Enforcement of Arbitral Awards and the Fundamental Principles of Vietnamese Law

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Introduction

In recent years, we have seen the Vietnam courts recognise a growing number of foreign arbitral awards while increasingly declining to set aside domestic arbitral awards. This signals a positive and pro-arbitration landscape in Vietnam, as well as the willingness and openness of Vietnamese courts to recognise and enforce both foreign and domestic arbitral awards.

Despite the improvement, however, certain challenges remain with respect to the enforcement of arbitral awards in Vietnam. One challenge that has persisted until today is the uncertainty surrounding the "fundamental principles of Vietnamese law", a ground on which a domestic award may be set aside or a foreign award may not be recognised.

Background

Under the New York Convention 1958 on the Recognition and Enforcement of Foreign Arbitral Awards ("**NYC**"), there are certain circumstances in which a foreign arbitral award will not be recognised by a State. One such case is where the recognition or enforcement of the award would be contrary to the public policy of that country *(NYC, Article V(2)b).* The notion of "public policy" remains undefined under the NYC, which has led to different interpretations of that term by its contracting countries.

Upon ratifying the NYC on 12 September 1995, Vietnam entered the following declaration, effectively giving it latitude in how it construes the NYC: "*Interpretation of the Convention before the Vietnamese Courts or competent authorities should be made in accordance with the Constitution and the law of Viet Nam.*"

Many jurisdictions have taken narrow approaches in defining "public policy", often applying it only in exceptional cases if the award offends or contravenes fundamental legal norms. However, the term "public

policy" is not used in Vietnam. Instead, the country has adopted in lieu the phrase "fundamental principles of Vietnamese law".

This phrase is used in various Vietnamese legal instruments which stipulate that parties are generally free to agree on the application of a foreign law provided that it is not inconsistent with the "fundamental principles of Vietnamese law". Examples of such legal instruments include:

- Article 670.1 of the Civil Code 2015;
- Article 5.2 of the Commercial Law;
- Article 5.3 of the Maritime Code 2015; and
- Article 14.3 of the Law on Commercial Arbitration 2010 ("**LCA**").

Relevantly, Article 68.2(e) of the LCA stipulates that an award may be set aside if it is contrary to the "fundamental principles of Vietnamese law". In similar vein, Article 459.2(b) of the Civil Procedure Code 2015 ("**CPC 2015**") provides that a foreign arbitral award shall not be recognised on the same basis.

However, despite the long-standing use of the phrase "fundamental principles of Vietnamese law", its scope and boundaries remain unclear.

Definition and Guidance from the Council of Judges

In 2014, the Council of Judges of the Supreme People's Court of Vietnam ("**Council of Judges**") laid down Resolution 01/2014/NQ-HDTP ("**Resolution 01**") which guides the Law of Commercial Arbitration of Vietnam.

Under Resolution 01, "an arbitral award contravening the fundamental principles of Vietnamese law" is defined as an award that violates the fundamental principles of conduct and which has an effect on the formulation and implementation of Vietnamese law. In considering a request to set aside an award, Resolution 01 requires the court to determine whether the award infringes any fundamental principles related to the tribunal's resolution of the dispute. The court will set aside an award if it determines that the merits of the award are contrary to any fundamental principles of Vietnamese law, which the arbitral tribunal had not respected or applied in rendering the award, and when such award seriously infringes on the interests of the State, the lawful rights and interests of any party of the dispute, or other third party.

Resolution 01 provides two examples to illustrate this:

- Example 1: The parties had voluntarily agreed to settle the dispute and the agreement did not violate the law, or any moral or social order. If the tribunal did not recognise this agreement in its award, such award would violate the principles of freedom and voluntariness in the field of commerce under Article 11 of the Commercial Law and Article 4 of the CPC.

- Example 2: If a party to the dispute produces evidence to support that the arbitral award was rendered by duress, deception, or bribery, such award will violate the fundamental principles of Vietnamese law – namely, that arbitrators be independent, objective, and impartial as regulated in Article 4.2 of the LCA.

However, Resolution 01 arguably raises more questions than answers. The determination of the "fundamental principles of conduct" and whether the award would have "an effect on the formulation and implementation of Vietnamese law" is no clearer than the underlying question of what constitutes the

fundamental principles of Vietnamese law. While the two examples lend clarity to two specific scenarios, it sheds no light on how a court should apply that in other scenarios.

Therefore, unfortunately, Resolution 01 provides little contribution to defining the scope of these fundamental principles. In the absence of further guidance, the Vietnamese courts continue to diverge in their application of these principles.

Application by the Vietnamese Courts

Whereas some courts have taken a narrow view in only applying such a rule in exceptional circumstances (aligning with practices of other arbitration jurisdictions), some courts apply a broad construction to the fundamental principles – in many cases associating a violation with any finding on the merits in the award that did not fully accord with Vietnamese law. For the latter approach, this has seen instances in which the Vietnamese courts have reviewed the substance of the tribunal's findings, despite the CPC 2015 specifying that a court (in deciding on whether to recognise a foreign award) would not do a "re-trial" of the dispute.

The subjectivity and variances in the approach are best demonstrated by past cases of the Vietnamese courts, in which awards were either set aside or were not recognised on grounds that they violated the fundamental principles of Vietnamese law. These cases are not precedents, meaning courts are not bound to follow them in their adjudicative tasks.

Domestic awards

1. ***B Company v. NC Company* (2020)**: The People's Court of Hanoi set aside a domestic award on the ground that in making its award, the tribunal did not cite any specific legal basis or legal document in its reasoning. As such, the court held that the tribunal had failed to comply with the content requirements for awards under law, which requires awards to contain the "grounds for making the award".

2. ***Tisco v. AGC* (2014)**: The tribunal rendered a domestic award that ordered AGC to pay compensation to Tisco. The People's Court of Hanoi set aside this award on the finding that the tribunal's award of compensation was inadequate, thereby violating the fundamental principles of Vietnamese law. However, notably, the court did not provide further reasoning in its decision as to the principles that it considered to have been violated.

Foreign awards

1. ***Sudico v. No. 260 Architects* (2017)**: The People's Court of Hanoi (first-instance) and the High Court of Hanoi (on appeal) both refused to recognise a foreign award on the basis that various contents of the tribunal's award were not consistent with Vietnamese law. These included the failure by No. 260 Architects to comply with certain provisions of Vietnam's construction laws concerning design. The courts held that the tribunal failed to (properly) apply the laws of Vietnam in rendering its award, which was a breach of the fundamental principles of Vietnamese law.

2. ***Toepfer v. Sao Mai* (2011)**: The Supreme People's Court of Hanoi refused to recognise a foreign award, as it determined that (i) Toepfer had failed to take measures to mitigate its losses as required by law, which in turn violated the principle of good faith under Article 6 of the Civil Law 2005; and (ii)

the sum of damages awarded by the tribunal was not consistent with the principle that compensation is to be determined according to "actual and direct loss".

3. ***Tyco Services Singapore v. Leighton Contractors (VN)* (2003)**: The dispute concerned a joint venture contract between two construction companies. Leighton argued that the joint venture was not legitimate due to Tyco's failure to obtain a licence required under Vietnamese law to carry out its construction activities. The first-instance court recognised the foreign award, holding that the legitimacy of the joint venture was a matter of substance which it was not able to review. However, the Supreme People's Court of Ho Chi Minh City overturned this decision on appeal, finding that Tyco's failure to obtain the licence constituted a breach of the fundamental principles of Vietnamese law.

4. ***Energo-Novus v. Vinatex* (1998)**: The People's Court of Hanoi refused to recognise a foreign award as the tribunal had failed to recognise the validity of a notarised document that was submitted by the respondent during the arbitration.

According to the Ministry of Justice's database on the recognition and enforcement of foreign court judgments and foreign awards (for the period from 2012 to 30 September 2019), the court refused to recognise 36% of foreign awards (30 out of 83 foreign awards). Of these, 10 awards included a reference to the fundamental principles of Vietnamese law as a basis for refusal – the second most common ground for refusal (the first being improper service).

Concluding Remarks

It is apparent in the numerous Vietnamese court decisions – both historical and recent – that specific guidance will be needed to ensure a consistent application of the "fundamental principles of Vietnamese law" ground. This will be necessary to enable continued improvement of Vietnam's arbitration landscape.

For domestic awards, save for the exceptional cases above, it has become more commonplace for courts to refuse applications to set aside an award on this ground. In recent times, we have witnessed the courts take the position that it would not review the substance of awards in determining setting aside applications. It is hoped that with time, such an approach will become the norm for both foreign and domestic awards, and guidance will be shifted in line with this position.

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