Arbitration in Vietnam: a journey to international standards

Nguyen Bao Huy of LEADCO Legal Counsel tracks the growth of arbitration in Vietnam as the country moves towards international integration.

For many decades, arbitration has been regarded as an effective method of resolving commercial disputes in many countries. However, for political and economic reasons, an effective arbitration process had not been recognised in Vietnam for a number of years. Recently, along with the major reforms such as “Doi Moi” (renovation) which took place in 1986, and the country’s accession to the WTO in 2007, Vietnam’s regulations concerning arbitration have steadily improved in efforts to reach international standards. This article provides an overview of recent arbitration developments in Vietnam and its future trends.1

The era of “so-called” arbitration
Before 1993, there existed two types of arbitration in Vietnam: the State’s economic arbitration system (established in 1960); and non-governmental arbitration including the Foreign Trade Arbitration Committee (established in 1963) and the Maritime Arbitration Committee (established in 1964). However, these two types of arbitration were not entirely similar to the kind of arbitration that was understood by the international community.

For example, the State’s economic arbitration system was in fact governed by a State agency with jurisdiction to resolve disputes arising from contracts among State-owned enterprises (SOEs). In other words, the State’s arbitration agency acted as a State Court and its jurisdiction did not originate from the choice of the relevant parties. Non-governmental arbitration, on the other hand, dealt mostly with disputes arising from international contracts between Vietnamese SOEs and their counterparts from Soviet bloc countries such as Russia, Poland, East Germany and Czechoslovakia, and other states. It is interesting to note that the majority of the cases submitted to the Foreign Trade and Maritime arbitration committees were settled through amicable negotiation and mediation.

Initial efforts to establish effective arbitration
In 1986, Vietnam carried out strategic reforms to its economic and social policies. Since then, private enterprises and foreign direct investment have been recognised and facilitated for national economic development. Together with an open-door policy which was also adopted in 1986, commercial transactions between Vietnam and
foreign countries rapidly increased. In the context of the new economic and social model, the two previous types of arbitration became inappropriate.

Eventually in 1993, the State’s economic arbitration system was replaced with the economic courts under the People’s Court system of Vietnam. In the same year, the Foreign Trade Arbitration Committee and the Maritime Arbitration Committee were consolidated into the Vietnam International Arbitration Centre (VIAC) at the Vietnam Chamber of Commerce and Industry, under the Prime Minister’s Decision 204/TTg. One year later, the Vietnamese Government issued Decree 116/CP (Decree 116), which provided a legal framework for the organisation and operation of arbitration in Vietnam. Pursuant to the Decree 116, five arbitration centers were established across the country.

Another important improvement to the arbitration system was Vietnam’s accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) in 1995. In accordance with the New York Convention, arbitral awards made in the territory of another contracting state are now generally recognised and enforced in Vietnam. The above developments brought significant progress to the arbitration process in Vietnam. For instance, for the first time Vietnam allowed non-governmental arbitration to resolve disputes between domestic parties.

Unfortunately, the new regulations on arbitration in 1993 and 1994 also contained major shortcomings. First and foremost, the parties to an arbitration agreement cannot apply to courts for interim measures under these regulations, nor are arbitrators entitled to issue such measures.

Another initial problem concerned the enforcement of arbitral awards, as the 1993 and 1994 regulations did not provide for any effective mechanism to implement such awards. For example, enforcement of the VIAC’s awards depended entirely on the goodwill of the relevant parties. Accordingly, at that time many law firms recommended that their clients not choose the VIAC for dispute resolution.

The arbitration process under Decree 116 was even worse. For example, Decree 116 provided that if one party did not implement the award, the other party was entitled to ask the competent court to retry the dispute, a provision which defeated the purpose and finality provided by arbitration. As a result, from 1994 to 2003 there were very few cases submitted to Vietnam’s five arbitration centres.

The turning point
As initial efforts to set up an effective arbitration regime in Vietnam turned out to be of limited utility, the Standing Committee of Vietnam’s National Assembly issued an Ordinance on Commercial Arbitration (the Ordinance) in 2003 to address the procedural shortcomings of the previous regulations. The substantial changes under this Ordinance can be summarised as follows:

- For the first time, lawmakers recognised the concept of ad hoc arbitration in Vietnam, which provides the parties with an additional option for arbitration to resolve disputes.

- The Ordinance clearly affirms that arbitral awards are final and the parties are not entitled to appeal. If a party does not agree with the arbitral award, that party can only apply to a competent court to set aside the award based on the limited grounds as listed in the Ordinance (which are basically modeled on those under the UNCITRAL Model Law on International Commercial Arbitration (the Model Law)). The court will not review the merits of the arbitral award. The Ordinance also officially recognises other important principles of arbitration including “Kompetenz-Kompetenz” and the separability of arbitration agreements.

The Ordinance provides parties with more flexibility to choose the foreign law or the international commercial usages to govern their contracts; to choose the place of arbitration in Vietnam or in a foreign country; to
choose the language to be used in arbitration proceedings; and to appoint arbitrators who are within or outside the list of arbitrators of the arbitration centres in Vietnam, or who may even be foreigners.3

As a result of the breakthrough provided by the Ordinance, the VIAC – the most reputable arbitration centre in Vietnam – has developed considerably, as indicated both by the filed cases as well as the number and range of arbitrators. From 2002 to 2008, the VIAC received 198 case submissions, of which 149 cases involved foreign elements. On average, the number of cases submitted to the VIAC increased by 15 percent annually during this period. Furthermore, in 2005 the VIAC’s list of arbitrators included 74 Vietnamese arbitrators. Currently, this list includes 117 Vietnamese and 6 foreign arbitrators.

Major trends to improve arbitration
The contributions made by the Ordinance to the development of arbitration in Vietnam are undeniable. However, after six years of implementation, the Ordinance also demonstrates some deficiencies. For example, according to the Ordinance, parties are only entitled to select Vietnamese arbitrators for disputes not involving foreign elements. Unfortunately, despite the growth outlined above, the number of qualified Vietnamese arbitrators remains very limited. Another problem is the lack of authority for competent courts to issue interim measures before the constitution of the arbitral tribunal.

In addition, the adoption of a new Investment Law and new Commercial Law in 2005, and particularly Vietnam’s accession to the WTO in 2007, has increased the need to improve the Ordinance in order to bring Vietnam’s arbitration regulations closer to common standards in other developed countries. For this purpose, a committee was established in 2008 to draft a new Arbitration Law. The draft Arbitration Law (the draft law) was submitted to Vietnam’s National Assembly for initial discussion in November 2009. Expected to be adopted and promulgated in 2010, the draft law provides for some major improvements.

Firstly, the scope of arbitrability would be enlarged under the draft law. Except for disputes concerning personal rights, marriage, family and bankruptcy, the draft law proposes that all other disputes arising from a defined legal relationship, whether contractual or not, can be resolved by arbitration. Under the current Ordinance, only disputes arising from commercial activities can be resolved by arbi-
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The draft law also proposes to include any physical person, legal person, organisation and State agency as permissible parties to arbitration agreements, whereas under the current Ordinance only business organisations and individuals are entitled to choose arbitration as a method of dispute resolution.

Secondly, the draft law proposes to give more judicial support to arbitration proceedings. According to the draft law, the scope of support would be enlarged to include witness summons and evidence collection. The draft law also proposes two important changes to interim measures: before and after the constitution of the arbitral tribunal, a party may ask a competent court to order interim measures; and the arbitral tribunal will be entitled to order interim measures, with such measures being implemented by the judgment enforcement agency upon the request of the relevant party.

Thirdly, the draft law proposes abolishing the difference between arbitration regulations for domestic disputes and those for disputes involving foreign elements, with regard to the appointment of arbitrators, place of arbitration, and language of arbitration. In other words, for all disputes falling under the scope of the Arbitration Law, parties would be free to select arbitrators whether Vietnamese or not, and whether within or outside the list of the arbitration centres; to select the place of arbitration in Vietnam or in a foreign country; and to choose non-Vietnamese languages to be used in the arbitration proceedings.

Finally, in order to avoid delay tactics in arbitration-related proceedings, the draft law proposes adopting the concept of waiver – if a party knows or comes to know that a provision of the law or the arbitration agreement is breached but fails to object to such breach within the time-limit provided by the law, that party shall be deemed to have waived their rights to object before the arbitral tribunal or the court (a concept modeled on Article 4 of the Model Law). If adopted, this would be the first time this concept has been introduced into Vietnam’s legal system.

ENDNOTES
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2 However, Vietnam follows an approach which is rather strict with regard to the authorisation and capacity of signatories to an arbitration agreement and therefore, in order to avoid refusal of the recognition of the arbitral award in Vietnam, parties should ensure that any persons who sign an arbitration agreement are fully authorised to do so under applicable laws.
3 According to Article 2.1 of the Ordinance, a dispute involving foreign elements is a dispute arising from commercial activities in which one or more of the participating parties is a foreigner or foreign legal entity, or where the grounds for establishing, altering or terminating the relationship which is the subject of the dispute arise abroad, or where assets relating to the dispute are located abroad.