The new Law on Commercial Arbitration in Vietnam

By Tam Shu Ching and Gregory Crovo*

Foreign investors in developing countries traditionally prefer arbitration as a means to settle disputes because it promises speedier resolution, less cost, confidentiality of proceedings and flexibility when it comes to choosing who the arbitrator will be and where the arbitration is to be conducted. The lure of arbitration is even greater in a country like Vietnam where the other alternative—litigation and use of the local court systems—is plagued with an inefficient judiciary, lack of transparency and strong political influence.

Recently, the Law on Commercial Arbitration moved Vietnamese arbitration laws even closer to the international standard—a move which garnered international support. However, it is questionable as to whether the courts and other relevant authorities will also change their attitude towards arbitration to coincide with the changes and improvements in the black letter law. The Law on Commercial Arbitration cannot itself exist in a vacuum. In addition to good arbitration laws, Vietnam will need to ensure the growth of a solid legal profession, an impartial and capable judiciary and a strong enforcement apparatus so that there will not be a gap between theory and practice. Undoubtedly, the new Law on Commercial Arbitration has introduced significant improvements. However it remains to be seen whether the effect of these changes will be good, bad or inconsequential as this ultimately depends on actual implementation of the positive law.

A. The Ordinance as a Stepping Stone

In 2007, Vietnam acceded to the WTO, making Vietnam a more attractive destination for foreign investment. With increased foreign investment, the likelihood of commercial disputes arising would be greater than before. Prior to committing funds to an investment, a commercial entity will have to consider, among other things, whether the laws of a particular jurisdiction are likely to be enforced and whether the sanctity of the contracts made would be upheld by the available dispute resolution mechanism. A robust arbitration infrastructure is all the more important as a support of international trade and investment where there is considerably less confidence in the national court. Arbitration has been a dispute resolution mechanism in Vietnam for decades but since its inception in the 1990s,
it has been far from popular. In 2003, the National Assembly passed the Ordinance on Commercial Arbitration, a landmark legal instrument that was hoped to significantly change arbitration in Vietnam. However, the response was lacklustre. There was no key transnational arbitration dispute decided under the Ordinance. Nevertheless, the Ordinance was a major stepping stone which led to the new and improved Law on Commercial Arbitration passed on 17 June 2010 by the 12th Legislature of the National Assembly. The new law came into effect on 1 January 2011 and there have been many positive changes.

B. **Broader Scope of Arbitrable Disputes**

Under the old law, arbitral tribunals could only hear disputes concerning “commercial activities” which were narrowly defined under Article 2 of the Ordinance. With the new law, arbitral tribunals are now given competence to resolve not only disputes arising from commercial activities, but also disputes where at least one of the parties engaged in commercial activities or any other disputes which the law stipulates must be resolved by arbitration. Furthermore, the new law has a specific provision clarifying that a consumer has the right to bring his/her claim against a seller or service provider to arbitration if the standard terms of the contract has an arbitration clause. The Law on Commercial Arbitration also provides for further expansion of the scope of arbitration through future legislation.

C. **Increase in the Pool of Available Arbitrators**

The doctrine of party autonomy allows parties to freely choose their arbitrators. However, under the old Ordinance, an arbitrator must have a university qualification and five years of practical experience in his field of study. Above all that, an arbitrator had to be a Vietnamese citizen. Foreign arbitrators could only be appointed in disputes involving “foreign elements”. A foreign-invested joint venture company or a 100% foreign-owned company were considered Vietnamese entities under the Ordinance and hence were not allowed to choose a foreign arbitrator to act in their arbitration in Vietnam. These strict requirements significantly restricted parties’ choice of arbitrators, much to the dismay of many foreign investors.

Under the new law, apart from arbitrators with a university degree and five years of practical experience, those with “highly specialised qualifications and considerable practical experience” may still be selected to act as an arbitrator notwithstanding any failure to satisfy the previously mentioned university requirements. Although the terms “highly specialised qualifications” and “considerable practical
experience” seem rather vague and discretionary in nature, the change is still a laudable one as it presents an intention to expand the previously narrow pool of arbitrators that parties can access. More significantly, the requirement of Vietnamese citizenship has been eliminated under the new law. This means that foreigners can now be appointed as arbitrators in Vietnam if they meet all of the aforementioned requirements. This would also mean that more foreign investors would be comfortable with referring their disputes to arbitration in Vietnam. The significant implication of these changes seems to be that a purely local dispute can now be resolved by a foreign arbitrator under Vietnamese law within the territory of Vietnam and the arbitral award issued by such an arbitrator would be treated as a local award. Encouragingly, there are a number of foreign arbitrators currently on the list of arbitrators of the Vietnam International Arbitration Centre.

D. Establishment of Foreign Arbitration Centres and Representative Offices

Another change which signifies Vietnam’s integration into the international community is the provision which allows foreign arbitration centres to establish their branches and/or representative offices in Vietnam. However, it is noteworthy that arbitral awards issued by foreign arbitration centres in Vietnam are still considered “foreign arbitral awards” and have to go through the tiresome process of recognition by Vietnamese courts when enforcement is sought.

E. Giving Effect to the Chosen Applicable Law

Another aspect of party autonomy is that parties are allowed to choose the applicable law to govern their dispute. Under the Ordinance, Vietnamese law had to be applied to settle a dispute if both parties to the dispute were Vietnamese parties. In a dispute involving “foreign elements”, the arbitral tribunal may only apply a foreign law chosen by the parties to the extent that such choice of foreign law and its application, will not contradict the “fundamental principles” of Vietnamese law.

With the enactment of the new law, for disputes with a foreign element, the tribunal must recognize party autonomy and apply the law chosen by the parties without having to consider if the chosen law is consistent with the fundamental principles of Vietnamese law. This improvement brings the Vietnamese arbitration laws in line with the UNCITRAL Model Law as well as the arbitration laws of the world’s leading jurisdictions.
F. Power Conferrred on Tribunal to Determine Language of Arbitration Proceedings

The default position under the old law if parties do not stipulate or agree on the language to be used during the proceedings is that the proceedings would be conducted in Vietnamese. This was the position even where the matter clearly involved foreign elements. This was a major deterrence for foreign arbitrators. Under the new law, where there is an absence of agreement as to the language of the arbitral proceedings, the tribunal has the power to determine the language which is most convenient or appropriate to the situation. This is a much welcomed change.

G. Power Conferrred on Tribunal to Grant Interim Relief

Interim relief is critical in any form of dispute resolution. Parties must have the option to seek interim relief for prohibition of any change in status quo of the assets in dispute lest an award in their favour would be deemed nugatory. Under the old law, parties could only seek interim relief from the Vietnamese courts.

The new Law on Commercial Arbitration now gives tribunals the power to grant various interim reliefs, thus allowing arbitration proceedings to avoid being hindered by the inefficiency of the Vietnamese courts and operate more effectively in the protection of the rights and interest of parties to a dispute.

H. Criticisms of the New Law

Some of the positive changes embodied in the Law on Commercial Arbitration have been discussed above. However, there are other changes and non-changes which have attracted criticism.

1. No right of appeal against decision to set aside award

Previously under the old Ordinance, an aggrieved party had the right to file an appeal to the Supreme Court against a decision of a provincial court to set aside an award. Presently, under the new arbitration law, there is no such right of appeal. On one hand, this change is a progressive one as it ensures finality. On the other hand, there is a risk of incorrect decisions stifling the growth of arbitration as a viable dispute resolution mechanism in Vietnam. This is especially so given that the provincial courts have a reputation of being overzealous when it comes to setting aside arbitral awards, thus rendering many awards a nullity.
2. **No re-arbitration**

As with the old Ordinance, the new arbitration law provides that if an arbitral award is set aside, the parties must refer the case to litigation in the Vietnamese courts. Re-arbitration can only occur with the agreement of both parties. Hence, even if an award is set aside due to a procedural irregularity that does not affect the merits of the case, parties do not have the option to re-arbitrate. It is disappointing that this concept was not revised in the new Law such that the sanctity of an arbitration contract is not upheld, further dampening any hopes of encouraging international arbitration.

3. **No immunity for arbitrators**

Under the old Ordinance, there was no immunity given to arbitrators. Arbitrators were not precluded from being hauled to court and ordered to pay damages if he renders an incorrect decision, even without any mala fides on his part. During the drafting stages of the new arbitration law, practitioners suggested that the new law should include an immunity provision, adapted from the English Arbitration Act, protecting an arbitrator from liability save in cases where there is wilful misconduct. Unfortunately, this suggestion was not implemented in the final draft. This would likely deter foreign arbitrators to accept appointments unless they are adequately covered by insurance.

I. **The Problem of Enforcement in Practice**

Vietnam has been a party to the New York Convention since 1995. In theory, it means that awards made in another country that is a signatory to the New York Convention should be enforceable in Vietnam. However, investors found it difficult to enforce a foreign arbitration award because of the court’s anti-arbitration stance which manifested in broad interpretation of the grounds for refusal of enforcement. Article V of the New York Convention provides for a list of defences that might prevent an arbitral award from being enforced. In particular, one of those defences provided that an award would not be enforced if enforcement would “violate the public policy of the enforcing country”. This ground of public policy for refusal of enforcement of foreign arbitral awards was adapted into the Vietnamese Civil Procedure Code as “basic principles of the laws of Vietnam”.

The Vietnamese court’s interpretation of “basic principles” was much broader than the arbitration community could have imagined. In the oft-cited case of Tyco
Services Singapore Pte Ltd v Leighton Contractors (Vietnam), Tyco, a Singaporean entity applied for recognition and enforcement in Vietnam of an arbitral award rendered by an Australian arbitration. Enforcement was refused by the Ho Chi Minh People’s Supreme Court because the contractor in that case failed to obtain the requisite construction permit thus violating the basic principles of Vietnamese law. By doing so, the courts have subtly reviewed the merits of an award made, with complete disregard to a choice of foreign law. It is unclear whether the new arbitration law will improve the enforcement aspect of foreign arbitral awards since the enforcement process is still governed by the Civil Procedure Code.

J. A Glimmer of Hope for the Future

From a legislator’s point of view, despite the shortcomings still remaining after the new enactment, it is hard to dispute that Vietnam has indeed come a long way in terms of its arbitration laws. The Law on Commercial Arbitration is a milestone achieved because it manages to bring the laws closer to the international standard. However, it is still too early to judge if this improvement in black letter law will indeed lead to an increase in the influx of foreign arbitration in Vietnam. Currently, there is still a lack of empirical evidence even though the Law on Commercial Arbitration came into effect slightly over a year ago on January 2011. Evidently, this is due to the fact that arbitration agreements entered into before 1 January 2011 are to be implemented in accordance with the old law, being the law applicable at the time of entry into the contract to arbitrate. Hence, disputes arising after 1 January 2011 out of these contracts would still be under the purview of the old law. This means the effects of the new law may not even be felt until several years down the road. As it now stands, no foreign arbitration centre or representative offices have been set up in Vietnam even though the new law now provides for this possibility and the implementing legislation has been enacted, setting out in detail the procedure for doing so.

The lack of empirical evidence could also be due to the fact that judicial or arbitral proceedings and their resulting judgements or awards are typically not reported or made publicly available. Hence it is hard to assess how foreign investors are reacting to the new law, in particular the increase in party autonomy it promises. That said, what really matters in the long run is the attitude of the Vietnamese
courts and Vietnamese government on arbitration as a viable dispute resolution mechanism.

Undoubtedly, a modern and liberalised arbitration law is a positive step forward. However, if the Vietnamese courts do not adopt a more pro-arbitration stance especially in terms of granting a stay in favour of arbitration as well as enforcement of arbitral awards, it is hard to see how there would be a conducive environment for arbitration to take place. Education and training of Vietnamese judges and arbitrators to bring their mind set and skills more in line with the international standard as well as initiatives taken by the Vietnamese government to promote Vietnam as a place of arbitration are essential to developing a robust arbitration infrastructure. Inexperienced judges who are not updated with the modern principles of the new arbitration law will only stymie a claimant’s ability to arbitrate in an expedient manner and ultimately enforce an award made pursuant to a lawful arbitration proceeding, whether or not within the territory of Vietnam. Major reforms are needed to help ameliorate the deficiencies in the Vietnamese court system so that they are seen as fairer and more independent especially when deciding on the enforceability of foreign arbitral awards.

With the new law, arbitration in Vietnam seems to be held in generally higher esteem by foreign investors and the legal community. However, many are still taking a wait-and-see approach as when it comes to interpretation of legislation, no other judiciary can be more unpredictable than the Vietnamese. It really just takes another case like Tyco Services Singapore Pte Ltd v Leighton Contractors (Vietnam) for this little glimmer of hope to vanish.

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