

**COURT RULING SETS PRECEDENT**

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Disputes arising out of most transaction documents of large infrastructure and other projects in Vietnam are normally submitted to foreign arbitration. Awards rendered by such arbitration are considered foreign arbitral awards and are theoretically enforceable because Vietnam is a member of the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).

Vietnam has implemented the New York Convention through its own Ordinance on Recognition and Enforcement of Foreign Arbitral Awards passed by the Standing Committee of the National Assembly in 1995. Under the Ordinance, to be enforced in Vietnam, foreign arbitral awards must be recognised and held enforceable by Vietnamese courts. Although the legislation has been in place for quite some time, recognition and enforcement by Vietnamese courts has not been widely tested.

On May 23, 2002, the Economic Court of Ho Chi Minh City (the Court) issued Decision 82/QD-XDTT to recognise an arbitral award rendered by a Queensland arbitration in relation to a "joint venture" contractual dispute between Tyco Services Singapore Pte. Ltd (Tyco) and Leighton Contractor (VN) Ltd (Leighton). This is probably the first time a court in HCMC has recognised a foreign arbitral award for enforcement in Vietnam. The ruling is consistent with the New York Convention and Ordinance principles, and sets a precedent on recognition and enforcement of foreign arbitral awards. It is thus of significant importance and greatly enhances the legal environment in Vietnam.

This article summarises the general rules under Vietnamese law in relation to recognition by Vietnamese courts of foreign arbitral awards for enforcement in Vietnam. It also highlights some of the main points presented in the judgement and issues raised by it.

**General Rules**

A "foreign arbitral award" is defined as "an arbitral award made outside the territory of Vietnam by an arbitrator appointed by mutual agreement of the parties in order to settle a dispute arising from their commercial legal relations."

To be enforced in Vietnam, a foreign arbitral award must be recognised and held enforceable by a Vietnamese court, and the recognition procedures for enforcement are set forth in the Ordinance. In principle, a Vietnamese court may recognise for enforcement an award rendered by an arbitration panel of "a country that is a party to a relevant international treaty of which Vietnam is a participant or a signatory," i.e. the New York Convention. In addition, recognition and enforcement of foreign arbitral awards are also permitted on the basis of reciprocity without the condition that Vietnam is a signatory or participant of an international treaty.

Under the Ordinance, the applicant must first send a request to the Ministry of Justice for enforcement of the award. The Ministry of Justice then will appoint a court of the relevant province where the party against whom the award is sought resides or is located or where the property is located to consider recognising the award for enforcement. Consistent with the New York Convention principles, the Ordinance provides that such a court is not required to review

and reconsider the merit of the arbitral award, but only check compliance with the provisions of the Ordinance.

A Vietnamese court may refuse to recognise a foreign arbitral award for enforcement in Vietnam on, among others, the following grounds:

- (i) the arbitration proceedings were not complied with (e.g., the composition of the arbitration panel, or the arbitration procedure, was not consistent with the arbitration agreement, etc.);
- (ii) the recognition of the foreign arbitral award for enforcement in Vietnam is contrary to the basic principles of the laws of Vietnam (i.e., public policy); or
- (iii) the transactions in dispute were not commercial in nature.

### **Facts**

In this case, Tyco and Leighton in 1992 entered into a “joint venture” contract for co-operation in a construction project in central Vietnam. The contract is governed and interpreted in accordance with the laws of the state of Queensland, Australia. The dispute resolution clause of the contract provides that “in case of a dispute between the signatories, it will be brought to trial by an independent arbitrator as required by one of the two sides who will be appointed by the President of the Institute of Engineers in Australia. The trial will take place in Queensland in accordance with laws of this state.”

A dispute arose and was submitted to the arbitrator in Queensland. Tyco was successful in the arbitration but Leighton was not willing to honour the award. Tyco then submitted its request to the Ministry of Justice, and the Economic Court of Ho Chi Minh City was finally designated to consider recognising the arbitral award for enforcement in Vietnam.

### **Court Judgement**

In its judgement, the Court recognised the award. Importantly, the Court emphasised that it did not review and reconsider the merit of the award but only checked compliance with the provisions of the Ordinance. As described in the judgement, Leighton made the following arguments (among others) to request the Court to reject Tyco’s request:

- (i) The contract is invalid under Vietnamese law because (a) Tyco did not obtain the appropriate license issued by the Ministry of Construction for entry into the contract and hence did not have the capacity to enter into the contract; and (b) the contract itself was not approved by the Ministry of Planning and Investment. Hence, the recognition of the award for enforcement in Vietnam is contrary to the fundamental principles of Vietnamese law; and
- (ii) The transactions contemplated under the contract were not commercial in nature.

### **Public Policy**

In relation to the first argument made by Leighton, the Court made it clear that as required by the Ordinance it did not review and reconsider the merit of the award but only checked compliance with the Ordinance provisions. Specifically, the Court cited Article 15.4 of the Ordinance, which reads in its entirety as follows: “when considering an application, the court shall not review the dispute which has been resolved by the foreign arbitrator but shall only check the foreign

arbitration award and attached documents against the provisions of this Ordinance and other provisions of the laws of Vietnam and of the international treaties of which the Socialist Republic of Vietnam is a participant or signatory for decision.” The Court indicated that consideration of whether the contract is valid or not is consideration of the merit of the award and therefore the Court did not take into account the validity of the contract in question in making its judgement.

Interestingly, it may be understood from this ruling that if the Queensland arbitration did not or was not asked to review the validity of the contract, then the Court would not look at this issue again even if it was asked by the losing party to do so in the court proceedings in Vietnam. Accordingly, awards rendered by foreign arbitration may be enforced in Vietnam regardless of how Vietnamese courts would view the validity of the underlying transaction documents if the validity issue has not been presented to and decided by such arbitration.

### **Commercial in Nature**

In relation to the second argument made by Leighton, the Court explained that the Contract was signed prior to the enactment of the Commercial Law of Vietnam (National Assembly, May 23, 1997) and hence it is impossible to conclude that the transactions contemplated in the Contract were not commercial in nature at the time the Contract was made. The Court argument may be inferred to mean that for transactions entered into after the enactment of the Commercial Law, the Commercial Law may be used as the basis to determine whether the transactions are commercial in nature or not. This inference, if adopted by Vietnamese courts, would create a risk due to the limited scope of commercial acts as defined in the Commercial Law.

The Commercial Law provides for an exhaustive list of 14 commercial acts such as the sale and purchase of goods, representation of business persons, agency arrangement for purchase or sale of goods, and advertising etc. It however does not include for example financing and lending transactions. Hence, if the “commercial in nature” exception and reservation is narrowly interpreted based on the Commercial Law, there exists a risk that the awards rendered by foreign arbitration in connection with the types of transactions not listed in the Commercial Law may not be enforced in Vietnam because they are not commercial in nature.

### **Conclusion**

Despite the uncertainty created by the judgement in relation to the interpretation of the “commercial in nature” exception/reservation, and certain other flaws in the legal analysis presented in the judgement, overall it is believed to be of great importance and a step forward as hitherto Vietnamese courts have been hesitant in recognising and enforcing foreign arbitral awards. We understand that the case is now being appealed, but if the original judgement is upheld it will certainly be a landmark for the Vietnam legal system.