

Recognition and Enforcement of Foreign Arbitral Awards in Vietnam

A Case Analysis of *Sojitz Pla-Net Corporation v Rang Dong Holding Joint Stock Company*

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Introduction

This article examines the recent case of Sojitz Pla-Net Corporation (**SPNC**) v Rang Dong Holding Joint Stock Company (**Rang Dong Holding**), in the context of the recognition and enforcement of a foreign arbitral award in Vietnam (**the Case**).

The Case involved a dispute arising from a share sale and purchase agreement entered into by and among SPNC (as the buyer), Rang Dong Holding (as the seller) and others, in 2017 (**the SPA**). This dispute led to:

- (a) arbitration at the Singapore International Arbitration Centre (**SIAC**) under the SIAC Rules of Arbitration and seated in Singapore; and
- (b) a subsequent petition for recognition and enforcement in Vietnam of the arbitral award (**the SIAC Arbitral Award**) issued by an arbitral tribunal constituted under the SIAC Rules of Arbitration (**the SIAC Arbitral Tribunal**) and duly verified and formalised by the SIAC.

Background

SPNC and Rang Dong Holding (among others) entered into the SPA in 2017. Pursuant to the express provisions of the SPA, SPNC acquired from Rang Dong Holding 20% of the issued and fully paid-up ordinary shares (**the Purchased Shares**) in the charter capital of an existing subsidiary of Rang Dong Holding (namely, Rang Dong Long An Plastic Joint Stock Company (**Rang Dong Long An**)), for a purchase price in the amount of VND174,375,000,000 (**the Purchase Price**).

Although the share sale and purchase transaction provided for under the SPA (**the Share Transfer Transaction**) was duly completed in accordance with the express provisions of the SPA and the applicable laws of Vietnam (**SPA Completion**), a dispute (**the Conditions Subsequent Dispute**) arose between SPNC and Rang Dong Holding (**the Parties**) after SPA Completion, in relation to the matter of whether or not Rang Dong Holding had fulfilled, would be able to fulfil, and/or ought to have been required by SPNC to fulfil, the full list of conditions subsequent (**the Conditions Subsequent**) to which the Parties had agreed under the express provisions of the SPA.

The Parties were unable to resolve the Conditions Subsequent Dispute, which resulted in SPNC exercising a right under the express provisions of the SPA to terminate the SPA and demand the immediate repayment by Rang Dong Holding of an amount being equivalent to 90% of the Purchase Price (namely, VND156,937,500,000) (**the 90% Repayment Amount**).

Despite Rang Dong Long An having purported to de-register the Purchased Shares from the name of SPNC and re-register the Purchased Shares back into the name of Rang Dong Holding, Rang Dong Holding refused to repay the 90% Repayment Amount upon SPNC's demand. The Parties were unable to resolve the matter by negotiation, which resulted in SPNC commencing arbitration proceedings (**the SIAC Arbitration Proceedings**) against Rang Dong Holding in the SIAC, under the SIAC Rules of Arbitration, located and seated in Singapore, in accordance with the express dispute resolution provisions of the SPA.

Under the SIAC Arbitration Proceedings, SPNC sought to recover from Rang Dong Holding the 90% Repayment Amount, or damages in lieu thereof, in addition to interest, costs, and certain other relief.

The SIAC Arbitral Award

The SIAC Arbitral Tribunal under the SIAC Arbitral Award made the following determinations, in relation to the various claims and/or purported counter-claims which the Parties had made against one another during the course of the SIAC Arbitration Proceedings:

1. That SPNC succeeded in its claim.
2. That SPNC lawfully terminated the SPA.
3. That Rang Dong Holding breached the SPA by failing to repay the 90% Repayment Amount to SPNC immediately upon SPNC's termination of the SPA (**the Key Contractual Breach**).
4. That Rang Dong Holding must pay to SPNC the amount of VND156,937,500,000 as damages (**the Damages Award**).
5. That Rang Dong Holding must pay to SPNC interest at the rate of 10% per annum on the sum of VND156,937,500,000 in respect of the period from 1 April 2020 (the due date for repayment of the 90% Repayment Amount), until the actual date of payment (**the Primary Interest Award**).
6. That SPNC was not liable to Rang Dong Holding for any costs incurred by Rang Dong Holding in relation to its performance of the SPA (**the No Liability Finding**).
7. That Rang Dong Holding must reimburse SPNC for the SIAC Arbitral Tribunal's fees and charges as well as the SIAC's administrative fees and charges, in the amount of SGD371,563.60 (**the Arbitration Costs Award**).
8. That Rang Dong Holding must reimburse SPNC for its legal and other reasonable costs, in the amounts of USD585,974.35 and SGD7,414.20 (**the Legal Costs Award**).
9. That Rang Dong Holding must pay to SPNC interest at the rate of 5.33% per annum on the amounts awarded under the Arbitration Costs Award and the Legal Costs Award, in respect of the period from the date of the SIAC Arbitral Award until the date of actual payment (**the Secondary Interest Award**).
10. That all other requests and claims were rejected.

Significantly, the Damages Award arose directly from the Key Contractual Breach, the substance of which was the breach by Rang Dong Holding of its obligation under the express provisions of the SPA to repay to SPNC the 90% Repayment Amount immediately upon SPNC's termination of the SPA (**the Immediate Termination Repayment Obligation**).

The SIAC Arbitral Tribunal:

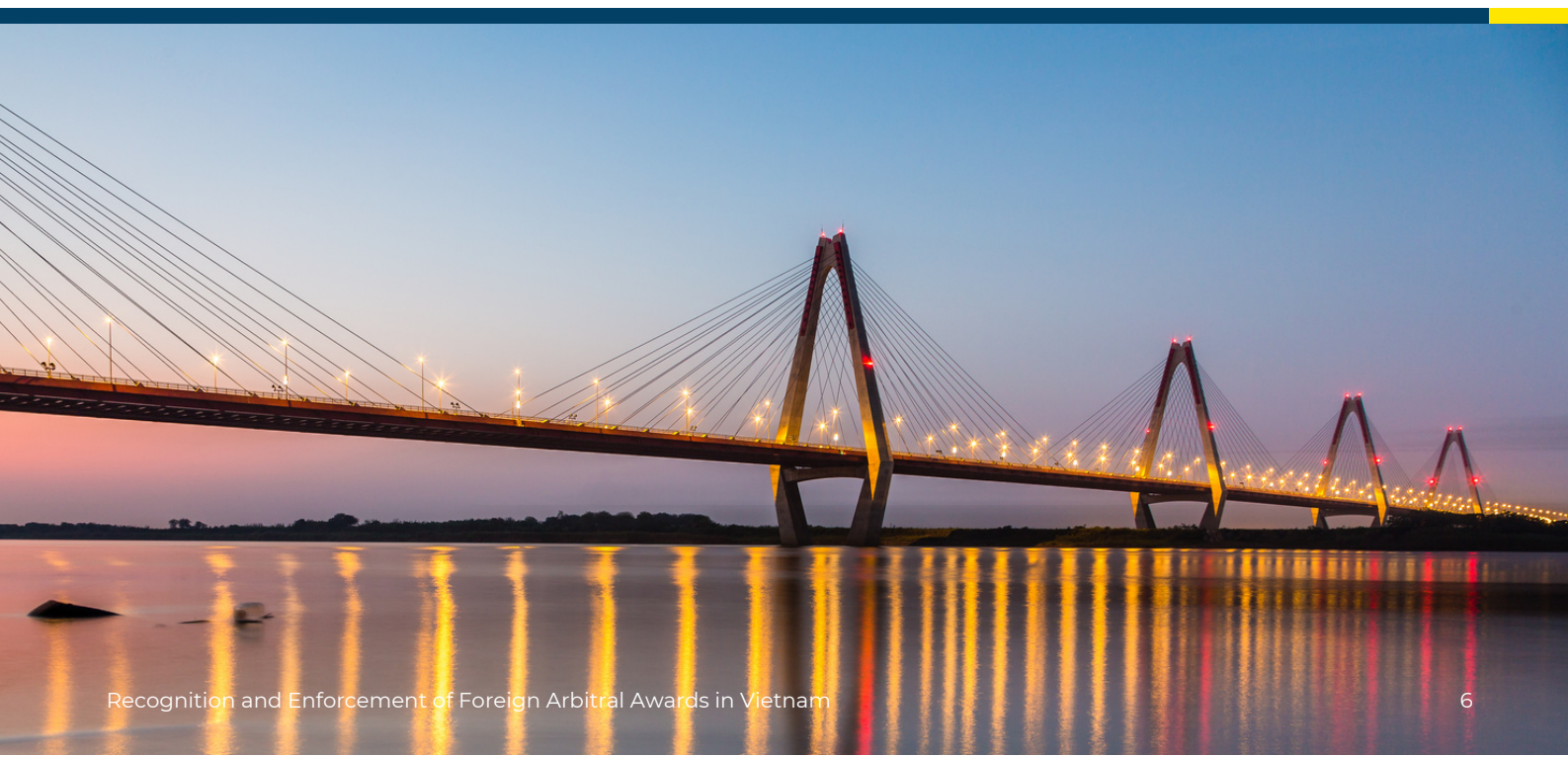
- (a) did not permit Rang Dong Holding to prosecute against SPNC its proposed counter-claim to recover certain alleged costs (**the Alleged Transaction Costs**) arising from its performance of the SPA (**the RDH Counter-claim**), due to the fact that Rang Dong Holding had refused to pay the counter-claim fees required under the provisions of the SIAC Rules of Arbitration (**the Counter-claim Fees**);

The SIAC Arbitral Award

- (b) rejected the assertion of Rang Dong Holding that it had a right to offset the Alleged Transaction Costs against any amount which may be awarded in favour of SPNC (without this assertion constituting a counter-claim) (**the Alleged Offset Right**); and
- (c) made the No Liability Finding, on the basis of the express provisions of the SPA which specified that each Party would bear the entirety of its own costs arising from its entry into the SPA and its performance of its obligations under the SPA.

The SIAC Arbitral Award required Rang Dong Holding immediately to pay to SPNC the entirety of the awarded amount, inclusive of interest calculated up to the actual date of payment (**the Awarded Amount**).

Despite SPNC then having demanded immediate payment of the Awarded Amount in accordance with the provisions of the SIAC Arbitral Award, Rang Dong Holding refused to pay to SPNC the whole or any part of the Awarded Amount.



Recognition and enforcement - first instance

SPNC proceeded to petition the People's Court of Ho Chi Minh City (**the First Instance Court**) to recognise the SIAC Arbitral Award for enforcement in Vietnam (**the Recognition Petition**).

At the hearing of the Recognition Petition (**the First Instance Hearing**), the Procurator of the People's Procuracy of Ho Chi Minh City, who appeared before the First Instance Court in the First Instance Hearing, argued that:

- (a) there were no valid legal grounds upon which the recognition of the SIAC Arbitral Award for enforcement in Vietnam could be refused; and
- (b) the SIAC Arbitral Award should be recognised by the First Instance Court for enforcement in Vietnam.

Despite the opinion of the Procurator, the First Instance Court refused to recognise the SIAC Arbitral Award for enforcement in Vietnam, on the grounds that, for the purposes of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (**the NY Convention**), a number of elements of the SIAC Arbitral Award were "...inconsistent with the fundamental principles of Vietnamese law...".

In reaching its conclusions, the First Instance Court identified and relied upon two "...fundamental principles of Vietnamese law...", namely:

- (a) the principle of freedom to enter voluntarily into agreements (**the Principle of Freedom to Contract**); and
- (b) the principle that persons and entities have the right to seek to have their lawful rights and interests protected by courts or arbitral tribunals of competent jurisdiction (**the Principle of Right to Claim**).

Inconsistency with the Principle of Freedom to Contract

The First Instance Court identified a number of respects in which it considered that the SIAC Arbitral Award was inconsistent with the Principle of Freedom to Contract, namely the following:

1. Failure to apply the Commercial Law

The SPA was governed by the laws of Vietnam.

The First Instance Court found that the SIAC Arbitral Tribunal had failed to apply the laws of Vietnam in making the SIAC Arbitral Award, in a number of respects, including by failing to apply the Law on Commerce (2005) of Vietnam (**the Commercial Law**) when interpreting and making determinations in relation to the express provisions of the SPA.

The SIAC Arbitral Tribunal had found that it was unnecessary for it to determine whether or not the SPA and the Share Transfer Transaction were regulated by the Commercial Law (as asserted by Rang Dong Holding but denied by SPNC), on the grounds that the Immediate Termination Repayment Obligation could not in any event be said to constitute a "liquidated damages" provision (contrary to the assertions of Rang Dong Holding). On this basis, the SIAC Arbitral Tribunal declined to make any determination as to the matter of whether or not the SPA and the Share Transfer Transaction were regulated by the Commercial Law (as it was unnecessary for it to do so).

The First Instance Court found that the SIAC Arbitral Tribunal's failure to apply the provisions of the Commercial Law in determining the SIAC Arbitral Award was inconsistent with the Principle of Freedom to Contract.

Recognition and enforcement - first instance

The First Instance Court reasoned that since the SPA was governed by the laws of Vietnam:

- (a) the SPA and the Share Transfer Transaction were regulated by the Commercial Law;
- (b) the provisions of the Commercial Law should have been applied by the SIAC Arbitral Tribunal in determining the liability of Rang Dong Holding under the SPA (in precedence over the Civil Code, any other laws of Vietnam, and/or the express provisions of the SPA); and
- (c) as a result of the failure of the SIAC Arbitral Tribunal to apply the Commercial Law in determining the liability of Rang Dong Holding under the SPA, the SIAC Arbitral Award was inconsistent with the Principle of Freedom to Contract.

2. Undue reliance upon the express provisions of the SPA

The First Instance Court found that in determining the SIAC Arbitral Award, the SIAC Arbitral Tribunal had relied to a significant extent on the express provisions of the SPA, particularly in relation to the meaning and effect of the Immediate Termination Repayment Obligation, and in so doing had failed to cite express provisions of Vietnam legislation to the extent which the First Instance Court considered to be necessary.

The First Instance Court determined that because the SIAC Arbitral Tribunal, in relation to a number of key matters in dispute between the Parties, interpreted and applied the express provisions of the SPA without also citing express provisions of Vietnam legislation as part of its analysis in determining those matters:

- (a) the SIAC Arbitration Tribunal failed to apply the agreed governing law of the SPA (namely, the laws of Vietnam) when making its determinations in relation to key matters in dispute between the Parties; and
- (b) as a result, the SIAC Arbitral Award was inconsistent with the Principle of Freedom to Contract.

3. Unlawful application of the Singapore Arbitration Law

The First Instance Court found that:

- (a) in making the Secondary Interest Award, the SIAC Arbitral Tribunal had relied on the provisions of the laws of Singapore relating to international, commercial arbitration (**the Singapore Arbitration Law**); and
- (b) by applying the Singapore Arbitration Law in making the Secondary Interest Award, the SIAC Arbitral Tribunal failed to uphold and apply the Parties' choice of governing law under the SPA, namely the laws of Vietnam.

As a result of these findings in relation to the Secondary Interest Award, the First Instance Court determined that the SIAC Arbitral Award was inconsistent with the Principle of Freedom to Contract.

Inconsistency with the Principle of Right to Claim

In addition, the First Instance Court found that as a result of the SIAC Arbitral Tribunal having:

- (a) refused to allow Rang Dong Holding to prosecute the RDH Counter-claim;

Recognition and enforcement - first instance

(b) determined that Rang Dong Holding had no legal right to assert any right to offset the Alleged Transaction Costs against any amount to be awarded in favour of SPNC (without this constituting a cross-claim); and

(c) made the No Liability Determination, as requested by SPNC,

the SIAC Arbitral Award was inconsistent with the Principle of Right to Claim.



Recognition and enforcement - appeal

SPNC proceeded to lodge an appeal to the High Court in Ho Chi Minh City (**the Appellate Court**), seeking to overturn the First Instance Decision and to have the Appellate Court recognise the SIAC Arbitral Award for enforcement in Vietnam.

The People's Procuracy of Ho Chi Minh City also lodged an appeal to the Appellate Court, seeking to overturn the First Instance Decision and to have the Appellate Court recognise the SIAC Arbitral Award for enforcement in Vietnam.

The key legal grounds upon which SPNC appealed against the First Instance Decision were the following:

1. That the First Instance Court acted in contravention of the NY Convention and the Civil Procedure Code, by revisiting the substantive merits of the SIAC Arbitral Award when formulating and handing down the First Instance Decision.
2. That the SIAC Arbitral Tribunal in fact applied – and correctly applied – the laws of Vietnam in determining the substantive aspects of SPNC's claims against Rang Dong Holding, despite having relied in some instances and where appropriate on the express provisions of the SPA without also citing express provisions of Vietnam legislation.
3. That the SIAC Arbitral Tribunal correctly applied the Singapore Arbitration Law in making the Secondary Interest Award, due to the fact that the Secondary Interest Award was a procedural (as opposed to a substantive) matter and therefore to be determined under the laws of the jurisdiction in which the SIAC Arbitration Proceedings were seated (namely, Singapore).
4. That if Rang Dong Holding had wished to prosecute the RDH Counter-claim against SPNC, it should have acted in accordance with the SIAC Rules of Arbitration by paying the necessary Counter-claim Fees.
5. That in making the No Liability Finding, the SIAC Arbitral Tribunal merely applied the express provisions of the SPA, and this did not amount to Rang Dong Holding being denied any Vietnam law right to make claims to protect or enforce its rights.
6. That no aspect of the SIAC Arbitral Award contravened any "...fundamental principle of Vietnam law...", even if it is accepted that the Principle of Freedom to Contract and the Principle of Right to Claim are indeed "...fundamental principles of Vietnam law..." (which SPNC neither admitted nor denied).

The key legal grounds upon which the People's Procuracy of Ho Chi Minh City relied in formulating its appeal against the First Instance Decision were broadly consistent with those put forward by SPNC, as summarised above.

The Appellate Court upheld SPNC's appeal in full and issued a decision recognising the entirety of the SIAC Arbitral Award for enforcement in Vietnam (**the Appeal Decision**).

The key reasoning set out by the Appellate Court in its Appeal Decision was the following:

1. That the First Instance Court had no jurisdiction to revisit the substantive merits of the SIAC Arbitral Award and had acted beyond the scope of its lawful powers by so doing.

Recognition and enforcement - appeal

2. That no aspect of the SIAC Arbitral Award was inconsistent with the Principle of Freedom to Contract, including:
 - (a) the SIAC Arbitral Tribunal having found it unnecessary to determine whether or not the SPA and the Share Transfer Transaction were regulated by the Commercial Law;
 - (b) the SIAC Arbitral Tribunal having in some instances relied on express provisions of the SPA without also citing express provisions of Vietnam legislation, in making its substantive determinations; and
 - (c) the SIAC Arbitral Tribunal having applied the Singapore Arbitration Law to the procedural aspects of the SIAC Arbitration Proceedings, including in making the Secondary Interest Award.
3. That the primary reason why Rang Dong Holding had been prevented from prosecuting the RDH Counter-claim was its failure to pay the Counter-claim Fees as required by the SIAC Rules of Arbitration.
4. That no part of the SIAC Arbitral Award would operate to prevent Rang Dong Holding from endeavouring to assert in fresh arbitral proceedings its alleged rights in relation to the Alleged Transaction Costs.
5. That it was unreasonable for the First Instance Court to have determined that the SIAC Arbitral Tribunal's refusal to allow Rang Dong Holding to prosecute the RDH Counter-claim and/or the SIAC Arbitral Tribunal's making of the No Liability Finding were inconsistent with the Principle of Right to Claim.
6. That the No Liability Finding was a contractual matter within the jurisdiction of the SIAC Arbitral Tribunal and thus beyond the jurisdiction of the Courts of Vietnam.

The key legislative provisions upon which the Appellate Court relied in formulating and handing down the Appeal Decision were those which are cited and reproduced, verbatim, below:

1. Clause 4 Article 458 of the Civil Procedure Code

“When considering the application for the recognition and enforcement of foreign arbitral award, the Tribunal is not allowed to revisit the dispute which has been resolved by foreign arbitration in the award. The court shall only check and compare the foreign arbitral award and the documents enclosed with the application with the regulations in Chapters XXXV and XXXVII of this Code, other relevant regulations of Vietnamese law and international treaties to which the Socialist Republic of Vietnam is a member as the basis for the decision to recognise or not recognise the award.”

2. Article 3 of the NY Convention

“Each Contracting State shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon.”

3. Clause 4 Article 4 of the Civil Code

“Where there is any difference between the provisions of this Code and of an international treaty to which the Socialist Republic of Vietnam is a member on the same issue, the provisions of the international treaty shall apply.”

4. Clause 3 Article 2 of the Civil Procedure Code

“The Civil Procedure Code applies to the settlement of civil cases involving foreign element(s); where the international treaties to which the Socialist Republic of Vietnam is a signatory provide otherwise, the provisions of such international treaties shall apply.”

Recognition and enforcement - appeal

5. Article 5 of the New York Convention, setting out the instances in which recognition and enforcement of an award may be refused

"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 recognized 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 law 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.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country."

In conclusion, the Appellate Court determined, on the basis of Article 5 of the NY Convention, that:

(a) the Award "...does not fall within the circumstances for refusing the recognition and enforcement of the [award]..."; and

(b) the First Instance Court acted beyond the scope of its lawful jurisdiction in refusing to recognise the Award for enforcement in Vietnam.

Conclusion

This Case highlighted the propensity of respondents in Vietnam to seek to avoid the recognition of foreign arbitral awards for enforcement in Vietnam, by relying on the public policy exception under the NY Convention which states that foreign arbitral awards will be recognised for enforcement in Vietnam to the extent that they are not “...inconsistent with the fundamental principles of Vietnam law...”.

This Case further highlighted the difficulties that often arise from the fact that there is no express definition under the laws of Vietnam as to what does or does not constitute a “...fundamental principle of Vietnam law...”. In the absence of such a definition, respondents often proceed on the basis that every provision of every legislative instrument in Vietnam constitutes a “...fundamental principle of Vietnam law...”, and on this basis assert that any and all aspects of foreign arbitral awards which are not based entirely upon express provisions of Vietnam law are tantamount to “...inconsistency with the fundamental principles of Vietnam law...”. Assertions of this kind sometimes persuade Vietnamese Courts, notwithstanding that such assertions are, of themselves, inconsistent with the NY Convention and the Civil Procedure Code.

This Case also illustrated the fact that Courts in Vietnam – when seeking diligently to apply the laws of Vietnam in determining applications for recognition and enforcement of foreign arbitral awards which come before them – may sometimes inadvertently act beyond the scope of the jurisdiction afforded to them by the Civil Procedure Code and the NY Convention, by revisiting the substantive merits of the relevant foreign arbitral award, as opposed to considering and determining the application for recognition and enforcement within the confines of the applicable provisions of the Civil Procedure Code and the NY Convention (as cited by the Appellate Court and reproduced verbatim in this article, above).

It would be of immense benefit to all persons and entities residing and/or doing business in Vietnam for specific legislation (and/or official Supreme Court guidance) to be issued, to define in clear and precise terms what is and what is not a “...fundamental principle of Vietnam law...”, for the purposes of the NY Convention and the Civil Procedure Code.

It would also be of immense benefit to all persons and entities residing and/or doing business in Vietnam for the Supreme Court to issue detailed and official guidance to the People’s Courts of all provinces and municipalities in Vietnam, for them to follow when considering and determining applications for recognition and enforcement of foreign arbitral awards, thereby providing the provincial and municipal People’s Courts with clarity as to how to:

- (a) avoid revisiting the substantive merits of foreign arbitral awards; and
- (b) remain within the confines of the applicable provisions of the Civil Procedure Code and the NY Convention (as cited by the Appellate Court and reproduced verbatim in this article, above).

The Appellate Court is to be commended for its clear and correct understanding and application of the key provisions of the NY Convention and the Civil Procedure Code, as evidenced by the Appeal Decision.

Important Legal Notices

This article is intended to be a general and high-level overview only and is not intended to be a detailed or comprehensive treatment of the legal and/or practical aspects of prosecuting applications for recognition of foreign arbitral awards for enforcement in Vietnam.

Any person or entity wishing to implement any type of transaction in and/or in connection with Vietnam, including without limitation to prosecute any litigation or arbitration case in or in connection with Vietnam, should always take appropriate and Vietnam-specific legal, financial, accounting, taxation, and other professional advice before so doing.

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Recognition and Enforcement of Foreign Arbitral Awards in Vietnam

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