreme Court in Hanoi.

[785] Decision of 6 June 2014 of the Provincial Court of Long An.

[786] Code No 92/2015/QH13 on Civil Procedure (issued by the National Assembly on 25 November 2004).

[787] Article 451(1) of the Civil Procedure Code 2015; Decision No 02/2016/QĐST–KDTM of 11 November 2016 of the Provincial Court in Binh Thuan.

In Germany, although there are two tendencies on the time limit within which to request the recognition and enforcement of foreign arbitral awards (a 30–year period[788] and no time limit[789]), the German courts have been generous in determining the time limit in which the creditor must file the petition. In one case, the Higher Regional Court of Frankfurt recognised and enforced an arbitral award 23 years after it was enacted.[790]

(iv) Under the provisions of the Ordinance of 1995, along with the application form. the creditor had to submit an original or certified copy of a foreign award and an original or certified copy of an original arbitration agreement compliant with Vietnamese law. If these documents were drafted in foreign languages, they had to be translated into Vietnamese in compliance with Vietnamese law. Nevertheless, under the Civil Procedure Code of 2004 (amended in 2011), a petitioner applying for the recognition and enforcement of an award was unable to submit the original foreign award and the original arbitration agreement.[791] This provision was absolutely contrary to the original notion of the New York Convention. Fortunately, the Civil Procedure Code of 2015 returned to the true philosophy of the New York Convention, being in favour of the due rights and legitimate interests of the petitioner. Accordingly, a petitioner has the right to submit either an original version of the foreign award or a certified copy of it. The petitioner can also submit an original version or certified copy of the arbitration agreement to the Vietnamese authorities, including the Ministry of Justice and the provincial courts of Vietnam.

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[788] Kronke/Nacimiento/Otto (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International 2010) 127.

[789] Reimar Wolff (ed), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards – Commentary* (C.H.Beck–Hart–Nomos 2012) 199; Dennis Solomon, 'Interpretation and Application of the New York Convention in Germany' in George A. Bermann (ed), *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts* (Springer 2017) 374.

[790] Higher Regional Court of Frankfurt 5.12.2016 – 26 Sch 2/16, BeckRS 2016, 117314.

[791] Nguyen Gia Thien Le, 'Recognition and enforcement of foreign arbitral awards' (2016) Volume 24 Legislative Studies Journal 48.

Pursuant to the regulations of the Ordinance of 1995 and the Civil Procedure Code of 2004 (amended in 2011),[792] all petitions for the recognition and enforcement of foreign arbitral awards had to be served to the Ministry of Justice, unless the treaties on legal assistance between Vietnam and other parties[793] provided otherwise. Those provisions were contrary to the best practice of international arbitration, which insists that the petitioner can submit a petition for the recognition and enforcement of foreign awards to the national jurisdictional court. Germany has set a perfect example for this situation. Fortunately, Vietnam's Civil Procedure Code of 2015[794] has followed a more liberal approach, governing that the petitioner only has to submit the application form and the attached documents to the Ministry of Justice if the award is rendered inside a signatory country that has a treaty on legal assistance with Vietnam.[795] Otherwise the petitioner can indisputably serve both the application form and the attached documents to the Vietnamese jurisdictional provincial courts.

(v) The practice of international arbitration has always been that only the courts take part in the procedure of recognising and enforcing foreign arbitral awards, while the procuracies do not play any role in this procedure. German law applies this tendency strictly. In Vietnam, however, the procuracy has constitutional rights and obligations to attend the procedure of the recognition and enforcement of foreign arbitral awards. In this procedure, the procuracy exercises specific functions, such as supervising the procedure and proposing an opinion.[796] In both the first instance hearing and at the appeal stage, as well as the hearing in cassation stage or the hearing in re–opening stage, the procuracy has the right to take into consideration the submitted application form as well as the attached documents served by the creditor. This authority also has the right to propose an opinion concerning the petition for the recognition

[792] Article 10(1) of the Ordinance of 1995; Article 364(1) of the Civil Procedure Code of 2004.
[793] Treaties on legal assistance between Vietnam and Cuba, Poland, Belarus, the Czech Republic, Slovakia, Hungary and Mongolia (if the debtor resides or has its registered office in Vietnam).
[794] Article 451(1) of the Civil Procedure Code of 2015.
[795] Nguyen Gia Thien Le and Thi Thuy Linh Nguyen, 'Recognition and enforcement of foreign arbitral awards in Vietnam: A perspective of the Treaties on Legal Assistance (Công nhận và cho thi hành phán quyết của trọng tài nước ngoài tại Việt Nam – Nhìn từ các hiệp định tương trợ tư pháp)' (2019) Volume 1 People's Court Journal 27.
[796] Article 21 of the Civil Procedure Code 2015.

and enforcement of the foreign arbitral award.[797] In several cases, the provincial court and the provincial procuracy have the same perspectives on the recognition and enforcement of a foreign arbitral award.[798] Nevertheless, in some cases the provincial procuracies and the provincial courts disagree, in which case the court can absolutely deliberate the petition at its discretion, regardless of the opinion of the procuracy.[799] One of the significant roles of the procuracy is that this authority can, based on its own initiative, appeal the first instance decision of the provincial court, in the event that it finds that the first instance decision was issued with substantive and procedural flaws.

(vi) The grounds for a refusal of the recognition and enforcement of foreign arbitral awards are the most important part of Chapter II. Due to the direct application of the New York Convention,[800] German law does not have any specific provisions concerning the grounds justifying a refusal of the recognition and enforcement of foreign arbitral awards. On the other hand, the grounds listed in Chapter V of the New York Convention are clearly transplanted into Vietnamese law. The Ordinance of 1995, the Civil Procedure Code of 2004 (amended in 2011) and the Civil Procedure Code of 2015[801] all had specific provisions on the grounds for a refusal of the recognition and enforcement of foreign arbitral awards. Notably, both German law and Vietnamese law have firmly insisted on the strict application of Article V of the New

[797] Vietnamese Supreme Court – US AIDS, 'Training Summary Record of Workshop on New points of the Civil Procedure Code 2015 and the New York Convention 1958 on Recognition and enforcement of foreign arbitral awards (Kỷ yếu tập huấn Những quy định mới của Bộ luật tố tụng dân sự 2015 và Công ước New York 1958 về Công nhận và cho thi hành phán quyết trọng tài nước ngoài)' (Vietnamese Supreme Court, December 2016) 23.

[798] Decision No 01/2009/QĐST–KDTM of 31 December 2009 of the Provincial Court of Can Tho City; Decision No 177/2014/QĐST–KDTM of 5 March 2014 of the Provincial Court of Ho Chi Minh City; Decision No 03/2007/ST–KDTM of 10 August 2007 of the Provincial Court of Hung Yen.

[799] Decision No 09/2016/QĐST–KDTM of 20 September 2016 of the Provincial Court of Binh Duong.

[800] Article 1061 of the German Civil Code.

[801] Article 16(1)(a) of the Ordinance of 1995; Article 370(1)(a) and Article 370(1)(b) of the Civil Procedure Code of 2004 (amended in 2011); Article 459(1)(a) and Article 459(1)(b) of the Civil Procedure Code of 2015.

York Convention. Therefore, irrespective of the terms "*may*" or "*must*", this point of view leaves the courts in Germany[802] and in Vietnam with no room for discretion or deviation.

Four of the most criticised points of Vietnamese law in relation to arbitration are the shifting of the burden of proof onto the creditor;[803] the application of Vietnamese substantive law to determine the capacity of the foreign party;[804] the application of Vietnamese procedural law to take into consideration the due process of arbitration;[805] and the unclear notion of the term 'fundamental principles of Vietnamese law'.[806]

The German perception of the term "international public policy" can be a persuasive reference for the Vietnamese courts. Finally, the matters of *lodo irrituale* [807] and double exequatur,[808] which were definitely refused by the German courts, can also be a valuable example for the Vietnamese courts.

In addition to the experience of case law rendered by German courts, another suggestion that could be valuable for the Vietnamese courts to consider is the direct application of the New York Convention, like the German courts have done. The provisions of the New York Convention are scientifically, persuasively and qualifiedly designed. Therefore, the direct application of the New York Convention by the national courts can be seen as a reasonable

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[802] Dennis Solomon, 'Interpretation and Application of the New York Convention in Germany' in George A. Bermann (ed), *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts* (Springer 2017) 342.

[803] Decision No 01/2013/QTST–KDTM of 27 May 2013 of Provincial Court of Long An.

[804] Decision No 33/2016/KDTM–QĐ of 11 April 2016 of the Higher Court in Hanoi; Decision No 117/2014/QĐ–PT of 7 August 2014 of the Appellate Court of the Supreme Court in Hanoi; Decision No 01/2015/DSPT–QĐ of 13 January 2015 of the Appellate Court of the Supreme Court in Hanoi.

[805] Decision No 15/2014/QĐPT–KDTM of 23 April 2014 of the Appellate Court of the Supreme Court in Ho Chi Minh City; Decision No 127/2013/QĐKDTM–PT of 3 July 2013 of the Appellate Court of the Supreme Court in Ho Chi Minh City; Decision No 54/2015/VKDTM–PT of 22 May 2015 of the Appellate Court of the Supreme Court in Hanoi.

[806] Decision No 07/2014/QĐST–KDTM of the Provincial Court of Hanoi.

[807] Federal Court of Justice, 08.11.1981 – III ZR 42/80.

[808] Federal Court of Justice, 02.07.2009 – IX ZR 152/06.

and meaningful solution. The practice of judicial experience shows that the direct application of the New York Convention by the German courts effectively supports the procedure of the recognition and enforcement of foreign arbitral awards. This is also to prevent divergent opinions as well as diversified attitudes among the higher regional courts, and between the higher regional courts and the Federal Court of Justice. The plausible outcome of this prevention is to create a friendly mechanism for the recognition and enforcement of foreign arbitral awards in Germany. Unlike German law, the Vietnamese jurisdiction has chosen its own way in which to transfer the New York Convention into the regulations of the national law. This transference has unfortunately caused diversity and even deviation in comparison to the original and standard qualifications of the New York Convention. The deviating provisions were relating to attaching documents submitted together with the application form, and the burden of proof set out in the Civil Procedure Code of 2004 (amended in 2011). The current Civil Procedure Code still maintains another deviating provision on the definition of a foreign arbitral award. There can be little doubt that the direct application of the New York Convention would be useful for Vietnamese courts, as they can eliminate the differences between Vietnamese law and the Convention itself. Furthermore, it also establishes a common position for the various courts of Vietnam when those courts are facing cases on the recognition and enforcement of foreign arbitral awards. The possibility of directly applying the New York Convention is guaranteed under the Civil Procedure Code, as this code reads that international treaties to which Vietnam is a member or a signatory will prevail over the domestic law where those legal instruments have any conflicts.

Legal instruments

1) International treaties and conventions

Convention on the Execution of Foreign Arbitral Awards signed at Geneva on 26 September 1927 (the Geneva Convention)

Convention on the Recognition and Enforcement of Foreign Arbitral Awards enacted by the United Nations on 10 June 1958 (the New York Convention)

Treaty on Legal Assistance in Civil, Family, Labour and Criminal Matters between Vietnam and Cuba (signed on 30 November 1984)

Treaty on Legal Assistance in Civil, Family and Criminal Matters between Vietnam and Bulgaria (signed on 3 October 1986)

Treaty on Legal Assistance in Civil, Family and Criminal Matters between Vietnam and Hungary (signed on 18 January 1987)

Treaty on Legal Assistance in Civil and Criminal Matters between Vietnam and the former Czechoslovakia (signed on 12 October 1987) (Slovakia and the Czech Republic adopted)

Treaty on Legal Assistance in Civil, Family and Criminal Matters between Vietnam and Poland (signed on 22 March 1993)

Treaty on Legal Assistance in Civil and Criminal Matters between Vietnam and Laos (signed on 6 July 1998)

Treaty on Legal Assistance in Civil and Criminal Matters between Vietnam and Russia (signed on 25 August 1998)

Treaty on Legal Assistance in Civil and Criminal Matters between Vietnam and China (signed on 19 October 1998)

Treaty on Legal Assistance in Civil Matters between Vietnam and France (signed on 24 February 1999)

Treaty on Legal Assistance in Civil and Criminal Matters between Vietnam and Ukraine (signed on 6 April 2000)

Treaty on Legal Assistance in Civil, Family and Criminal Matters between Vietnam and Mongolia (signed on 17 April 2000)

Treaty on Legal Assistance in Civil, Family, Labour and Criminal matters between Vietnam and Belarus (signed on 14 September 2000)

Treaty on Legal Assistance in Civil and Criminal matters between Vietnam and North Korea (signed on 3 May 2002)

Treaty on Legal Assistance in Civil and Commercial Matters between Vietnam and Algeria (signed on 14 April 2010)

Treaty on Legal Assistance in Civil Matters between Vietnam and Kazakhstan (signed on 31 October 2011)

Treaty on Legal Assistance in Civil Matters between Vietnam and Cambodia (signed on 21 January 2013)

Agreement on the Reciprocal Promotion and Protection of Investments between Vietnam and Australia (signed on 5 March 1991)

2) Legal instruments of Vietnam

Decree of 14 January 1960 of the Vietnamese Government

Order No 19/LCT of 26 July 1960 of the State President

Decree No 59/CP of 30 April 1963 of the Vietnamese Government

Decree No 153/CP of 5 October 1964 of the Vietnamese Government

Law No 3–LCT/HĐNN on 3 July 1981 of the State President

Decree of 10 August 1981 of the Vietnamese Council of Ministers (former name of the Vietnamese Government)

Law on Foreign Investment in Vietnam of 1987 (enacted by the National Assembly on 29 December 1987)

Ordinance of 10 January 1990 of the National Assembly

Law No 2/L–CTN on 6 October 1992 of the State President

Decision No 204/TTg of 28 April 1993 of the Prime Minister

Decree No 116/CP of 5 September 1994 of the Vietnamese Government

Law on the Organisation of the Courts (amended in 1993) of 28 December 1993 of the National Assembly

Decision No 453/QĐ–CTN of 14 September 1995 of the Vietnamese President

Ordinance on Recognition and Enforcement of the Foreign Arbitral Awards in Vietnam (the Ordinance of 1995) (enacted by the Standing Committee of the National Assembly on 14 September 1995)

Ordinance No 27–LCT/HĐNN8 on Procedures for the Settlement of Civil Cases (enacted by the State Council on 7 December 1989)

Ordinance on Procedures for the Settlement of Economic Cases 1994 enacted by the Standing Committee of the National Assembly (coming to force via Order No31–L/CTN of 29 March 1994 of the Vietnamese President)

Ordinance on Procedures for the Settlement of Labour Disputes 1996 enacted by the Standing Committee of the National Assembly (coming to force via the Order No 48–L/CTN of 11 April 1996 of the Vietnamese President)

Ordinance No 08/2003/PL–UBTVQH of 25 February 2003 on Commercial Arbitration of the Standing Committee of the National Assembly

Code No 24/2004/QH11 on Civil Procedure (issued by the National Assembly on 15 June 2004) (the Civil Procedure Code of 2004)

Law No 08/2007/QH12 on Legal Assistance (issued by the Vietnamese National Assembly on 21 November 2007)

Law No 54/2010/QH12 on Commercial Arbitration (issued by National Assembly on 17 June 2010)

Law No 65/2011/QH12 on Amending and Supplementing a Number of Articles of the Civil Procedure Code (issued by National Assembly on 29 March 2011) (the Civil Procedure Code of 2004 (amended in 2011))

Resolution No 01/2014/NQ–HĐTP of 20 March 2014 on Guidelines for the law on Commercial Arbitration of the Supreme Court

Code No 92/2015/QH13 on Civil Procedure (issued by the National Assembly on 25 November 2004)

3) Legal instruments of Germany

Arbitration Act 1998 (Book X of the Civil Procedure Code)

Civil Code

4) Legal instruments of other countries

Dutch Civil Code

Romanian Civil Code

Turkish Code of Obligations

Georgian Civil Code

Latvian Civil Code

Portuguese Civil Code

Limitation Act 1963 of India

5) Rules

Rules of the International Centre for Dispute Resolution of the American Arbitration Association (AAA–ACDR Rules)

UNCITRAL Model Law on International Commercial Arbitration of 1985 (amended in 2006).

Arbitration Rules of the German Arbitration Institution (DIS Rules)

Arbitration Rules of the International Court of Arbitration of the International Chamber of Commerce (ICC Rules)

Arbitration Rules of the Judicial Arbitration and Mediation Service (JAMS Rules)

Arbitration Rules of the Singapore International Arbitration Centre (SIAC Rules)

Arbitration Rules of the Arbitration Body of the International Cotton Association (ICA Rules)

Arbitration Rules of the Arbitration Board of the German Coffee Association

Arbitration Rules of the Arbitration Body of the Singapore Commodity Exchange Limited (SICOM Rules)

Arbitration Rules of the Jiaozuo Arbitration Committee (Henan, China)

Arbitration Rules of the Hong Kong International Arbitration Centre (HKIAC Rules)

Arbitration Rules of the Swiss Chambers' Arbitration Institution (Swiss Rules)

Arbitration Rules of the Badan Arbitrase Nasional Indonesia

Arbitration Rules of the International Commercial Arbitration Court at the Russian Chamber of Commerce and Industry

Arbitration Rules of the Vietnam International Arbitration Centre at the Vietnamese Chamber of Commerce and Industry (VIAC Rules)

Case laws

1) Case laws of Vietnamese courts

Decision No 59/KTPT of 4 June 1998 of the Appellate Court of the Supreme Court in Hanoi

Judgment No 39/KTST of 10 September 1998 of the Provincial Court of Ho Chi Minh City

Judgment No 21/KTST of 2 February 2000 of the Provincial Court of Ho Chi Minh City

Decision No 78/QĐ–XĐTT of 24 April 2001 of the Provincial Court of Ho Chi Minh City

Decision No 01/QĐ of 21 September 2001 of the Provincial Court in Hanoi

Decision of 18 December 2001 of the Provincial Court of Lam Dong

Judgment No 01/DSST of 18 January 2002 of the Provincial Court of Ninh Thuan

Decision No 82/QĐ–XĐTT of 23 May 2002 of the Provincial Court of Ho Chi Minh City Judgment No 158/PTDS of 11 July 2002 of the Appellate Court of the Supreme Court in Ho Chi Minh City

Decision No 02/PTDS of 21 January 2003 of the Appellate Court of the Supreme Court in Ho Chi Minh City

Decision No 03/KT–QĐTT of 15 October 2004 of the Provincial Court of Hanoi Judgment No 11/KTPT of 14 January 2005 of the Appellate Court of the Supreme Court in Hanoi

Decision No 02/2005/XQĐTT–ST of 11 May 2005 of the Provincial Court of Hanoi

Decision No 142/2005/QĐPT of 12 July 2005 rendered by the Court of Appeal of the Supreme Court in Hanoi

Decision No 06/TTST of 23 September 2005 of the Provincial Court of Hanoi

Decision No 04/2006/QĐ of 6 January 2006 of the Appellate Court of the Supreme Court in Hanoi

Decision No 10/2006/PT of 10 January 2006 of the Appellate Court of the Supreme Court in Hanoi

Decision No 390/2006/DS–ST of 27 April 2006 of the Provincial Court of Ho Chi Minh City

Decision No 112/2006/TTPT of 2 June 2006 of the Appellate Court of the Supreme Court in Hanoi

Decision No 421/2006/KDTM–ST of 24 August 2006 of the Provincial Court of Ho Chi Minh City

Decision No 363/2006/DSPT of 7 September 2006 of the Appellate Court of the Supreme Court in Ho Chi Minh City

Decision No 03/KTST of 15 September 2006 of the Provincial Court of Hanoi

Decision No 01/QĐST–TTTM of 12 March 2007 of the Provincial Court of Hanoi

Decision No 116/2007/PT–KDTM of 23 and 29 May 2007 of the Provincial Court of Ha Hoi

Decision No 03/2007/ST–KDTM of 10 August 2007 of the Provincial Court in Hung Yen

Decision No 1745/2007/QĐVDS of 20 September 2007 of the Provincial Court of Ho Chi Minh City

Decision No 1198/2008/QĐST–KDTM of 11 August 2008 of the Provincial Court of Ho Chi Minh City

Decision No 121/2008/KDTM–PT of 10 October 2008 of the Appellate Court of the Supreme Court in Ho Chi Minh City

Decision No 152/2008/QĐ–PT of 26 November 2008 of the Appellate Court of the Supreme Court in Ho Chi Minh City

Decision No 866/2009/KDTM–QĐST of 15 April 2009 of the Provincial Court of Ho Chi Minh City

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Decision No 2611/2009/QĐST–KDTM of 10 September 2009 of the Provincial Court of Ho Chi Minh City

Decision No 171/2009/QĐ–PT of 26 September 2009 of the Provincial Court of Ho Chi Minh City

Decision No 01/2009/QĐST–KDTM of 31 December 2009 of the Provincial Court of Can Tho

Decision No 113/2010/KDTM–PT of 9 June 2010 of the Appellate Court of the Supreme Court in Ho Chi Minh City

Decision No 51/2011/KD–TMPT of 24 March 2011 of the Appellate Court of the Supreme Court in Hanoi

Decision No 51/2011/KDTM–QĐPT of 8 April 2011 of the Appellate Court of the Supreme Court in Ho Chi Minh City

Decision No 21/2012/QĐ–BPKCTT of 17 February 2012 of the Provincial Court of Ho Chi Minh City

Decision No 625/2012/QĐST–KDTM of 14 May 2012 of the Provincial Court of Ho Chi Minh City

Decision No 1254/2012/QĐ–BPKCTT of 24 August 2012 of the Provincial Court of Ho Chi Minh City

Decision No 1375/2012/QĐKDTM–ST of 11 September 2012 of the Provincial Court of Ho Chi Minh City

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Decision No 69/2013/QĐPT–KDTM of 15 March 2013 of the Appellate Court of the Supreme Court in Ho Chi Minh City

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Decision No 01/2013/QTST–KDTM of 27 May 2013 of the Provincial Court of Long An

Decision No 04/2013/QĐST–DS of 17 June 2013 of the Provincial Court of Binh Thuan

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Decision No 145/2013/QĐKDTM–PT of 12 August 2013 of the Appellate Court of the Supreme Court in Ho Chi Minh City

Decision No 01/2013/QĐST–KDTM of 18 September 2013 of the Provincial Court of Binh Thuan

Decision No 1254/2013/QĐ–BPKCTT of 17 October 2013 of the Provincial Court of Ho Chi Minh City

Decision No 156/2014/QĐST–KDTM of 26 February 2014 of the Provincial Court of Ho Chi Minh City

Decision No 176/2014/QĐKQTM–ST of 4 March 2014 of the Provincial Court of Ho Chi Minh City

Decision of 6 June 2014 of the Provincial Court of Long An

Decision No 177/2014/QĐST–KDTM of 5 March 2014 of the Provincial Court of Ho Chi Minh City

Decision No 15/2014/QĐPT–KDTM of 23 April 2014 of the Appeal Court of the Supreme Court in Ho Chi Minh City

Decision No 117/2014/QĐ–PT of 7 August 2014 of the Appellate Court of the Supreme Court in Hanoi

Decision No 17/2014/QĐST–KDTM of 11 August 2014 of the Provincial Court of Dong Nai

Decision No 52/2014/QĐKDTM–PT of 9 September 2014 of the Appellate Court of the Supreme Court in Ho Chi Minh City

Decision No 01/2015/DSPT–QĐ of 13 January 2015 of the Appellate Court of the Supreme Court in Hanoi

Decision No 08/2015/QĐKDTM–PT of 6 March 2015 of the Court of Appeal of the Supreme Court in Ho Chi Minh City

Decision No 03/2015/QĐST–KDTM of 25 September 2015 of the Provincial Court of Hanoi

Decision No 05/2015/KDTM–ST of 25 December 2015 of the Provincial Court of Hanoi

Decision No 33/2016/KDTM–QĐ of 11 April 2016 of the Higher Court in Hanoi

Decision No 33/2016/QĐPT–KDTM of 8 August 2016 of the Higher Court in Ho Chi Minh City

Decision No 09/2016/QĐST–KDTM of 20 September 2016 of the Provincial Court of Binh Duong

Decision No 02/2016/QĐST–KDTM of 11 November 2016 of the Provincial Court of Binh Thuan

Decision No 84/2017/KDTM–PT of 30 March 2017 of the Higher Court in Hanoi

Decision No 05/2017/QĐKDTM–ST of 21 July 2017 of the Provincial Court in Hanoi

Decision No 01/2017/QĐKDTM–ST of 29 December 2017 of the Provincial Court of Can Tho

Decision No 16/2018/QĐ–PT of 14 May 2018 of the Higher Court in Ho Chi Minh City Decision No 25/2018/QĐKDTM–PT of 28 June 2018 of the Higher Court in Ho Chi Minh City

2) Case laws of German courts

Imperial Court 28.03.1924, RGZ 108, 139 (142 *seq*.)

Federal Court of Justice 12.05.1958, BGHZ 27, 249 (255).

Higher Regional Court of Hamburg 15.04.1964 – 5 U 116/63

Federal Court of Justice 03.07.1975, JZ 1976, 245 (247)

Federal Court of Justice, 08.11.1981 – III ZR 42/80

Federal Court of Justice, NJW 1982, 1224

Federal Court of Justice, 25.10.1983 BGHZ 46, 365

Federal Court of Justice, 27.03.1984 – IX ZR 24/83

Federal Court of Justice, NJW 1986, 3027, 3028

Federal Court of Justice 15.05.1986, BGHZ 98, 70 (73 *et seq*.)

Higher Regional Court of Stuttgart, RIW 1988, 480, 483

Higher Regional Court of Dresden 20.10.1998 – 11 Sch 04/98

Higher Regional Court of Hamburg 26.01.1989, RIW 1991, 152 (154)

Federal Court of Justice 18.01.1990, BGHZ 110, 104 (106 *et seq*.)

Higher Regional Court of Hamburg, RIW 1991, 152

Federal Court of Justice 04.06.1992, BGHZ 118, 312 (338 *et seq*.)

Higher Regional Court of Hamburg 12.03.1998, IPRspr 1999, No 178

Higher Regional Court of Hamburg 30.07.1998, RPS 1/1999, 13 (16)

Higher Regional Court of Dresden 13.01.1999 – 11 Sch 06/98

Federal Court of Justice 15.07.1999, BGHZ 142, 204 (206)

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