

A grayscale image of a city skyline with various skyscrapers and buildings, serving as a background for the title.

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Practice of resolving the petitions for recognition of foreign arbitration awards in Vietnam

Nguyen Cong Phu

Partner, LNT & Partners



Topic 1. Some challenges and difficulties

Topic 2. Reasons for non-recognition of arbitral award

Topic 3. Comments and suggestions



1. Some challenges and difficulties

- Documentation enclosed with the request
- Burden of proof
- The Court's authority to choose whether to recognize or refuse
- Cases contrary to basic principles of Vietnamese law
- The exclusive jurisdiction of the Vietnamese Court
- The concept of “Foreign Arbitration” and applicable law



1.1. Documentation enclosed with the request

- Under Article 453 of Civil Procedure Code:
 - Original or certified copy of foreign arbitration award
 - Original or certified copy of arbitration agreement
- In practice:
 - What if the arbitration agreement is executed by electronic means?
 - There have been cases where contracts were sent by Skype => Copy?



1.2. Burden of proof

- **Article V of the 1958 New York Convention:** Clearly stipulates the burden of proof
- **Civil Procedure Code 2004:** Does not stipulate which party has the burden of proof
- **Article 459 of the Civil Procedure Code 2015:** There are regulations but the burden of proof is still unclear
- **In practice:** Some Judges require the petitioning party to prove it



1.3. The Court's authority to recognize or refuse

- **New York Convention:** The court can still recognize even though it has the right to refuse
- **Civil Procedure Code 2015:** The Court does not recognize in cases specified in Article 459
- **In Practice:** The Court always does not recognize in cases specified in Article 459

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1.4. Cases contrary to basic principles of Vietnamese law

- **New York Convention:** The term “public policy”
- **Civil Procedure Code 2015:** The phrase "basic principles of Vietnamese law"
- **In practice:** Many judges have inconsistent understandings of the above concept



1.5. The exclusive jurisdiction of the Vietnamese Court

- **Clause 2, Article 459 of the Civil Procedure Code:** Not recognized if the Arbitration does not have jurisdiction to resolve the dispute
- **Clause 1, Article 470 of the Civil Procedure Code:** Related to rights to real estate => Jurisdiction belongs to Vietnamese Courts
- **In practice:** Many judges have inconsistent understandings of the above regulations



1.6. The concept of “Foreign Arbitration” and applicable law

- **Clause 3, Article 424 of the Civil Procedure Code:** definition of “Foreign arbitration” according to the Law on Commercial Arbitration
- **Clause 11, Article 3 of the Law on Commercial Arbitration:** “Foreign arbitration” means an arbitration established under foreign law.
- **Ad hoc arbitration:** Basis for determining “Foreign arbitration”?
- **Applicable law:**
 - **Foreign arbitration:** Request to recognize the award according to the Civil Procedure Code
 - **Vietnam Arbitration:** Request to cancel the award under the Law on Commercial Arbitration



2. Reasons for non-recognition of arbitral award

- The representative executed the arbitration agreement had no authority
- The representative participating in the arbitration proceedings is not legal
- The arbitration award listed the names of the parties incorrectly
- Incorrect understanding of the burden of proof (not in accordance with the NY Convention)
- Inconsistent understanding of "basic principles of Vietnamese law"
- There are inconsistent understandings of the exclusive jurisdiction of the Vietnamese Court



3. Comments and suggestions

- Additional provisions to the Civil Procedure Code for the case of electronic arbitration agreements
- Amendment for the Civil Procedure Code: **Replace** the phrase "*basic principles of Vietnamese law*" **with** the phrase "*basic principles of **Vietnamese civil law***"
- If the Civil Procedure Code would not be amended, the Council of Judges of the Supreme People's Court should issue a Resolution guiding as above
- Amendment for the Civil Procedure Code to more clearly stipulate the exclusive jurisdiction of the Vietnamese Court or have a guiding Resolution issued by the Council of Judges of the Supreme People's Court.



Thank you

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CASE STUDY ON SETTING ASIDE ARBITRAL AWARDS AND NON-RECOGNITION OF FOREIGN ARBITRAL AWARDS IN VIETNAM

Le Net

Partner, LNT & Partners

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- B.2. Case studies
- B.3. Suggestions for Arbitral Tribunal

A. Setting aside arbitration awards in Vietnam

A.1. Legal basis

Grounds for setting aside arbitration awards (Article 68 Commercial Arbitration Law 2010)

– Note: the Court is not allowed to re-judge the content of the dispute.

At the request of one of the parties (within 30 days after receiving the arbitral award), the court shall consider setting aside the award

Based on one of these criteria:

- No valid arbitration agreement;
- The Tribunal's procedures are inconsistent with the parties' agreement or the law;
- Dispute exceeds the Tribunal's jurisdiction;
- Details beyond the Tribunal's jurisdiction in an arbitral award shall be set aside;
- Counterfeit evidence;
- An arbitrator's receipt of benefits from one party may compromise the award's fairness;
- Award contravenes **basic principles of Vietnamese law**

?

Basic principles of Vietnamese law is the effective basic rules for formulation and implementation of Vietnam's Law.
(Article 14 Resolution 01/2014/NQ-HDTP)

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A. Setting aside arbitration awards in Vietnam

A.1. Legal basis

Decision	Arbitral award details	Reason of the Court	Outcome
Decision No. []/2023/QD-PQTT	Dispute between a Singaporean company and Vietnam company on the guarantee of an obligation in a share purchase agreement.	Foreign documents received without consularization is contrary to CPC (referred to Art CC to make it general principle of Vietnam law). CPC applied because LCA is silent. Not allowed to correct (notarization) after confirming jurisdiction. Denied an argument is deemed lacking objectivity and consequently runs afoul of Article 4.2 of the Commercial Arbitration Law—a tenet governing arbitration principles.	The request to set aside the award has been accepted (<i>Article 68.2.dd LCA 2010</i>)
Decision No. 965/2023/QD-PQTT	Dispute over damages for not paying franchise fee during Covid time.	Covid is a force majeure therefore requesting R to pay fee during force majeure event is contrary to the franchise contract (violating freedom of contract principle). The quantum for cost incurred/to be incurred is not clear to be confirmed as actual damages.	The request to set aside the award has been accepted (<i>Article 68.2.a&d LCA</i>)

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A. Setting aside arbitration awards in Vietnam

A.1. Legal basis

Decision	Arbitral award details	Reason of the Court	Outcome
Decision No. 578/2022/Q D-PQTT	Dispute over the Building structure supply and construction contract between the CN Company (Claimant) and CR Company (Respondent) for the Arena Project (HCMC)	The award did not fall within the scope of the Claimant's request (warranty amount). Therefore, the award violate the principle of freedom of contract(<i>Article 3.2 of the 2015 Civil Code</i>) The tribunal did not collect / assess evidence properly.	The request to set aside the award has been accepted (<i>Article 68.2.dd LCA</i>)
Decision No. 974/2019/Q D-PQTT	Dispute over economic contract between Company T (Claimant) and Company C (Respondent), settled by Arbitration Center of H City	Dispute at HCMC economic arbitration centre – this centre does not exist, but there is no agreement to re-appointing arbitration centre – violating LCA. The Respondent has objected jurisdiction but has not been considered by the Tribunal.	The request to set aside the award has been accepted (<i>Article 68.2.b&d LCA</i>)

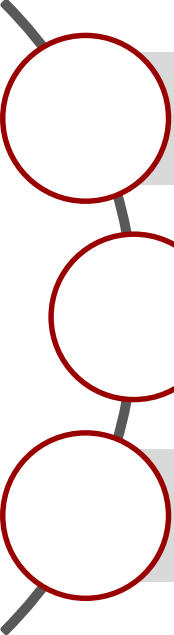
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A. Setting aside arbitration awards in Vietnam

A.1. Legal basis

Suggestions for Arbitral Tribunal



Carefully consider the scope of the Arbitral Tribunal's jurisdiction

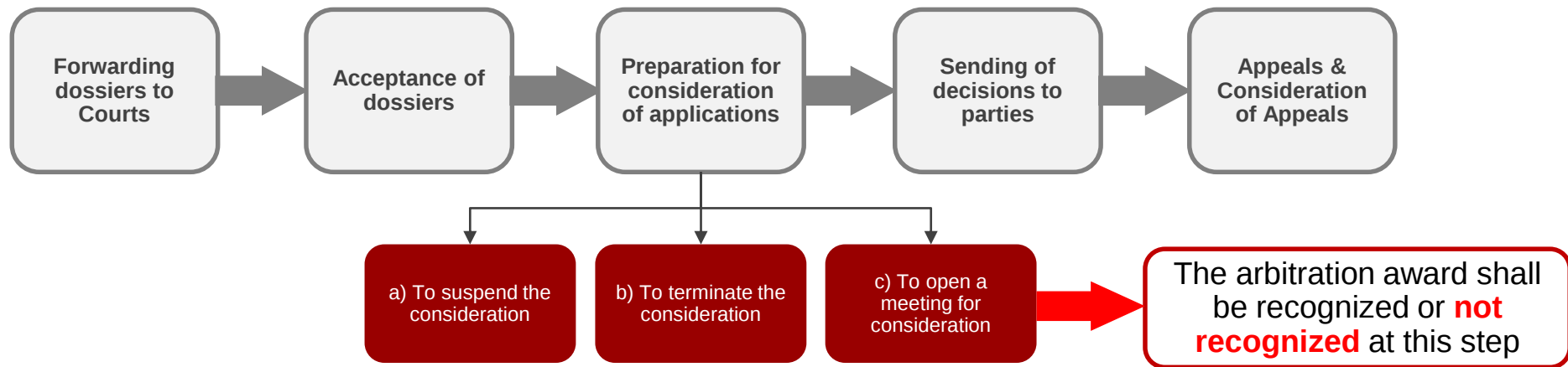
Comply with the dispute resolution procedure in the Contract
(negotiation => mediation => arbitration)

Ensure dispute documents are delivered promptly to parties

A. Setting aside arbitration awards in Vietnam

A.1. Legal basis

The procedure of recognizing the foreign arbitration awards



A. Setting aside arbitration awards in Vietnam

A.1. Legal basis

Criteria for non-recognition (*Article 459 Code of Civil Procedure*)

1. Lack of legal capacity of parties to conclude the arbitration agreement under applicable laws;
2. Legal ineffectiveness of the arbitration agreement based on the chosen law or the law of the award's jurisdiction when parties can't decide;
3. Inadequate notification to judgment debtors or inability to exercise procedural rights due to valid reasons;
4. Unrequested or excessively competent foreign arbitrator's award; potential recognition of the requested part in Vietnam;
5. Inconsistencies in foreign arbitrator's composition or procedures with the agreement or the law of the award's jurisdiction;
6. Lack of compulsory legal effect of the foreign arbitrator's award on parties;
7. Cancellation or termination of enforcement by competent agencies in the award's country or the applicable home country law.

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A. Setting aside arbitration awards in Vietnam

A.1. Legal basis

1	Award details	Reason of the Court	Outcome
Decision 01/2019/QĐKDT M-ST	▪ Dispute over commercial business ▪ Settled by arbitration Center of the Nut & Dried Fruit Trade Association in UK	The arbitration agreement explicitly specified that the case should be resolved by CENTA (Arbitration Center of the Grains Association), not the TNA arbitration center. => The arbitral tribunal made a decision outside its jurisdiction, <u>falling within non-recognition criteria</u> of unrequested foreign arbitration (Article 459.1.d Civil Procedure Code 2015)	Not recognized

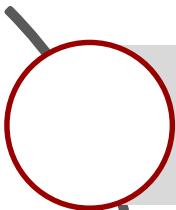
A. Setting aside arbitration awards in Vietnam

A.1. Legal basis

2	Award details	Reason of the Court	Outcome
Decision 01/2017/QDK DTM-ST	- Dispute over Commercial business (sales contract) - Settled by Arbitral Tribunal of the Singapore International Arbitration Center (SIAC)	- The agreement was signed by an unauthorized person => <u>Falling within the non-recognition criteria of capacity of parties to conclude such agreement (Article 459.1.a Civil Procedure Code 2015)</u> - The documents provided by the executing Party do not contain evidence that the arbitrator has sent notice to the executing Party => <u>Falling within the non-recognition criteria of the adequate notification to judgment debtors or inability to exercise procedural rights due to valid reasons (Article 459.1.c Civil Procedure Code 2015)</u>	Not recognized

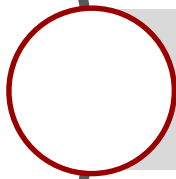
A. Setting aside arbitration awards in Vietnam

A.1. Legal basis

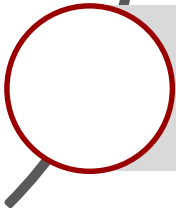


Ensure that the arbitration award complies with the basic principles of Vietnam's law and Rule of Arbitration of the selected Arbitration Center

Suggestions for Arbitral Tribunal



Ensure Finality of the Award: Confirm that the arbitration award is final and binding



Engage Local Counsel

Thank you

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Thực tiễn giải quyết yêu cầu công nhận phán quyết trọng tài nước ngoài tại Việt Nam (*Vietnamese version*)

Nguyễn Công Phú

Luật sư Thành viên, LNT & Partners

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Topic 1. Một số khó khăn, vướng mắc

Topic 2. Nguyên nhân một số phán quyết không được công nhận

Topic 3. Một vài đề nghị



1. Một số khó khăn, vướng mắc

- Giấy tờ, tài liệu gửi kèm theo đơn yêu cầu
- Nghĩa vụ chứng minh
- Thẩm quyền lựa chọn công nhận hoặc từ chối của Tòa án
- Trường hợp trái với các nguyên tắc cơ bản của pháp luật VN
- Thẩm quyền riêng biệt của Tòa án VN
- Khái niệm “Trọng tài nước ngoài” và luật áp dụng



1.1. Giấy tờ, tài liệu gửi kèm theo đơn yêu cầu

- Quy định tại Điều 453 BLTTDS:
 - Bản chính hoặc bản sao có chứng thực PQ của Trọng tài nước ngoài
 - Bản chính hoặc bản sao có chứng thực thỏa thuận trọng tài
- Thực tiễn:
 - Trường hợp thỏa thuận trọng tài xác lập bằng phương tiện điện tử?
 - Đã có trường hợp hợp đồng được gửi bằng skype => Bản sao?



1.2. Nghĩa vụ chứng minh

- **Điều V Công ước New York 1958:** Quy định rõ nghĩa vụ chứng minh
- **BLTTDS 2004:** Không quy định bên nào có nghĩa vụ chứng minh
- **Điều 459 BLTTDS 2015:** Quy định vẫn chưa rõ nghĩa vụ chứng minh
- **Thực tiễn:** Một số Thẩm phán yêu cầu bên có đơn phải chứng minh



1.3. Thẩm quyền lựa chọn công nhận hoặc từ chối của tòa án

- **Công ước New York:** Tòa án vẫn có thể công nhận khi được quyền từ chối
- **BLTTDS 2015:** Tòa án không công nhận khi thuộc các trường hợp Điều 459
- **Thực tiễn:** Tòa án luôn không công nhận khi thuộc trường hợp Điều 459



1.4. Trường hợp trái với các nguyên tắc cơ bản của pháp luật Việt Nam

- **Công ước New York:** Dùng thuật ngữ “chính sách công” (public policy)
- **BLTTDS 2015:** Dùng cụm từ “nguyên tắc cơ bản của pháp luật VN”
- **Thực tiễn:** Nhiều Thẩm phán hiểu chưa thống nhất về khái niệm trên



1.5. Thẩm quyền riêng biệt của tòa án Việt Nam

- **K2 Đ459 BLTTDS:** Không công nhận nếu Trọng tài không được giải quyết
- **K1 Đ470 BLTTDS:** Liên quan đến quyền đ/v BĐS => Thẩm quyền TAVN
- **Thực tiễn:** Nhiều Thẩm phán hiểu không thống nhất về quy định trên



1.6. Khái niệm “trọng tài nước ngoài” và luật áp dụng

- **K3 Đ424 BLTTDS:** Xác định “Trọng tài nước ngoài” theo LTTTM
- **K11 Đ3 LTTTM:** “Trọng tài nước ngoài” là trọng tài thành lập theo PLNN
- **Trọng tài vụ việc:** Căn cứ xác định “Trọng tài nước ngoài”?
- **Luật áp dụng:**
 - **Trọng tài nước ngoài:** Yêu cầu công nhận phán quyết theo BLTTDS
 - **Trọng tài VN:** Yêu cầu hủy phán quyết theo LTTTM



2. Nguyên nhân một số phán quyết không được công nhận

- Người đại diện xác lập thỏa thuận trọng tài không có thẩm quyền
- Người đại diện tham gia tố tụng trọng tài không hợp pháp
- Phán quyết trọng tài ghi tên các bên không chính xác
- Cách hiểu không đúng về nghĩa vụ chứng minh (sai với Công ước NY)
- Cách hiểu không thống nhất về “nguyên tắc cơ bản của pháp luật VN”
- Cách hiểu không thống nhất về thẩm quyền riêng biệt của Tòa án VN



3. Một vài đề nghị

- Bổ sung vào BLTTDS quy định về trường hợp thỏa thuận trọng tài điện tử
- Sửa BLTTDS theo hướng: Thay cụm từ “*các nguyên tắc cơ bản của pháp luật VN*” bằng cụm từ “*các nguyên tắc cơ bản của pháp luật dân sự VN*”
- Nếu chưa sửa BLTTDS, HĐTP TANDTC nên có NQ hướng dẫn như trên
- Sửa đổi BLTTDS theo hướng quy định rõ ràng hơn về thẩm quyền riêng biệt của Tòa án VN hoặc có NQ hướng dẫn của HĐTP TANDTC

Trân trọng cảm ơn

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