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VIETNAM: New Law on Commercial Arbitration

Since Vietnam joined the WTO in 2007, the country has witnessed an increasing flow of investment capital from foreign investors, and also domestic companies seem to be more active in international trade. The increase in transactions and contracts leads inevitably to a higher likelihood of transactional and contractual disputes. In view of these developments, arbitration is also in Vietnam viewed as a more business-friendly and efficient option for dispute resolution.

Therefore, to foster the further development of arbitration, the National Assembly of Vietnam, on its latest session, has adopted the Law No.54/2010/QH12 on Commercial Arbitration (the "CAL") which will take effect from 1 January 2011 and replace the "Ordinance on Commercial Arbitration 2003."

The CAL comprises 13 chapters and 82 articles which regulate—inter alia— the jurisdiction of commercial arbitration, arbitration forms, arbitration organizations, arbitrators, arbitration proceedings, rights and responsibilities of parties in arbitration procedures, court's jurisdiction over arbitration activities, enforcement of arbitral awards, and organization and operation of foreign arbitration in Vietnam. The new law was drafted with the UNICITRAL Model Law in mind and contains a number of significant changes when compared to the old law.

Disputes resolved by arbitration

According to the CAL, the disputes to be resolved by arbitration include: disputes between parties arising from commercial activities; disputes in which at least one party conducts commercial activities; and other disputes between parties which may be resolved by arbitration as provided by law.¹

A dispute can be resolved by arbitration if there is an arbitration agreement. The arbitration agreement can be made before or after the dispute occurred.² Arbitration is to be conducted privately unless otherwise agreed by the parties,³ and the arbitral award is final.⁴ In cases where an arbitration agreement is already made, the court must refuse acceptance of the petition filed by any party unless the arbitration agreement is invalid or unenforceable.⁵

With respect to a dispute between an enterprise and a consumer, notwithstanding that an arbitration agreement is already contemplated in the terms and conditions for sale of goods or provision of services prepared by the enterprise, the consumer has the right to alternatively file a petition in court or bring the case to the arbitration. The enterprise may request for resolving the dispute by arbitration if the consumer's consent is obtained.⁶

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- 1 CAL, Article 2.
 - 2 CAL, Article 5.1.
 - 3 CAL, Article 4.4.
 - 4 CAL, Article 4.5.
 - 5 CAL, Article 6.
 - 6 CAL, Article 17.

Dear Reader,

On June 17 Vietnam has passed a new "Law on Commercial Arbitration". The new Law incorporates a number of significant changes as compared to the 2003 Arbitration Ordinance and it will come into effect on **1 January 2011**. No official English translation of the law has been published yet.

As usual, if you have any comments, remarks or questions, we would love to hear from you. Please contact me at +65 -6324-0060 or by email to respondek@rflegal.com.

Kind regards,
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It is important to note that when a party finds that the provisions of the CAL or an arbitration agreement are violated but does not make an objection within the stipulated time limit, such party will lose the right to later object to the arbitral proceedings or in court.⁷

Language used in arbitral proceedings

The parties to a dispute *with* a foreign element⁸ may mutually agree on the language used in the arbitration proceedings. In case of failing to reach such agreement, the arbitration tribunal will decide on the language used.⁹

The language used in arbitration proceedings of disputes *without* a foreign element is Vietnamese. As an exception, disputes in which at least one party is a foreign-invested enterprise in Vietnam can be resolved in a language other than Vietnamese.¹⁰

Applicable law

Vietnamese law is applicable to the disputes without a foreign element involved.¹¹ In contrast, the parties to a dispute with a foreign element have the right to choose the applicable law. In case the parties fail to do so, the arbitration tribunal decides the applicable law which is considered as most suitable to the case.¹² Besides, arbitration tribunals may apply international practice to resolve disputes provided that such application does not contravene the fundamental principles of Vietnam.¹³

Arbitration agreements

An arbitration agreement must be made in writing, and can be established as an arbitration clause in a contract or separate agreement under any of the following forms:¹⁴

- communication between the parties by telegram, fax, telex, email or other forms as stipulated by law.
- written communication between the parties;
- an agreement recorded in writing by a lawyer, a notary public or a competent authority;
- a document contemplating an arbitration agreement such as a contract, documentary evidence, company charter and other similar documents to which the parties

- refer when making a transaction;
- an agreement as evidenced via exchange of statements of claims and/or defense in which the existence of an arbitration agreement is referred to by a party without objection by the other party.

An arbitration agreement is considered as invalid when:¹⁵

- the dispute arises beyond the jurisdiction of arbitration;
- the person establishing the arbitration agreement is not so authorized by law;
- the person establishing the arbitration agreement has no civil capacity as stipulated in the Civil Code;
- the form of the arbitration agreement is not properly made under the CAL;
- a party is deceived, threatened or coerced in the course of establishing the arbitration agreement and its request to void the arbitration agreement is granted by a court;
- the arbitration agreement violates legal prohibitions.

Arbitrators

One who satisfies all of the following conditions may act as an arbitrator, regardless of whether he/she has the Vietnamese nationality:¹⁶

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- 7 CAL, Article 13.
 - 8 Under Article 758 of the Vietnam Civil Code, a foreign element means a civil relation in which a least one of the participating parties is a foreign body, organization or individual or is a Vietnamese residing overseas, or a civil relation between participating parties being Vietnamese citizens or organizations but the basis for the establishment, modification or termination of such relation was the law of a foreign country, or such basis arose in a foreign country, or the assets involved in the relation are located in a foreign country.
 - 9 CAL, Article 10.2.
 - 10 CAL, Article 10.1.
 - 11 CAL, Article 14.1.
 - 12 CAL, Article 14.2.
 - 13 CAL, Article 14.3.
 - 14 CAL, Article 16.
 - 15 CAL, Article 17.
 - 16 CAL, Article 20.1.

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- Having full civil legal capacity;
- Having a university degree and at least five years' work experience in the sector of his/her studies;
- In special cases, an expert with high professional qualifications and ample practical experience but failing to meet the two above conditions may be selected to act as an arbitrator.

An arbitrator is entitled to:¹⁷

- accept or refuse to resolve a dispute;
- remain independent during dispute resolution;
- refuse to provide information concerning a dispute; and
- receive remuneration.

and is obligated to:

- keep the dispute confidential, except otherwise required law;
- be impartial and ensure quick and timely resolution of the dispute; and
- observe the professional ethics code.

Arbitration centers

An arbitration center will be established by a decision of the Minister of Justice in case where there are at least 5 Vietnamese founders.¹⁸ The arbitration centre must register its operation at the Department of Justice within 30 days from the establishment.¹⁹

An arbitration centre is a non-profit organization with legal entity status and is allowed to establish branches, representative offices both in Vietnam and abroad.²⁰

Statements of claim

In order for disputes to be resolved at an arbitration centre, the claimant must submit a statement of claim. For disputes to be resolved by ad hoc arbitration, the claimant must send a statement of claim to the respondent.²¹ A statement of claim must have the following contents:

- Date of the statement of claim;

- Name and address of parties; name and address of each witness, if any;
- Summary of dispute contents;
- Grounds and evidence of claims, if any;
- Particular requests of the claimant and value of the dispute;
- Name and address of the person whom the claimant selects as arbitrator or proposes to be appointed arbitrator.

Along with the statement of claim, the arbitration agreement and originals or copies of relevant document must be submitted.²²

Arbitration proceedings commence on the date a statement of claim is received by the arbitration tribunal unless otherwise agreed by the parties.²³ For ad hoc arbitration, arbitration proceedings commence on the date the claimant's statement of claim is received by the respondent unless otherwise agreed by the parties.²⁴

The statute of limitations for initiating arbitration proceedings is two years from the date the legitimate rights and interests were infringed upon, unless otherwise provided by a specific law.²⁵

Arbitration tribunals

The parties may freely agree upon the number of arbitrators and the manner of appointing such arbitrators.²⁶ Unless otherwise agreed by the parties, an arbitration tribunal is composed of three arbitrators.²⁷

17 CAL, Article 21.
 18 CAL, Article 24.1.
 19 CAL, Article 25.
 20 CAL, Articles 27.2&3.
 21 CAL, Article 30.1.
 22 CAL, Article 30.3.
 23 CAL, Article 31.1.
 24 CAL, Article 31.2.
 25 CAL, Article 33.
 26 CAL, Article 39.1.
 27 CAL, Article 39.2.

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Prior to consideration of the contents of a dispute, the arbitration tribunal must consider the validity of the arbitration agreement and its jurisdiction over the dispute. If the arbitration agreement is invalid or unenforceable, or the dispute is beyond the arbitration tribunal's jurisdiction, the arbitration tribunal must suspend the arbitration proceedings and inform the parties of it.²⁸

At the parties' request, the arbitration tribunal may summon witnesses for provision of information and documents related to the resolution of the dispute.²⁹ The arbitration tribunal may, at its own initiative or at the request of one or several parties, summon experts and request evaluation of property in dispute. The cost of experts or evaluation is either borne by the party requesting the expert or evaluation or is allocated by the arbitration tribunal.³⁰

Where the arbitration tribunal or the parties have taken necessary measures to collect evidence but are unsuccessful, they may seek such assistance from the competent court. Within 32 working days, the court must provide the arbitration tribunal or the parties with the requested evidence, otherwise it must be notice the arbitration tribunal or the parties of the result.³¹

Injunctive relief

Any of the parties may request the arbitral tribunals to issue interim relief orders or alternatively seek interim relief from the competent court.³² The request for interim relief from the court is not considered as an objection of the arbitration agreement or renouncement of the dispute resolution by arbitration of the requested party.³³

Meetings for dispute resolution

The parties may directly attend hearings or authorize their representatives to attend and invite witnesses and lawyers.³⁴ If a claimant who has been duly summoned to attend the hearing is absent without legitimate reason or leaves the hearing without consent of the arbitration tribunal, the claimant will be considered as having withdrawn his/her

statement of claim. In this case, the arbitration tribunal will continue to resolve the dispute at the respondent's request or counterclaim.³⁵

If a respondent who has been duly summoned to attend the hearing is absent without a legitimate reason or leaves the hearing for dispute resolution without consent of the arbitration tribunal, the arbitration tribunal will continue to resolve the dispute based on the available documents and evidence.³⁶

At the parties' request, the arbitration tribunal may conduct a hearing based on the documents, without their presence.³⁷

The parties may request the arbitration tribunal to attest reconciliation of the dispute. If the reconciliation is successful, the arbitration tribunal will make minutes of the successful reconciliation and issue a decision acknowledging successful reconciliation by the parties. This decision will be final and valid as an arbitral award.³⁸

Arbitral awards

An arbitral award is made on a basis of majority vote of the arbitration tribunal. Failing a majority vote, the arbitral award shall follow the opinion of the chairman of the arbitration tribunal.³⁹

An arbitral award must be in writing and contain the following items:⁴⁰

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- 28 CAL, Article 43.1.
 - 29 CAL, Article 46.2.
 - 30 CAL, Article 46.3.
 - 31 CAL, Article 46.6.
 - 32 CAL, Article 48.1.
 - 33 CAL, Article 48.2.
 - 34 CAL, Article 55.2.
 - 35 CAL, Article 56.1.
 - 36 CAL, Article 56.2.
 - 37 CAL, Article 56.3.
 - 38 CAL, Article 58.
 - 39 CAL, Article 60.
 - 40 CAL, Article 61.1

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- Date and place of issuance of the award;
- Name and address of the claimant and the respondent;
- Full name and address of each arbitrator;
- Summary of the statement of claim and the disputed matters;
- Grounds for issuing the award, except for the case the parties mutually request not to include the grounds in the award;
- The award on the results of dispute resolution;
- Time limit for execution of the award;
- Allocation of arbitral fees and other relevant fees.
- Signatures of the arbitrators.

Within 30 days from the date of receiving the award, either party may request the arbitration tribunal to correct misspellings and miscalculations in the award or to provide explanation on a specific point or content of the award, and inform the other party of such a request.⁴¹

Arbitration centers are responsible for keeping files on the disputes they have officially accepted. Files on disputes resolved by ad hoc arbitration must be kept by the parties or the arbitrators. The time limit for retaining files will not be more than five years.⁴²

The parties are encouraged to voluntarily carry out an arbitral award.⁴³ If any party fails to carry out voluntarily an arbitral award after the date of expiry of the time-limit for its execution, and that same party has not applied for setting aside the award, the arbitral award creditor has the right to apply to the enforcement body to enforce the award.⁴⁴

Setting aside of arbitration award

The court will consider setting aside an arbitral award upon written application of a party.⁴⁵ It will issue a decision setting aside an arbitral award if the requesting party proves that the arbitration tribunal has issued the award in one of the following cases:⁴⁶

- There is no arbitration agreement or the arbitration agreement is invalid;

- The dispute falls outside the arbitration tribunal’s jurisdiction; where an arbitral award has content beyond the arbitration tribunal’s jurisdiction, such content will be set aside;
- Evidence based upon which the arbitration tribunal issues an award is forgery; arbitrator(s) received bribes from a party to the dispute, which impact the objectiveness and impartiality of the arbitral award.

In addition, the court will issue a decision setting aside an arbitral award if such arbitral award is contrary to the fundamental principles of Vietnamese law.⁴⁷

Organization and operation of foreign arbitration centers in Vietnam

A foreign arbitration organization lawfully established and operating in foreign countries, respecting the Constitution and laws of Vietnam, may operate in Vietnam in the form of branch or representative office of the foreign arbitration centre.⁴⁸

Branches and representative offices are entitled, among others, to:⁴⁹

- lease office space, to lease and purchase facilities and things necessary for their operation;
- recruit Vietnamese and foreign employees in accordance with Vietnamese law;
- open bank accounts in Vietnamese dong and foreign currency at banks licensed to operate in Vietnam; and
- hold a seal bearing its name.

41 CAL, Articles 63.1&2.
 42 CAL, Article 64.
 43 CAL, Article 65.
 44 CAL, Article 66.1.
 45 CAL, Article 68.1.
 46 CAL, Article 68.2.
 47 CAL, Article 68.2(dd).
 48 CAL, Articles 73&74.
 49 CAL, Articles 76&78.

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In addition to the above, branches are entitled to:⁵⁰

- appoint arbitrators to establish arbitration tribunals as authorized by the foreign arbitration centers;
- provide arbitration and reconciliation services;
- provide administrative, office and other services for dispute resolution by the foreign arbitration centers; and
- collect arbitration fees and other lawful receipts.

Unlike the branches' rights, representative offices may seek and promote opportunities for arbitration activities of their organizations in Vietnam but are prohibited from conducting arbitration activities in Vietnam.⁵¹

Branches and representative offices are obligated to report annually on their operations to the Department of Justice in the locality where they register operation.⁵²

Arbitration centers established prior to the effectiveness of the CAL

Arbitration centers established prior to 1 January 2011 need not perform procedures for re-establishment but must amend and revise their charters and arbitration procedural rules in conformity with the CAL within 12 months. Otherwise, their establishment licenses may be revoked and such centers will have to terminate their operations.⁵³

Evaluation

The new law brings arbitration in Vietnam significantly more in line with international standards. The position of arbitrators are strengthened, the tribunal is now also in charge of interim measures. Finally also foreign arbitrators can be appointed. Furthermore, foreign arbitration organizations are allowed to set up representative offices and branches in Vietnam. Under the new law, the Vietnamese courts have been tasked to assist arbitration proceedings by collecting and preserving evidence and also by ensuring that witnesses are present at hearings.

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- 50 CAL, Article 76.
 - 51 CAL, Article 78.
 - 52 CAL, Articles 76&78.
 - 53 CAL, Article 80.

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