Although arbitration first appeared in Vietnam in the 1960s in the forms of the State Economic Arbitration System (SEAS), the Foreign Trade Arbitration Committee (FTAC) and the Maritime Arbitration Committee (MAC), it was not until 1986 that arbitration activities in Vietnam began to actually flourish, owing to an all-round renovation policy named Doi Moi. This policy was promulgated with top priority given to economic reforms to create a multi-sector economy, attracting greater foreign investment and broadening the export market. As a result, Vietnam has signed 50 bilateral investment treaties (BITs)\(^1\) and eight regional and bilateral free trade agreements (FTAs).\(^2\) The 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) was acceded to on 12 September 1995, with entry into force on 11 December 1995. With these significant changes, awareness of arbitration in Vietnam has increased and arbitration has gradually become a favoured mechanism for dispute settlement in transactions between Vietnamese parties and their international partners. According to the Preliminary Report on the Three Years of Implementation of the LCA of the Vietnamese Ministry of Justice (MOJ), from 2011 to 2013 the number of disputes resolved by arbitration increased sharply. The Vietnamese government also encourages the development of arbitration as an alternative dispute resolution mechanism by making efforts to synchronise laws on arbitration with a pro-arbitration regime. Conferences, seminars and training courses sponsored by both Vietnamese government agencies and non-government institutions have been organised to improve the understanding of and provide necessary skills to local judges, arbitrators and Vietnamese enterprises.

**Arbitration law in Vietnam**

The first legislation on arbitration in Vietnam was the Ordinance on Commercial Arbitration\(^3\) (OCA) dated 25 February 2003. However, to foster arbitration activity
and encourage a pro-arbitration approach in Vietnam, the Law on Commercial Arbitration4 Vietnam on 17 June 2010 and came into effect on 1 January 2011, replacing the OCA. (LCA) was passed by the National Assembly of5

The LCA was designed in line with the 2006 UNCITRAL Model Law on International Commercial Arbitration (Model Law). However, owing to local circumstances, there are certain differences, inter alia:

Article 2 of the LCA states that disputes arising from commercial activities are arbitrable whereas nowhere in the LCA does it clarify the meaning of the term ‘commercial activities’. This term is defined in the 2005 Commercial Law of Vietnam as encompassing all activities of profit-making purposes, including, inter alia, sale or purchase of goods, provision of services, investment and commercial promotion. However, it is unclear as to whether tort claims are arbitrable or whether profit-making purposes bear the same meaning as the commercial nature mentioned in the UNCITRAL Model Law.6

The LCA sets out certain mandatory qualifications for arbitrators to ensure that disputes will be settled by reliable tribunals.7

The LCA also supports arb-med procedures by permitting arbitration tribunals, at the request of parties, to assist them in reaching an amicable resolution of their dispute.8

To be enforced in Vietnam, ad hoc arbitration awards are required to be registered with national courts.9

One ground for vacating arbitral awards under the LCA is ‘fundamental principles of Vietnamese Law’ instead of ‘public policy’ as provided in the UNCITRAL Model Law. The interpretation of this term is a complicated issue in Vietnam.

In addition, there are by-laws issued to guide the implementation of the LCA, namely Decree No. 63/2011/ND-CP dated 28 July 2011 and Resolution 01/2014/NQ-HDTP dated 20 March 2014 of the Council of Judges of the Supreme People's Court of Vietnam (Resolution 01/2014).10 In particular, Resolution 01/2014 is designed to ensure the effectiveness of arbitral proceedings and to illuminate matters not expressly covered by the LCA, for example, the role of national courts over foreign arbitrations seated in Vietnam, consolidation of ongoing arbitration proceedings, the legal consequence of waiving the right to object and other provisions increasing the enforceability of arbitration agreements.
In Vietnam, the recognition and enforcement of foreign arbitral awards is regulated by Chapter XXIX-Part VI of Civil Procedure Code No. 24/2004/QH11 as amended in 2011 (CPC). Recently, the Supreme People’s Court of Vietnam issued a Practice Note 246/ TANDTC-KT dated 25 July 2014 (Practice Note 246), giving internal guidance on the resolution of applications for recognition and enforcement of foreign arbitral awards in Vietnam. This Practice Note shows the pro-arbitration approach taken by the Supreme People’s Court of Vietnam by clarifying the burden of proof of parties, the applicable law for examining the due conduct of arbitral proceedings, and the capacity of parties signing the arbitration agreement, and by explaining the exceptions to recognition and enforcement of foreign arbitral awards. Notably, the CPC is now undergoing review and amendment. This includes changes that are expected to be a significant step towards bringing the arbitration regime more closely into line with the New York Convention.

Both domestic and recognised foreign arbitral awards will be enforced in accordance with the Law on Enforcement of Civil Judgments No. 26/2008/QH12 (LECJ), which was passed by the National Assembly of Vietnam on 14 November 2008 and took effect on 1 July 2009.

**Arbitration institutions in Vietnam**

At this time, there are 11 arbitration centres in Vietnam with a total of 325 registered arbitrators. Among them, the most prominent institution is the Vietnam International Arbitration Centre (VIAC) at the Vietnam Chamber of Commerce and Industry (VCCI), with 149 reputable arbitrators, including 17 foreign arbitrators. The VIAC has internal guidance for arbitrators on the time and cost-effective conduct and management of arbitral proceedings. Remarkably, in 2014, the time it took to render a VIAC arbitral award ranged from 81 to 251 days.

In 2014 the VIAC achieved a great deal. The VIAC resolved 124 cases, with over 51 per cent of total disputes involving foreign elements and 20 per cent of total cases requiring the application of foreign law. That figure may partly represent the growth of arbitration activities in Vietnam.

**Enforceability of arbitration agreement**

An arbitration agreement will be enforceable under Vietnamese law if it demonstrates the implicit or explicit mutual consent of parties and is ‘in
writing’, regardless of whether the arbitration agreement is made before or after the time of the dispute (Tan Hoa v Valency Trading (2011), Decision 1190/2011/KDTM-QD of People’s Court of Ho Chi Minh City).

Before the LCA came into force, the position had been that regardless of the existence of a valid arbitration agreement, when one party initiated court proceedings, but the other party failed to object to the competence of the court, it might form a new choice of court clause, replacing the arbitration agreement. However, the Vietnamese Court dismissed this allegation and upheld the decision favouring jurisdiction of the arbitral tribunal (Kuo Chi Sheng v Truong Sanh (2009), Decision 1475/2009/KDTM-QD of the People’s Court of Ho Chi Minh City). This decision, in hindsight, is consistent with the provision of article 16(2)(dd) of the LCA and the recent guidance of the Supreme People’s Court in Resolution 01/2014, which limits the court to consider only the existence and the operability of arbitration agreements. The current stance is also entirely consistent with article II of the New York Convention regarding the guarantee of enforceability of an arbitration agreement. Resolution 01/2014 further supports arbitral proceedings by stating that even if the court finds that the dispute is not within the competence of the arbitral tribunal, the court shall stay the court proceedings in favour of the arbitration if the case has already been handled by an arbitral tribunal. In another case, the court decided that ‘internal corporate regulations are not binding on a third party’ when an award debtor claimed that its signatory lacked the capacity to sign the arbitration agreement due to restrictions provided in the internal charter/resolution of the company (Thuy Loc v Shiseido (2013) Decision 526/2013/KDTM-QD of the People’s Court of Ho Chi Minh City).

The supporting role of Vietnamese courts in arbitration

Articles 46, 47 and 48 of the LCA permit the arbitration tribunal, on its own initiative or at the request of one or both parties, to collect evidence and summon witnesses. The court shall, at the request of the tribunal or a party, exercise its supporting role in collecting evidence and summoning reluctant witnesses as set out in articles 46(5) and 46(6) of the LCA and article 11(3) of Resolution 01/2014, provided that previous attempts to collect evidence were unsuccessful and that the absence of said witness(es) would obstruct the dispute settlement.

Moreover, article 49(2) of the LCA gives the arbitral tribunal the power to order six types of interim relief at the request of one party, including:
prohibition of any change in the status quo of the assets in dispute;
prohibition of acts by, or ordering one or more specific acts to be taken by a party in dispute, aimed at preventing conduct adverse to the process of the arbitration proceedings;
attachment of the assets in dispute;
requirement of preservation, storage, sale or disposal of any of the assets of one or all parties in dispute;
requirement of interim payment of money as between the parties; and
prohibition of transfer of property rights of the assets in dispute.

However, to avoid application of the same interim relief by both the arbitral tribunal and court, the court shall refuse the application of a party if that party has requested the arbitral tribunal to apply the same interim measure, and vice versa, unless the interim measure requested by that party is beyond the competence of the arbitral tribunal.

Further, under article 50 of the LCA, parties shall bear the burden of proof of the necessity for such interim relief in the dispute settlement. On that basis, the arbitral tribunal and the court are free to determine whether to grant the requested measure.

Although under the CPC the court has the authority to order 13 kinds of interim relief, including those available to tribunals under the LCA as well as a number of exclusive ones, Resolution 01/2014 mistakenly limits the court’s power so that it is equal to the arbitral tribunal’s (ie, the court can only order the same kind of interim reliefs provided in article 49(2) of the LCA). It should be noted that interim relief may only be ordered by the court after the filing of a statement of claim in arbitration.

**Recourse against arbitral awards**

The grounds for recourse against arbitral awards are stated in article 68 of the LCA and are consistent with article 34 of the Model Law except for two main differences. The first is article 68(2)(dd) of the LCA regarding forged evidence affecting the issuance of the arbitral award and the arbitrator accepting money from one party, which was actually adopted from Chinese arbitration law. Secondly, as mentioned above, the LCA refers to the term ‘fundamental principles’ instead of ‘public policy’ as grounds for setting aside arbitral awards. When
invoking the grounds under article 68(2), the parties who challenge the arbitral award shall bear the onus of proof, except for the situation in article 68(2)(dd) involving the ‘fundamental principles of Vietnamese law’, which shall be the responsibility of the court. However, in some previous cases the Vietnamese court used this vague term to revisit the merits of the dispute19 (Hong Phat v China Policy Limited (2013) People’s Court of Ho Chi Minh City; Toepfer v Sao Mai (2011), The Appellate Court – Supreme People’s Court in Hanoi).

To clarify this point, Resolution 01/2014 of the Supreme People’s Court requires the competent court to consider the two following questions:20 (i) whether the principle that is purported to be breached is one of the ‘basic principles on conduct, of which effects are most overriding in respect of the development and implementation of Vietnamese legal system’; and (ii) whether an arbitral award ‘violates the interests of the government, and the legitimate rights and interests of third party(ies)’. If the arbitral award does not satisfy both questions the court will not set aside that award, on the basis of violation of fundamental principles of Vietnamese laws.

Although the new definition rectifies the incorrect understanding of some Vietnamese courts that all provisions of law could be ‘fundamental principles’, it is not comprehensive enough, since there are still a number of ‘fundamental principles’ that can be found in other laws. Additionally, the connection between the rights and interests of third parties and ‘fundamental principles of Vietnamese law’ is still debatable. It is, however, undeniable that with this new guidance the Vietnamese court will be more prudent when considering whether to vacate an arbitral award on this ground.

Notably, the decision of the competent court on recourse against arbitral awards is final and is not subject to appeal or cassation as stipulated in article 71 of the LCA.

Regardless of these problems, according to the report of the VIAC published at a conference on the annulment of arbitral awards on 20 January 2015, from 2003 to 2014, only 46 out of 679 arbitral awards were challenged (6.7 per cent) and, of those, only 19 were set aside. This demonstrates the favourable attitude of the local courts toward arbitration as well as the high enforceability of Vietnamese arbitral awards. The recent notable case between Vinalines (Vietnam), one of the largest state-owned corporations, and SK E&C, a Korean construction contractor, affirms this statement (Vinalines v SK E&C (2014), Decision No. 09/2014/QD-
In this particular case, Vinalines challenged the VIAC award in favour of SK E&C, ordering Vinalines to pay SK E&C the amount of around US$3 million. Vinalines requested that the arbitral award be set aside on several grounds, including the violation of fundamental principles of Vietnamese law, forged evidence and ultra petita claims. Vinalines also called for the intervention of the Ministry of Transportation, the Prime Minister and even the Supreme People’s Court for reconsideration of the arbitral award. However, the Court of Hanoi City finally dismissed these arguments and decided to uphold the arbitral award because Vinalines failed to prove their allegations and the court will not review the substantive matters decided by the arbitral tribunal.

**Enforcement of foreign arbitral awards**

Pursuant to the reservations that Vietnam made when ratifying the New York Convention, foreign arbitral awards are enforceable in Vietnam only when:

- they are awards made in the territory of another contracting state;
- they involve differences arising out of legal relationships, whether contractual or not, that are considered as ‘commercial’ under the national law of Vietnam; and
- with regard to awards satisfying the above condition of ‘commercial’ nature but made in the territory of non-contracting states, Vietnam will apply the Convention only to the extent to which those states grant reciprocal treatment.

The exceptions for recognition and enforcement of foreign arbitral awards in Vietnam set out in article 370 of the CPC are consistent with article V of the New York Convention. The only difference is the breach of ‘fundamental principles’ instead of ‘public policy’ as an exception to recognition and enforcement of foreign arbitral awards. It is arguable that the explanation of ‘fundamental principles of Vietnamese law’ in Resolution 01/2014, as mentioned above, is also applied to this ground.

Foreign arbitral awards are defined under the LCA and CPC as awards rendered in a foreign arbitration, either inside or outside the territory of Vietnam, to resolve a dispute as agreed by parties. Accordingly, a foreign arbitral award in Vietnam is considered a ‘non-domestic arbitral award’ under Article I of the New York Convention; however, Vietnam does not have any specific provision for non-domestic arbitration. As a result, there may be a situation where Vietnam is the place of arbitration but the arbitration is conducted under a foreign arbitration
institution rules (for example ICC Rules or SIAC Rules). In such a case, the arbitral proceedings shall, in light of article 5(5) of the Resolution 01/2014, be conducted in accordance with the LCA and recognition of this award will be considered under the provision of the CPC for a foreign arbitral award.

In theory, there is no specific time limit for a party to submit an application for the recognition and enforcement of foreign awards in Vietnam. However, a precedent shows that the court may apply a limit of one year to this kind of matter in the CPC (Cargill v Dong Quang (2014), Decision No. 01/2014/QDST-KDTM of the People’s Court of Long An province). Therefore, until further guidance on the time limit is issued, the award creditor is highly recommended to seek recognition and enforcement within one year of the award’s issuance.

Further, there is no provision on how contents of foreign law should be pleaded before Vietnamese courts. Consequently, in practice, some local judges, based on their subjective understanding, choose to consider matters governed by foreign law in light of analogical application of Vietnamese law, especially in the matters of the legal capacity of the contracting parties, the validity of the arbitration agreement and the fundamental principles of Vietnamese laws (Strategic Think Tank LLC and 260 Architects v Sudico (2014), Decision No. 07/2014/QDST_KDTM of the People’s Court of Hanoi). The burden of proof was also wrongly imposed on the award creditor (Ecom v Hatexco (2013), Decision 08/2013/VKDTM of the People’s Court of Hanoi). Some courts even applied the provision of service of notice in court proceedings to judge that the service of arbitral documents of the tribunal was improper and hence, refused the recognition of foreign arbitral awards (Ecom v Dong Quang (2013), Decision No. 01/2013/QDST-KDTM of the People’s Court of Long An).

In any case, the decision on the application of recognition and enforcement of a foreign arbitral award rendered by the first instance court is subject to appeal by the involved parties and objections by the People’s Prosecutors.

The misunderstandings of local courts may be the main reason why the percentage of foreign arbitral awards recognised and enforced in Vietnam is still low. According to the latest report of the Supreme People’s Court at a conference held by the Ministry of Justice of Vietnam, from 2005 to 2014, 24 out of a total of 52 applications for recognition and enforcement were dismissed – 46 per cent of all foreign awards were refused to be enforced in Vietnam. It is expected that
the correct guidance of the People’s Supreme Court in Practice Note 246 will lead to an increase in foreign arbitral awards becoming both recognised and enforced in Vietnam. It is, however, still advisable that international users appoint local bailiffs or lawyers to serve arbitral notices on Vietnamese counterparties as an extra method, especially in ex-parte proceedings, to avoid the most popular grounds for refusal of recognition and enforcement of potential awards at the later enforcement stage.

**Potential market for foreign practitioners and foreign arbitration institutions**

The LCA opens up a potential market for foreign arbitration institutions, foreign arbitrators and foreign lawyers.

In accordance with Chapter 12 of the LCA, both branches and the representative offices of foreign arbitration institutions shall be permitted to operate in Vietnam. Although at present no branch or representative office of a foreign arbitration institution has been established in Vietnam, this provision has paved the way for a stronger Vietnamese arbitration market in the future.

As mentioned above, there are currently 17 foreign arbitrators registered in Vietnam. Pursuant to the statistic of the VIAC, the number of disputes has foreign elements accounted for 51 per cent of total disputes at VIAC. Foreign arbitrators and experts are welcome to register under the list of arbitrators of Vietnamese arbitration institutions to meet the high demand of parties in international commercial disputes. Additionally, parties are free to appoint any foreign arbitrator who is not registered to resolve their disputes regardless of whether or not Vietnamese law is applicable.

More crucially, unlike court proceedings, foreign lawyers do not need to be qualified or admitted to the national Bar as Vietnamese lawyers to act in arbitrations in Vietnam. With the increase in disputes applying foreign laws, involvement of foreign lawyers will become essential in arbitral proceedings in Vietnam.

**A bright future for ADR in Vietnam**

In conclusion, we would like to highlight that Vietnamese law is in the process of review and amendment which we believe will lead to a brighter future of alternative dispute resolution mechanisms in Vietnam in general, as well as commercial mediation and arbitration in particular. This legislative activity comes hot on the
heels of a major revision of the Civil Code, the CPC and the birth of the first legislation on commercial mediation.

To improve arbitration activities, the amendments being addressed are inter alia: providing clear definitions of domestic and foreign arbitral awards in light of international arbitration practice and the New York Convention, applying interim reliefs in support of foreign arbitration, guiding the application of foreign law in settlement of dispute and removing some grounds for annulment of arbitral awards to be consistent with the UNCITRAL Model Law. In addition, the new CPC is drafted to be precisely in line with New York Convention to promote the success rate of foreign arbitral awards being recognised and enforced in Vietnam, as well as enhancing the investment environment of Vietnam.

Given the increasing interest in multi-tier dispute resolution processes, new legislation is being designed to recognise the mediated settlement agreement and encourage the use of med-arb and arb-med-arb.

Notes

According to the UNCTAD website:

Source: http://aric.adb.org/fta-country, site accessed on 11 April 201. ↑

No. 08/2003/PL UBTVQH11 ↑

No. 54-2010-QH12 ↑


See article 2 LCA and article 3(1) Commercial Act No. 36/2005-QH11. ↑

See article 20 LCA; this follows the approach adopted in several other Asian/SE Asian jurisdictions. ↑

See article 38 LCA. ↑

See article 62 LCA. ↑

Dzungsrt & Associates LLC (Note 5, above), p482. ↑

According to the latest statistics provided by the Ministry of Justice on 10 April 2015. ↑

See article 16(1) LCA. ↑

See article 16.2(dd) LCA. ↑

See article 2.2 Resolution 01/2014. ↑

See article 102 of CPC Provisional emergency measures:
1 Assigning minors to individuals or organisations to look after, nurture, take care of and educate them.
2 Forcing the prior performance of part of the alimony obligation.
3 Forcing the prior performance of part of the obligation to compensate for damage to individuals whose lives and/or health have been infringed upon.
4 Forcing the employers to advance wages, remunerations or compensations, allowances for labor accidents or occupational diseases incurred by employees.
5 Suspending the execution of decisions on dismissing employees.
6 Distaining the disputed properties.
7 Prohibiting the transfer of property right over the disputed properties.
8 Prohibiting the change of the current conditions of disputed properties.
9 Permitting the harvesting, sale of subsidiary food crops or other products, commodities.
10 Freezing accounts at banks or other credit institutions, State treasury; freezing properties at places of their deposit.
11 Freezing properties of the obligor.
12 Prohibiting involved parties from performing, or forcing them to perform certain acts.
13 Other provisional emergency measures provided for by law. ↑

Dzungsrt & Associates LLC (Note 5, above), p486. ↑

Ibid, p488. ↑

See article 14.2(dd) Resolution 01/2014. ↑

See article 343, para.4 & article 346(2) CPC. ↑
See article 345 & article 372 CPC. ↑

Available at the official website of the Ministry of Justice in Vietnamese at: www.moj.gov.vn/ct/tintuc/Pages/hoat-dong-cua-Bo-Tu-Phap.aspx?ItemID=6638, site accessed on 11 April 2015 ↑

Published in the official website of VIAC. Only available in Vietnamese: http://viac.vn/Uploads/ngoctb/Bao%20cao%20to%20tung%202013%20post%20len%20VVe%20(Dt1).pdf, site accessed on 11 April 2015. ↑

http://globalarbitrationreview.com/reviews/71/sections/238/chapters/2890/Vietnam/