

ARBITRATION UPDATE

THREE COURT JUDGEMENTS



JULY 2021

INTRODUCTION

Various court judgments in Vietnam published in the past couple of years had placed enforceability of foreign arbitral awards in Vietnam in a precarious situation.

Petitions for setting aside arbitral awards had been granted and enforcement of foreign arbitral awards rejected on the basis that the award is contrary to the “*basic principles of the laws of Vietnam*” without engaging on an analytical framework and clear guidelines on what is deemed contrary to the “*basic principles of the laws of Vietnam*”, putting arbitration users seeking enforcement in Vietnam on a long, uncertain, enforcement tunnel.

Of late, three judgments from Vietnamese courts shed some light at the end of the “*basic principles*” conundrum, perhaps a foreshadowing for Vietnam becoming one of the better known arbitration-friendly jurisdictions in ASEAN.

This update will discuss two court judgments that had rejected petitions to set aside arbitral awards, and one that had granted a petition to recognize and enforce a foreign arbitral award in Vietnam. The Court had, in two of these judgments, engaged in an analysis on why the contents of the arbitral awards did not violate the “*basic principles of the laws of Vietnam*”. While Vietnam is a civil law jurisdiction and therefore judgments can not be entirely relied upon from the perspective of precedent, as compared to common law jurisdictions, they do provide indications of the Vietnamese judiciary’s interpretations on these important issues.

We will also show that contrary to perceptions, misconceived or otherwise, Vietnam courts had been quick in acting upon the aforementioned petitions, *viz:*

1. VIAC award was issued in 14 November 2020. The award debtor filed a petition to set aside the arbitral award on 20 November 2020. The petition was rejected by the Court on 9 March 2021 or 4 months after the arbitral award was issued.
2. VIAC award was issued on 22 July 2020. The award debtor filed a petition to set aside, and the Court issued its decision rejecting the petition on 7 December 2020 or 5 months after the award was issued.
3. SIAC award was issued on 2 May 2019. The petition for recognition and enforcement was filed in October 2019, the Court opened for hearing the petition on 21 February 2020.

I. Petition to set aside an arbitral award, rejected by the People’s Court of Ho Chi Minh City¹; Significance of the minutes of the arbitration hearing.

1. What were the grounds for the petition for setting aside ?

An arbitral award was issued by a VIAC tribunal on 14 November 2020 (*Arbitral Award*) against Company B, the award debtor. One of the pieces of evidence submitted by Company A, the award creditor, was a set of financial statements to prove quantification of damages incurred. At the arbitration hearing, the award debtor requested for the summons of the auditor who prepared the statements, but the arbitral tribunal (*Tribunal*) did not provide the summons.

Company B filed a petition in the People’s Court of Ho Chi Minh City (*Court*) to set aside the Arbitral Award on the grounds that the Tribunal:

- a) did not objectively consider the evidence submitted;
- b) made mistakes in the assessment of evidence; and
- c) the Arbitral Award was contrary to the basic principles of the laws of Vietnam.

Company B had specifically referred to the Tribunal’s refusal to provide summons for the auditor to testify on the accuracy of the data in the financial statements. Company B argued that the Tribunal, by refusing to provide summons, has violated the arbitral proceedings and therefore the Arbitral Award is contrary to the basic principles of the laws of Vietnam.

2. What were the grounds for the Court’s judgment rejecting the petition to set aside?

The Court rejected the petition and did not set aside the Arbitral Award on the following bases:

- a) VIAC had issued minutes (or what other jurisdictions may refer to as a transcript) of the arbitration hearing dated 17 October 2020 which was signed by both Company A and Company B. The minutes relevantly reads: *“The parties do not provide any objections related to the arbitration procedure. The parties agreed that the Tribunal does not violate any basic principles. The parties did not object to the accuracy of all documents submitted by the parties in the arbitration procedure. The parties confirm the facts and contents stated in these documents, then requested the Tribunal to consider these as the pieces of evidence to resolve the dispute.”*

Whilst it is true that Company B requested the Tribunal to summon an auditor, it is also true that Company B did not object to the contents of the minutes of the arbitration hearing, and proceeded to sign the minutes at the end of the hearing. Company B had neither proffered any complaint or argument against the manner the arbitral proceedings had proceeded nor on the veracity of the evidence submitted by the parties.

The Court concluded that there is no legal basis to support the complaint that the Tribunal had violated the agreed arbitration procedure.

- b) It was not necessary to summon the auditor in the arbitral proceedings. The Tribunal had sufficient evidence on the outstanding debt of Company B to Company A in the form of

¹ Decision No. 300/2021/QD-PQTT dated 9 March 2021.

confirmation letters between the parties and consolidated financial reports where Company B itself has reported its outstanding debts to Company A in its financial reports. As it was not necessary to summons the auditor, the Court said that the Tribunal – by failing to summons the auditor – did not violate the basic principles of the laws of Vietnam.

- c) One of the requested reliefs made by Company B is the review of the interest rate under the Arbitral Award. The Court refused to do so on the basis that pursuant to Article 71.4² of the Law on Commercial Arbitration, the Court shall not re-hear the merits or contents of the Arbitral Award fully resolving the dispute as between the parties.

The Court did not see the reasons proffered in the petition to set aside as falling under the acceptable reasons listed in Article 68.2³ of the Law on Commercial Arbitration.

II. Petition to set aside an arbitral award, rejected by the People’s Court of Hai Phong⁴

1. What were the grounds for the petition for setting aside?

An arbitral award was issued by a VIAC tribunal on 25 July 2020 (*Arbitral Award*) against TP Shoe Company.

TP Shoe Company, as the award debtor, filed a petition in the People’s Court of Hai Phong to set aside the Arbitral Award on the following grounds:

- a) That the arbitral tribunal (*Tribunal*) had issued an order or decision to hold the hearing in Hanoi instead of Hai Phong, when Hai Phong was the agreed place for the hearing by the parties.
- b) According to Article 54 of the Law on Commercial Arbitration, summons to an arbitration hearing must be sent to the parties at least 30 days before the date of opening the hearing. Article

² **Article 71, Law on Commercial Arbitration. Hearing by court of petition requesting arbitral award be set aside.**

...

4. When hearing the petition, the council of judges shall rely on the provisions in article 68 of this Law and the materials accompanying the petition in order to reach its decision; and shall not review the merits of the dispute which the arbitration tribunal already resolved. The council of judges shall, after considering the petition and accompanying materials, after hearing witnesses, if any, who have been summoned and after hearing the procurator provide the opinion of the procuracy, discuss and reach a majority decision.

³ **Article 68, Law on Commercial Arbitration. Grounds for setting aside arbitral award**

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2. An arbitral award which falls within any one of the following cases shall be set aside:

- (a) There was no arbitration agreement or the arbitration agreement is void;
- (b) The composition of the arbitration tribunal was [or] the arbitration proceedings were inconsistent with the agreement of the parties or contrary to the provisions of this Law;
- (c) The dispute was not within the jurisdiction of the arbitration tribunal; where an award contains an item which falls outside the jurisdiction of the arbitration tribunal, such item shall be set aside;
- (d) The evidence supplied by the parties on which the arbitration tribunal relied to issue the award was forged; [or] an arbitrator received money, assets or some other material benefit from one of the parties in dispute which affected the objectivity and impartiality of the arbitral award;
- (dd) The arbitral award is contrary to the fundamental principles of the law of Vietnam.

⁴ Decision No. 06/2020 dated 7 December 2020

25 of the VIAC Rules of Arbitration requires 15 days before the date of opening the hearing unless the parties agree otherwise. The summons in this matter had been signed by VIAC only 12 days prior to the opening of the hearing.

One of the main counter-arguments made by the award creditor was the time limitation for filing a petition to set aside had expired by one day. Article 69 of the Law on Commercial Arbitration states that the award debtor has 30 days from receipt of the arbitral award within which to file a petition to set aside. The arbitral award was issued on 25 July 2020 and the petition was only filed by TP Shoe Company on 25 August 2020. The award debtor argued that the statute of limitations had already expired by one day and therefore TP Shoe Company should no longer be allowed to file the petition.

2. What were the grounds for the Court's judgment rejecting the petition to set aside?

The Court rejected the petition and did not set aside the Arbitral Award on the following bases:

- a) The postal records show that the Arbitral Award was received by TP Shoe Company on 27 July 2020. Filing of the petition to set aside on 25 August 2020 is therefore within the 30-day limitation period;
- b) On 29 May 2020, the Tribunal had initially issued summons fixing the venue for the arbitration hearing in Hanoi. According to the contract between the parties, the venue for the hearing was agreed to be in Hai Phong. On 15 June 2020, the Tribunal issued another summons and fixed the venue for the hearing in Hai Phong, as contractually stipulated by the parties. Indeed, the 29 May 2020 summons fixing the venue for the hearing to Hanoi would have violated the agreement of the parties, provisions of the laws of Vietnam and the VIAC Rules of Arbitration. The Tribunal however rectified this by way of the 15 June 2020 summons fixing the venue for the hearing to Hai Phong, and which the arbitration hearing had so proceeded in Hai Phong to comply with the agreement of the parties;
- c) Under Article 54⁵ of the Law on Commercial Arbitration, the time limitation for the issuance of summons for the arbitration hearing ought to be based on the parties' agreement or in the absence thereof, the relevant rules of the arbitration centre administering the arbitration. As there had been no agreement between the parties, the Court examined the provisions of the VIAC Rules, which provides that the summons shall be sent by the centre to the parties at least 15 days before the opening date of the hearing, which was complied with by VIAC. However, the initial opening date for the hearing was delayed and postponed by the Tribunal. In such event, the time limitation for issuing the summons shall be decided by the Tribunal itself, in the absence of any agreement from the parties. The summons for the new opening date of the hearing was dated 12 days prior to the new opening date as determined by the Tribunal; such decision by the Tribunal was not a violation of the VIAC Rules.

⁵ **Article 54, Law on Commercial Arbitration. Preparation for dispute resolution hearing**

2. Summonses to attend a hearing shall be forwarded to the parties at least 30 days prior to the date of commencement of a hearing, unless otherwise agreed by the parties or otherwise stipulated by the procedural rules of the arbitration centre.

III. Petition for recognition and enforcement of a SIAC foreign arbitral award, granted by the People's Court of Ho Chi Minh City;⁶ Burden of proof rests with the party subject to the enforcement of the arbitral award

An arbitral award was issued by an arbitrator appointed by the Singapore International Arbitration Centre (SIAC) on 2 May 2019 (*Arbitral Award*) in favour of Asia G (the award creditor) against Company M Investment JSC (*Company M*) and the latter's guarantors, Ms. Le and Mrs. Vo.

On 8 October 2019, Asia G filed a petition for the recognition and enforcement of the Arbitral Award (*Petition*) in the People's Court of Ho Chi Minh City (*Court*). Company M, Ms. Le and Mrs. Vo have all been duly served with notice from the Court, but all did not appear in the proceedings in court.

In granting the petition for recognition and enforcement, the Court said:

- a) Asia G had complied and provided all consular legalised and notarised documents as required pursuant to Article 418, 2015 Civil Procedure Code, and attached these documents to the Petition;
- b) The Arbitral Award has complied with the agreed arbitration procedure (i.e. SIAC has competence to resolve the dispute), having been duly notified to all of the parties, and the contents of the award are not contrary to the basic principles of the laws of Vietnam. The relevant contracts amongst the parties have been entered into on a voluntary and on arms' length basis;
- c) The burden of proof rests with the party subject to the enforcement of the arbitral award pursuant to Article 5.1 of the New York Convention⁷. If the award debtors wish to refuse the recognition and enforcement of the Arbitral Award in Vietnam, they must present evidence to prove before the Court that the Arbitral Award violated Article 459, Civil Procedure Code⁸. However, in the

⁶ Decision No. 215/2020/QDKDTM-ST dated 21 February 2020.

⁷ **Article 5.1, New York Convention.**

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

- (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
- (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
- (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced; or
- (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the laws of the country where the arbitration took place; or
- (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

⁸ **Article 459, Civil Procedure Code: Cases of non-recognition**

1. The court does not recognise an award of foreign arbitrators when considering that the evidence supplied by the judgment debtor to the court in order to object to the petition for recognition is grounded and legal, and the arbitration award falls under any of the following cases:

- (a) The parties signing the arbitration award did not have the capacity to sign such agreement in accordance with the law applicable to each party;

course of the Court proceedings hearing the Petition, the award debtors have been absent in spite being duly served with notice, including being notified through publication in newspapers. The award debtors did not submit any documents or evidence to persuade the Court against granting the Petition.

- Only the counsel for Ms. Le appeared before the Court. She suggested the following as grounds to resist the Petition:
 - the Arbitral Award did not summon Ms. Le's husband in the arbitration proceedings;
 - the cost of US\$13,000 set out in the Arbitral Award did not specify what it was for.
 - The Court did not engage these grounds. Referring to clause 4, Article 458 of the 2015 Civil Procedure Code⁹, the Court will not re-visit and re-try the merits of the dispute. Therefore, there is no legal basis to accept Ms. Le's counsel's grounds to refuse recognition and enforcement of the Arbitral Award.
- d) Pursuant to Article 5.1 of the New York Convention,¹⁰ in resisting recognition and enforcement petitions, the burden of proof lies upon the judgment or award debtor. If the award debtor wishes to resist the recognition and enforcement of the arbitral award in Vietnam, it must submit evidence to prove before the Court that the Arbitral Award has violated Article 459 of the Civil Procedure Code. At the acceptance of the petition process and at the hearing of the petition, the award debtor had failed to attend despite being duly served with notice of the Court proceedings.

(b) The arbitration agreement did not have legal effect in accordance with the laws of the country selected by the parties for application, or in accordance with the laws of the country where the award was issued, if the parties did not select an applicable law for such agreement;

(c) The agency, organisation or individual against whom the award is to be enforced was not notified in a timely and proper manner of the appointment of arbitrators, of the procedures for resolution of the dispute by foreign arbitration, or cannot exercise their litigation rights due to another legitimate reason;

(d) The award of foreign arbitrators was pronounced on a dispute for which resolution was not requested by the parties, or which exceeds the request of the parties who signed the arbitration agreement. Where it is possible to separate the section of the decision on matters which were requested from the section of the decision on matters which were not requested to be resolved by foreign arbitration, the section of the decision on matters which were requested to be resolved may be recognised and permitted to enforce in Vietnam;

(dd) The composition of foreign arbitrators or the procedures for dispute resolution of foreign arbitrators did not conform with the arbitration agreement or with the law of the country where the award of foreign arbitrators was pronounced, if the arbitration agreement is silent on such issues;

(e) The award of foreign arbitrators is not yet binding on the parties;

(g) The award of foreign arbitrators has been rescinded or suspended from enforcement by a competent agency of the jurisdiction where the award was pronounced, or of the jurisdiction of the applicable law.

⁹ Article 458. Meetings for considering applications

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4. When considering the application for recognition and enforcement, the Panel shall not conduct re-trial over the dispute when the foreign arbitrator's award has been issued. The Court shall be only entitled to check and compare the foreign arbitrator's award and accompanying papers and documents with provisions of Chapter XXXV and Chapter XXXVII of this Code, other relevant Vietnam legislative provisions and international treaties to which the Socialist Republic of Vietnam is a signatory to form the basis for the issuance of a decision to recognise and enforce such award.

¹⁰ **Article 5.1, New York Convention.**

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Ho Chi Minh City

19th Floor, Deutsches Haus
33 Le Duan Boulevard, District 1
Ho Chi Minh City, Vietnam
T: +84 28 3824 2733

Hanoi

12th Floor, Pacific Place
83B Ly Thuong Kiet Street, Hoan Kiem District
Hanoi, Vietnam
T: +84 24 3946 1203

Website www.frasersvn.com
Email legalenquiries@frasersvn.com

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