

Enforcement of Contracts in Vietnam and the Risks of Bilateral Investment Treaty (BIT) Disputes

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The Constitution in force (1992) consists of 147 articles divided into twelve chapters after a preamble, embodying the policy and legislation of Doi Moi. As for the political system, it is stipulated that: "The State promotes a multi-component commodity economy functioning in accordance with market mechanisms under the management of the State and following a socialist orientation. The multi-component economic structure with various forms of organization of production and trading is based on a system of ownership by the entire people, by collectives, and by private individuals, of which ownership by the entire people and by collectives constitutes the foundation." This article provides an acute analysis of the structural and procedural provisions of the frameworks for contract enforcement in Vietnam, addressing both domestic and foreign transactional disputes and the key issues associated with these. The link between Doi Moi, and consequential integration with the international economy and the influence of collective interests stipulated in the Constitution are discussed in this article, and we also consider examples from other jurisdictions to provide both insight and an understanding into this relationship that defines contract enforcement in Vietnam.

1 Introduction: Background of Vietnam's Legal System

While the economy is a "multi-component commodity," the politics is not yet "multi-party." It is expressly recognized in Article 4 of the 1992 Constitution that Vietnam is a socialist country under the leadership of a single party: the communist party of Vietnam (the "Party"). The Party is a large organization which has many para-administrative organs, expanding to the lowest administrative levels, under the leadership of a general secretary. He is voted for and elected by the Party's National Congress which is held once every five years. The National Assembly is the supreme legislative body and consists of 496 deputies. It consists of only one Chamber with a duration of five years. Any citi-

zens over 18 years of age may vote and those over 21 may stand for election. The Assembly will elect the Prime Minister who will nominate his ministers to establish the Government, subject to the adoption of the National Assembly. The Assembly also elects the President of the State Council (the “President”). The President together with the Prime Minister and the General Secretary of the Party become a triumvirate of powers in Vietnam.

1.1 *Social and Cultural Values*

Like in all Far East countries, Vietnamese culture has been developed by Buddhism, Confucianism, and Taoism. Confucianism is based on fundamental individual obligations toward collective structures, Taoism favors a state of resignation, flexibility, and modesty, while Buddhism views life as a “circle between reason and consequence.” Hierarchy, trust, and loyalty are the cornerstones of harmony. Vietnamese cultural values now are mixed with various foreign influences, the most visible of which are from China and France. For example, the tradition of codification in Vietnamese law is inherited from French culture, but the reluctance to bring a dispute into court most probably stems from Taoism, a philosophy from China.

1.2 *Legal Family*

While features of the French legal system are still visible in Vietnamese contract law today, it would be a mistake to think that the current Vietnamese *Civil Code* is just similar to the French Napoleonic Code. The laws of other socialist and ex-socialist countries, such as Russia and China, also have great influence on Vietnamese civil law. With its long history of wars, foreign influence, and its specific political system, it is difficult to place the Vietnamese legal system into a particular legal family. For certain, Vietnamese legal systems belong to civil law legal systems. During the period of real-socialism (1954-1986), the idea of private property was not encouraged and as such, dismissed the *raison d’etre* of the Civil Code. The old judiciary system was abolished. New judges did not know French law, thus as time passed, the influence of French law in Vietnam became an event of the past. Instead, the law on obligations are mostly influenced by the Civil Codes of socialist countries, most notably the Principles of Civil Law of the People’s Republic of China and the civil codes of the Russian Federation Soviet Republic and the German Democratic Republic. Vietnamese theorists worry little about the identity of Vietnamese law. They will adapt whatever the laws, with appropriate modification, as long as they are suitable to the socio-economic environment of the country.

1.3 The Role of Legislation

Departing from the classical doctrine of the separation of powers, legislation is executed by the Government and National Assembly together. In Vietnam, law is not only a body of rules enacted by the National Assembly. The National Assembly meets only two sessions a year, each session lasting for 15 days. Therefore, only the most important acts are passed as laws: the codes, budget and various tax laws, and some important economic laws such as foreign investment law or credit institution law. The remaining part of Vietnamese law is governed by ordinances from the Standing Committee, the President, and sub-law documents, such as decrees, circulars, and orders. In short, the National Assembly passes Laws, the Standing Committee issues Ordinances, and the Government issues Decrees. Those laws and sub-laws are subject to be further interpreted and sometime supplemented by Circulars, Resolutions, and Decisions of the Ministries explaining the application of the higher legislation. Decrees are sometimes issued with attached Regulations. To date, there is no Constitutional Court, as in other democratic countries, to exercise judicial review of Decrees and Regulations. Such control is in the hands of the National Assembly, assisted by the State Investigation Agency. Contracts in Vietnam are regulated by many laws and regulations. Each type of contract is subject to one specific regime. For example, the Law on Foreign Investment in Vietnam, and the Decree on Technology Transfer and its implementing Circular, govern technology transfer contracts. A specific Circular governs management contracts. Agency contracts are governed by Commercial Law and various Circulars of the Ministry of Trade, etc. In general, contracts are subject to the *Ordinance on Economic Contracts* (OEC), the *Commercial Law 1997* (CL), and most importantly, the *Vietnamese Civil Code 1996* (CC).

1.4 The Position of the Judiciary

The judiciary consists of independent judges who are selected by the President. The organization of the judiciary is provided for by the *Law on People's Judicature*. There are three levels of ordinary courts in Vietnam (the "People's courts"). Those are the District People's courts, provincial or city People's courts, and the People's Supreme Court. Apart from ordinary courts, there are also special tribunals such as administrative courts, economic courts, and labor courts, which form parts of the provincial People's court, as well as military tribunals. The People's Supreme Court supervises and directs the judicial work of the People's courts, military tribunals, and special tribunals. District courts deal, generally speaking, with less important criminal and civil cases, whereas the more important cases together with labor cases and economic cases are dealt with by the People's provincial courts. Appeals from judgment of the district courts may be lodged in the provincial courts. There are also courts of appeal affiliated with the People's Supreme Court in Hanoi, Ho Chi Minh City, and Da Nang. Finally, there is a possibility of cassation by the

People's Supreme Court. It does not re-assess the facts of a case but only reviews the legality of the judgment from procedural or material viewpoints. Administrative disputes are dealt with by either the supervisory administrative organs or administrative courts. To date, examples of the work of administrative courts are still limited. The Ministry of Justice is responsible for management of local courts. In principle, judges were elected, were independent, and obey the law only. Together with judges, cases are also decided by the People's laymen. A person elected as a judge or a People's layperson must be a Vietnamese citizen, loyal to the Fatherland and to socialism, and have the required legal knowledge and a determined spirit to protect the socialist legal system. In practice, the legal knowledge of judges in Vietnam is still to be supplemented. Some of them have not finished university legal education but have considerable experience instead.

2 Contract Enforcement in Vietnam

In recent years, Vietnam has been very successful in attracting foreign investment by improving its economic system, including the legal infrastructure of contract enforcement. When conducting business in Vietnam, foreign investors and even local businessman may want to see and know how the legal framework and/or the regime that Vietnamese law provides enforces a contract, especially a commercial contract. Civil enforcement of contracts in Vietnam is a two-track system. The first is a judicial track whereby a party to a contract requests a court judgment. The second is a judicial track in which complaints are filed through the arbitral system. In general, both of these tracks are equal to each other, meaning parties to a contract are entitled to make their choice of which dispute resolution system they would like to take. Consequently, the very first question that parties and their lawyers will ask should help to determine who has the jurisdiction to resolve a dispute. Similar to other countries, Vietnam adopts a legal principle of using an arbitral center solely in cases of having parties' mutual consent; consequently, in such a case, if one party initiates a lawsuit at a court, the court will refuse to handle it unless the arbitration agreement is invalid or unrealizable, meaning the court may accept to hear the case if there is no arbitral agreement up to the date a petition is filed.

2.1 Court Jurisdiction

The District Court is competent to judge the cases in their first instance stage. Under the Civil Procedure Code, the District Court is not of competent jurisdiction to hear certain cases, including disputes related to intellectual property, technology transfer, and cases wherein the disputable properties are located in different provinces within Vietnamese territory. The Provincial Court is of competent jurisdiction to hear in the first instance cases which are not under the competent jurisdiction of the District Court. However, as to cases where the District Court hears in the first instance, the Provincial

Court functions as the court of appeals to review and judge on any appeal against judgments made by the District Court in the first instance. As for requests for recognition and enforcement of foreign courts' and foreign arbitrators' judgments in Vietnam, the Provincial Court has competent jurisdiction to make such decisions. The Supreme Court is the competent jurisdiction that can review and judge on any appeal or protest against judgments made by the Provincial Court or court of appeals. Disputes related to the jurisdiction between the District Courts within the domain of a central province, or central city, to hear a specific case are settled by the Chief Judge of the relevant Provincial Court. Disputes related to the jurisdiction between the District Courts of the different central provinces, central cities, or disputes related to jurisdiction between the Provincial Courts are settled by the Chief Judge of the Supreme Court.

2.2 Procedure

2.2.1 Commencement of Proceedings

A statement of claim must be made in writing and contain information stipulated in Article 164.2 of Civil Procedure Code, with supporting documentation. If the court wishes to accept the case, it will inform the plaintiff of the court fee, which must be paid. Payment of this fee must be made within 15 days of receiving the notice. The Court will officially accept the case when the plaintiff submits a receipt for payment of the court fee deposit.

2.2.2 Preparation for Hearing the Case

Within three working days of the date of acceptance of the case, the Court will give notice in writing to the defendant that it has accepted the case. Within 15 working days of receipt of notice, the defendant must lodge an answer in writing against the claim of the plaintiff and attach documents or evidence, if any, with the Court. The Court shall then organize at least one, but typically two conciliation meetings between the parties. There are two possible outcomes to these meetings; firstly, if the parties reach a successful agreement, the Court will take minutes of the conciliation in which the parties mutually agree on all the matters in dispute. If the parties do not reject the agreement within seven working days of preparation of the minutes, the Court will issue a decision acknowledging the settlement. The decision shall be effective immediately after the issuance date and can neither be appealed nor protested against in accordance with appeals procedures. Secondly, if the parties fail to reach an agreement, the Court will issue a decision to bring the case to a hearing.

2.2.3 Stages

2.2.3.1 First Instance Hearing

Under the Civil Procedure Code, the court must conduct a trial within one month of

the decision to bring the case to a hearing. In the opening stage of the hearing, the court will also ask whether the parties could reach mutual agreement on the settlement of the dispute. If an agreement is reached, the court will issue a decision recognizing the agreement. In the event the parties still maintain their claims and fail to reach an agreement, the council of adjudicators will commence the hearing by listening to the presentation of the parties.

2.2.3.2 Appeal

If a party disagrees with the holding at first instance, an appeal must be heard in the court that held the trial at first instance within 15 days of the decision. After accepting the qualified appeal, the first instance court must give notice in writing to the Prosecution Institute and all affected parties. The relevant parties are obliged to give their responses to the appeal. The Appellate Courts do not review the case in its entirety; rather, they only review those parts which are specifically appealed or protested against or related to the review of the appealed or protested contents. The Appellate Court may; (i) uphold the first-instance judgments; (ii) revise the first-instance judgments; (iii) repeal the first-instance judgments and transfer the case files to the first instance court for retrial of the case; or (iv) abrogate the first-instance judgments and stop the resolution of the case. The appellate judgments take effect on the date they are pronounced.

2.2.3.3 Review

Under the laws of Vietnam, involved parties may petition for review (second appeal) of a case on the grounds of legal error or newly discovered evidence. The decision to grant such a review is made administratively by either the Chief Judge or Chief Procurator of a competent court or Procuracy. The grant of a review can also be accompanied by an order for the stay of enforcement. The review takes place in closed court rooms where the parties are not permitted to submit arguments. The non-transparent nature of this process, plus the lengthy review period (e.g., 12 months for a petition for review of a legal error), increases the uncertainty often attributed to Vietnam's litigation system.

2.3 What to Note When Taking the Court System as a Dispute Resolution Body

There are many cases reported to the Vietnamese Supreme Court and they illustrate some significant lessons that parties who use Vietnamese courts to resolve contract disputes may want to keep in mind.

2.4 Statute of Limitations

According to Article 159 of the Civil Procedure Code, the statute of limitations for

initiating civil lawsuits complies with provisions of the law. According to Article 23.1 of Resolution No. 03/2012/NQ-HDTP dated 3 December 2012, for civil disputes whose statute of limitations is stipulated in the relevant legislation, then such statute of limitations shall apply. For example, in the case between two enterprises with a dispute related to a distribution contract, provisions of the Commercial Code 2005 shall apply. Specifically, according to Article 319 of the Commercial Code, *“the statute of limitations for lawsuits applicable to commercial disputes shall be two years from the time when the lawful rights and interests are infringed upon.”*

Under the law, the statute of limitations for initiating a court case re-commences in the following cases; (i) the obligor has acknowledged a part or all of their obligations towards the person initiating the lawsuit; (ii) the obligor has fulfilled a portion of their obligations towards the person initiating the lawsuit; or (iii) the parties have reconciled with each other. The statute of limitation re-commences from the date following the date upon which any of the above event occurs. Of note, in courts’ dispute-settlement practice, if one party responds to or attends a meeting convened to discuss the dispute, such actions are taken to revive the statute of limitations.

2.5 Judicial Conciliation

In the stage of first instance, there will be several conciliation sessions organized under a judge’s supervision before the hearing date for the purpose of providing parties a chance to reach mutual agreement to settle their disputes. In this case, if a dispute settlement agreement is reached, the court will issue a decision recognizing such an agreement after 7 days from the date of that agreement. This decision by the court will be valid and be able to be enforced by a competent Civil Enforcement Department.

2.6 Court’s Judgment Effectiveness

Judgments made by the courts in the first instance will solely come into effect to be enforced if there is no appeal filed against such judgments within 15 days as from the date stated in the judgments. If the involving parties are absent from the court’s judgment declaration session, the foresaid time limit would be counted from the date when the judgment is delivered to the parties or is posted. Judgment made by the court of appeals becomes effective to be enforced as of the date on which it is declared and can solely be reviewed under the procedure of either cassation or reopening.

2.7 Foreign Dispute Party and Foreign Legal Counsel

The law on investment of Vietnam does not allow a foreign investor to refer a dispute to a court in a foreign jurisdiction. Vietnamese judges cannot apply foreign law to a case

before them and foreign lawyers cannot participate in proceedings as representatives, advocates, or protectors of the lawful rights and interests of concerned parties. Thus, Vietnamese courts will probably not uphold choice of law contract provisions if such provision is made in breach of the laws of Vietnam.

2.8 Arbitration System

According to the newly enacted Law 54/2010/QH12 on Commercial Arbitration, as of 1 January 2011, arbitration in Vietnam covers (i) disputes arising from commercial activities; (ii) disputes between the disputants, among those at least one carrying out commercial activities; and (iii) other disputes to be settled by arbitration as provided by law. Commercial disputes include the performance of one or many trading acts by business people or organizations, including the purchase and sale of goods, providing services, distribution, trade representation and agencies, consignment, renting and leasing, hire purchasing arrangements, construction, consultancy, technology, licensing, investment, financing, banking, insurance, exploration and exploitation, transport of goods and passengers by air, sea, rail, land, and other commercial acts as prescribed by law. Disputes between the involved parties are to be settled by an arbitral tribunal organized by an arbitration center such as the Financial and Commercial Center for Arbitration (FCCA), Vietnam International Arbitration Center (VIAC), or through ad-hoc arbitration set up by the parties involved. An arbitral tribunal will be composed of one or more arbitrators as agreed by the disputing parties. If the parties cannot agree on the number of arbitrators, the arbitral tribunal will be composed of three arbitrators.

2.9 Arbitration Procedure

The first step involves the claimant submitting a statement of claim containing the following; (i) information on the parties concerned; (ii) a brief of the dispute's contents; (iii) the legal grounds supporting the claims; (iv) the value of the dispute; and (v) the name of the arbitrator appointed by the claimant. In addition, the claimant has to provide supporting evidence and pay the arbitration fee in advance. It is sometimes possible to amend, add, or withdraw claims before the arbitral tribunal issues an award. In the second step, the Arbitration Center will check the adequacy of the application file. If the application file meets the required conditions, a notice will be served to both the claimant and respondent. Unless otherwise agreed by the parties or provided by the Arbitration Center's rules of proceedings, the respondent must send its statement of defense to the Arbitration Center within 30 days of receiving the claimants' claim. A statement of defense must contain; (i) the date on which the statement is written; (ii) the name and address of the respondent; (iii) the name of the arbitrator by the respondent; and (iv) argument and evidence in defense, including rejection or part of the whole of the claimants' claim. If the respondent

does not submit its statement of defense or the statement of defense does not mention the appointment of an arbitrator, the President of the Arbitration Center will appoint an arbitrator for the respondent. In the third step, within 15¹ days of being selected, the two arbitrators must select from the list of arbitrators of the Arbitration Center a third arbitrator to act as chairman. In the fourth step, the arbitrators will examine the submissions and verify the facts regarding the dispute. The arbitral tribunal may meet the parties to hear their opinions and gather evidence. The parties may request the arbitral tribunal to act as conciliator. If the conciliation is successful, the parties may request the arbitral tribunal to record and issue decisions recognizing the successful conciliation. The successful conciliation record must be signed by the parties and the arbitrators. The arbitral tribunal's decision recognizing the successful conciliation will be final and binding. Finally, in the fifth step, if the parties cannot reach a conciliation agreement, the arbitral tribunal will open a hearing of the case. The time for opening the hearing will be decided by the chairman of the arbitral tribunal, unless otherwise agreed by the parties. The hearing will be conducted in private. The arbitral tribunal may permit other persons to attend the hearing with the approval of the parties. The parties may directly attend or authorize their representatives to attend the hearing. They may invite witnesses and lawyers to protect their rights and legitimate interests. The arbitral tribunal's award will be made under the majority principle, except where disputes are settled by a sole arbitrator. Awards may be announced at the final meeting or afterwards but no later than 30 days after the end of the final meeting.

2.10 Enforcement of Domestic Arbitral Awards

Decisions from Vietnam's arbitration centers are final and binding on the parties and may be enforced by the Enforcement Department in the same manner as an enforceable court decision. This gives domestic arbitral awards an advantage over foreign arbitral awards or court judgments (which may be subject to appeals or cassation).

2.11 What to Note When Using an Arbitral Tribunal as a Dispute Resolution Body

A dispute resolution clause reflecting parties' mutual consent to a certain arbitration center/type as hearing body is the very first condition to be satisfied, otherwise Vietnamese courts will have no jurisdiction over disputes. Hence, the first issue in case of choosing arbitration is the aforementioned clause. Accordingly, such a clause should not merely prescribe whether and where an arbitration tribunal should be used, but also should clear-

¹ This period might be shorter depending on a certain applicable arbitral rule.

ly provide information concerning the applicable law (this can be at the tribunal's choice in cases involving foreign parties in the dispute); the arbitration language, and the number of arbitrators. Secondly, unlike the court system, there is no obligation for the tribunal to organize any conciliation between parties unless it is requested by the parties. However, in case there is a conciliation session requested and organized under the tribunal's witness and parties can reach a mutual agreement to settle the dispute, the tribunal may recognize such an agreement by its decision. And this decision is equally legal and enforceable in comparison with an arbitral award. Thirdly, to settle a dispute fairly, sometimes the appointed tribunal might need to have further investigation or apply an injunctive relief. In those cases, the tribunal will obtain a court order to do so that might take time and negatively effect the legitimate benefit of the parties. Last but not least, arbitral awards are final and binding, and may be challenged only in certain limited circumstances. A party may request a domestic arbitral award to be set aside on certain grounds within thirty (30) days of the date the award was granted. And in case a foresaid request is filed to the competent court, it will takes months and/or years for such a court to review the award to grant its final decision regarding the validity of that award. As a result, the losing party might take advantage of this weakness of law to delay the arbitral award enforcement procedure implemented by the civil enforcement department, and dispose of its property.

2.12 General Note to Enforce a Foreign Arbitral Award in Vietnam

Under the Civil Procedure Code, foreign arbitral awards are arbitral awards rendered outside Vietnam or those rendered by non-Vietnamese arbitrators within Vietnam. As the law currently stands, Vietnamese courts will only consider an application for recognition and enforcement of a foreign arbitral award if the award has been made in or by arbitrators of a country being a party to the New York Convention, or to the extent that the country in question grants reciprocal treatment to Vietnam. Vietnam ratified the New York Convention in 1995. There have been many instances where Vietnamese courts have enforced foreign arbitral awards.

2.13 Procedure for Seeking Recognition

An organization or individual with a foreign arbitral award rendered in favor of it may petition a Vietnamese court for recognition and enforcement of the award, provided that (i) with respect to the organization, the losing party maintains its head office in Vietnam; (ii) with respect to an individual, the individual resides or works in Vietnam; or (iii) the enforcement relates to property which is in Vietnam at the time the petition is made. An award recognized by a Vietnamese court will have the same legal effect as a judgment given by a Vietnamese court and can be enforced in Vietnam.

2.14 *Grounds for Rejection of Foreign Arbitral Awards*

A Vietnamese court may reject an application for recognition and enforcement of a foreign arbitral award if the respondent can provide evidence proving that (i) the parties lacked the capacity to sign the arbitration agreement in accordance with the law applicable to each party; (ii) the arbitration agreement is invalid under the applicable law; (iii) the respondent did not receive due notice of the appointment of arbitrators or the arbitration proceedings or for other legitimate reasons, the respondent could not exercise its rights in the proceedings; (iv) the foreign arbitral award was made where no settlement was requested or was beyond the request of the disputing parties; (v) the composition of the arbitration body and/or the arbitration proceedings was not in accordance with the arbitration agreement of the parties or the applicable law; (vi) the award is not yet binding on the parties; or (vii) the award has been overruled or suspended by competent authorities of the countries where the award was made or whose law was the governing law. Interestingly, the procedures prescribed by law in relation to the recognition and enforcement of foreign arbitral awards appear to grant only the respondent (i.e., the party who is subject to enforcement of the arbitral award) the right to participate in the court hearing. The applicant (i.e., the party seeking recognition and enforcement of the arbitral award) does not appear to enjoy a similar right.

2.15 *Practical Issues*

In addition to the legal requirements above, an investor should consider the practical issues of enforcing a foreign arbitral award in Vietnam. Although the law states that the courts should ratify awards which meet the requirements stated above without a discussion of their merits, the Vietnamese courts have historically gone beyond this legal rule. As such, it is not uncommon for judges to refuse to enforce an award because; (i) the underlying contract (including the arbitration provision) was invalid due to the fact that the signatory to that contract was not duly authorized to sign it; (ii) the dispute should not be resolved by arbitration under the laws of Vietnam, or the recognition and enforcement of the award is contrary to the “*basic principles of the laws of Vietnam*,” a concept which has had a vague expression in law; or (iii) upon an analysis of the factual content of the case, the judge believes the award should not have been granted. That is, in contravention of the written law, the Court decides to re-hear and re-consider the case already decided by the arbitrator and then reaches a different conclusion. However, since the WTO accession in 2007, the Vietnamese government has made strong efforts to strengthen the enforcement regime by introducing new legislation and detailed guideline regulations. The recent Law on Enforcement of Civil Judgment, which took effect from 1 July 2009, has helped to improve the recognition and enforcement of foreign arbitral awards in Vietnam.

3 Bit Disputes and the ICSID Convention in Vietnam

3.1 *BITs and Dispute Settlement Provisions*

Vietnam has signed over 60 Bilateral Investment Treaties (BITs), including with South Korea, China, the USA, Australia, France, and Germany. One of the key components of a BIT is the dispute settlement clause, which allows parties to the investment access to a dispute settlement facility. In the event of an investor-state dispute, the most common clause within a BIT will allow conditional access to an arbitration center such as the United Nations Commission on International Trade Law (UNCITRAL), Stockholm Chamber of Commerce, Vietnam International Arbitration Center, and others.² Vietnam is not a signatory, or contracting party to the International Centre for Settlement of Investment Disputes (ICSID) Convention, although it has come under pressure to sign up to the ICSID mechanism from the international community, as many BITs prefer to use the mechanism in the event of an investment-related dispute.³

3.2 *The Vietnamese Legal System and ICSID Compatibility*

The conditionality of access to the ICSID Dispute Settlement Mechanism is dependent on a number of requirements. Firstly, consent from the contracting parties to the dispute, and this can be either through a consent clause agreed upon by both parties, or through the domestic legislation of the host state. In the instance of Vietnam, this would be, if Vietnam were party to the ICSID mechanism, the Law on Commercial Arbitration (No.54/2010/QH12) along with Resolution No. 01/2014/NQ-HDTP,⁴ which applies to disputes that are both domestic and foreign in nature. The Law on Commercial Arbitration is based on the UNCITRAL Model Law on International Commercial Arbitration, and thus, many of the key aspects of the Law on Commercial Arbitration, including all stages of the arbitral process from arbitration agreement to the enforcement of the arbitral award.

Secondly, a general principle of international law is that the parties to the international investment or “cross-border transaction,” may choose which law their contract will be executed under.⁵ In Vietnam, the key sources of contract law come from the Civil Code, which governs the creation of civil contracts, and commercial contracts fall under the guidance of the Ordinance on Economic Contracts (OEC).⁶ Part VII of the Civil Code re-

2 Christoph Schreuer, “The World Bank/ICSID Dispute Settlement Procedures,” 150.

3 Ibid.

4 Net Le, “Arbitration Multi-jurisdictional Guide 2014/2015,” 2.

5 Quan Hien Nguyen, “Cross Border Transactions in Vietnam and the Vietnam-US Bilateral Trade Agreement,” 163.

6 Net Le, *Contract Law in Vietnam*, 26.

fers to civil transactions involving foreign factors, and Net notes that this is the Vietnamese equivalent of international private law in other countries,⁷ and as such, it governs cross-border transactions between a foreign party and a domestic party.⁸ On this basis that the Vietnam Law on Commercial Arbitration has been developed and thus well harmonized with the UNCITRAL arbitration rules, along with the Civil Code and Ordinance on Economic Contracts, there is scope to suggest that the legal frameworks exist to support the application of the ICSID mechanism under Vietnamese jurisdiction.

3.3 *BIT Disputes in Practice in Vietnam*

3.3.1 *Vietnamese Courts*

While the legal structures for cross-border transaction disputes may be present in Vietnam, as discussed above, there are a number of issues that increase risk in the event of a dispute. Firstly, the procedure for enforcement of international arbitral awards is complex in Vietnam; as a result of the inclusion of various authorities in the award enforcement process, including the Ministry of Justice, Provincial court, the Supreme Court, and finally an enforcement agency charged with enforcing the award. The inclusion of Vietnamese courts creates a further issue relating to the enforcement of the award, as the Vietnamese legal regime does not operate on the basis of precedent or case law; therefore, the enforcement of foreign awards has been hindered due to inconsistent and inaccurate interpretations.

3.3.2 *Grounds for Refusal of Enforcement of Foreign Awards*

The second key issue extends further with the interpretation of Vietnamese courts, such as in the case of *Conares Metal v Co Khi A*; the court found that the sales contract and the arbitration agreement were not separate, and as the sales contract was rendered invalid by the signatory lacking authorization to enter into the agreement, the arbitration agreement was also invalid. Thus the arbitration award was deemed unenforceable. Blanco et al note that this view of the courts was in contradiction to the common law understanding.⁹

The 2010 Law on Commercial Arbitration also includes the phrase “contrary to the basic principles of the Laws of Vietnam,” which is carried over from the previous law on arbitration. This phrase is noted for its lack of definition, and is therefore open to wide interpretation by Vietnamese courts. In the case of *Tyco v Leighton*, the court is noted for

⁷ Ibid.

⁸ Civil Code, Art. 826.

⁹ Elena Blanco, Tran Anh Dung, and Umut Turksen, “Evolving to Perfection? Enforcement of International Arbitral Awards in Vietnam,” 1002.

not explaining which “basic principle” was violated, and interpreted the “basic principle” as “any legal provision within the Vietnamese Statute books,”¹⁰ and thus as any legal provision can be violated, the courts can deem the award as falling outside the jurisdiction of Vietnamese law and unenforceable. In the *Yukos*¹¹ cases, Russia attempted to argue that the investors did not qualify as investors, as the Energy Charter Treaty contained a broad interpretation of what defined an “investor.”¹² This issue of interpretation allowed Russia to deny the enforcement of the arbitration award by the UNCITRAL rules on the Russian state,¹³ and has acted to set a precedent in international investment law regarding the risk to foreign investors associated with the broad interpretation of terms and the misuse of this by the court systems of the host state.

3.4 *The Maintenance of Sovereignty Over BIT Disputes*

Sovereign immunity is a principle of international law that is based on one state not being subject to the jurisdiction of another state, or the rules of an international arbitration forum.¹⁴ In the context of ICSID, this concept of sovereign immunity is challenged, as contracting parties give “consent to the submission of a dispute.”¹⁵ With the rapid growth of international commerce, this, a potent force in international trade, was tamed with the introduction of treaties, including friendship and investment.¹⁶ With regard to ICSID, the threat of jurisdictional immunity exists in the lack of requirement for a domestic court to support the ICSID mechanism, like that of the UNCITRAL Model Law system.¹⁷ This is at odds with, as previously mentioned, the Vietnamese requirement for provincial and the Supreme Court to enforce foreign awards. The detached nature of the ICSID system means that a provincial court can decline this jurisdiction if it does not comply with the ICSID arbitration clause.¹⁸ For Vietnam, the use of domestic courts is familiar with disputes that follow the UNCITRAL rules. For disputes that largely use ICSID mechanisms, this potentially gives the state the option to create a jurisdictional issue, as a provincial court in the defendant’s domestic jurisdiction, i.e. Vietnam, can decline jurisdiction if an ICSID dispute is raised against it. Furthermore, the state could utilize this to claim state responsibility in a particular action, and intervene at the recognition and enforcement stage of an ICSID proceeding, and “decline jurisdiction if a dispute is brought to it in

10 Ibid., 1004.

11 *Yukos Universal Limited v. The Russian Federation*, UNCITRAL, PCA Case No. AA 227.

12 Emmanuel Gaillard and Yas Banifatemi. “Yukos: Landmark Decision on the Energy Charter Treaty,” 79.

13 Ibid.

14 Okezie Chukwumerije, “ICSID Arbitration and Sovereign Immunity,” 166.

15 Andrew E. L. Tucker, “The Energy Charter Treaty and ‘Compulsory’ International State/Investor Arbitration,” 522.

16 Okezie Chukwumerije, “ICSID Arbitration and Sovereign Immunity,” 172.

17 Ibid., 174.

18 Ibid.

contravention of an ICSID arbitration clause.”¹⁹

3.5 ICSID and China as Comparative Analysis

The issue of sovereign immunity and international arbitration is not unique to Vietnam; China had ratified the ICSID Convention in 1993, but showed its reluctance to allow the acceptance of the jurisdiction center until recently.²⁰ This was born out of China’s economy being largely a destination for foreign investment, and as a result, the desire to control possible disputes with foreign investors within China.²¹ This supports the idea in the aforementioned discussion on the sovereignty over investment-related disputes, as China only allowed a very limited use of the ICSID mechanism in the event of an expropriation and nationalization in accordance with its notification under Article 25(4) of the Convention.²² China began to allow ICSID jurisdiction more widely when its economy began to outwardly invest in other countries. In the instance of Vietnam, outward investment has reached \$22 billion annually as of 2014,²³ and shows no signs of decreasing. This could lead to greater pressure from domestic investors to ratify the ICSID rules, although this would still require the express consent of the Vietnamese state as per Art. 25(1) of the ICSID Convention before the arbitration rules could have jurisdiction in Vietnam. This could prove to be an issue considering the perceived favoring of national provisions over international legal instruments, as noted in the case of *Energo Novus v Infectimex*,²⁴ in which the Vietnamese court referred only to the domestic 1995 Ordinance instead of the New York Convention.²⁵

As mentioned, the latest wave of investment agreements signed by China have allowed greater flexibility and application of the ICSID arbitration rules, and possibly the trade and investment agreement with the greatest level of detail for the use of arbitration is the China-New Zealand FTA signed in 2008, which goes into great detail with regard to the rules on disputes within the jurisdiction of the agreement. Notably, China ensures that that the dispute mechanism’s powers are contained, particularly by preventing the importing of other dispute resolution provisions by using most-favored nations clauses, thus preventing the use of the treaty through “treaty shopping.”

19 Ibid.

20 Monika. C. E. Heymann, “International Law and the Settlement of Investment Disputes Relating to China,” 51.

21 Ibid., 53.

22 China submitted a notification on 7 January 1993 declaring that it “would only consider submitting to the jurisdiction of the International Centre for Settlement of Investment Disputes disputes over compensation resulting from expropriation and nationalization.”

23 The Voice of Vietnam, “Vietnam’s outward FDI: Is the tide turning?,” <http://english.vov.vn/Economy/Vietnams-outward-FDI-Is-the-tide-turning/287821.vov>. Accessed March 6, 2015.

24 *Energo Novus v Infectimex*, 1995.

25 Elena Blanco, Tran Anh Dung, and Umut Turksen, “Evolving to Perfection? Enforcement of International Arbitral Awards in Vietnam,” 1005.

Secondly, China also allows the state party the right to object to a claim if it is “manifestly without merit or otherwise outside the jurisdiction of competence of the tribunal”;²⁶ Article 36 of the ICSID Convention provides for this; however, the scope of this particular provision is far greater and allows China to wield sovereign influence over the dispute process. This could be an option for Vietnam, which is keen to ensure a degree of sovereignty over the arbitration process, should it choose to become a signatory to the ICSID Convention, appeasing the demands of investors for at least a partially independent ICSID dispute settlement jurisdiction.

Thirdly, while many of China’s investment treaties refer disputes to domestic courts, which generally means that the disputing party will have to choose either the route of a domestic court, or arbitration, the China/New Zealand FTA allows for the disputing parties to submit the dispute to arbitration even after it has been submitted to the domestic court, so long as it is withdrawn from the court before the final judgment has been made. In the case of Vietnam, such a provision could be beneficial in two ways, allowing the state to retain domestic jurisdiction over disputes when the parties choose this, but still allowing for investors the option of international arbitration. This also places a limitation on the disputing party, in that once they have chosen the route of a domestic court, they may not be able to make a claim under international law. Allowing the Vietnamese government to both retain domestic jurisdiction *and* provide for international arbitration under ICSID in its investment treaties could act as a progressive solution for all parties.

4 Conclusion

This article has sought to discuss the both the mechanisms for the enforcement of contracts under Vietnamese jurisdiction, and to consider the risks associated with the enforcement of foreign contracts in the country, specifically international transactional disputes that are also subject to the jurisdiction of Bilateral Investment Treaties. The first section provides a foundation for the analysis of contracts enforcement, discussing the cultural, political, and judicial roles that influence the provisions for contract enforcement in Vietnam. The second section discusses the key aspects of contract enforcement in Vietnam. The legal provisions for dispute resolution are discussed in this section, and both domestic and foreign contract enforcement frameworks are discussed, along with the practical issues related to both. The final section moves onto foreign disputes in Vietnam that fall under the jurisdiction of BITs, and addresses the key issues related to this from the Vietnamese perspective, and also through the lens of case studies as comparative examples.

The legal framework of Vietnam has undergone significant reform in the past decade

26 Art. 154 (2) New Zealand FTA (2008).

to bring it in line with international norms of international investment law, and the country has the legal framework to support the international arbitral frameworks that ensure reduced risk for foreign investors. The key issues with introducing the ICSID Convention into Vietnam lie in the role of the courts in arbitration proceedings, and in the sense that foreign arbitration in Vietnam is currently governed primarily by a complex layer of court proceedings and their individual interpretations are not governed by precedent or case law. This increases the risk that courts will exercise sovereignty over BIT international arbitration awards with broad interpretations, similar to the actions of the Russian courts during the *Yukos* cases. For the Vietnamese government to reduce the risk associated with the international arbitration in BIT disputes, less broad interpretations by the court system will be required, which could allow for the country to sign the ICSID Convention, perhaps following the path of China's relationship with the Convention and undertaking a gradual acceptance of ICSID into its international arbitration system.

References

- Blanco, Elena, Tran Anh Dung, and Umut Turksen. "Evolving to Perfection? Enforcement of International Arbitral Awards in Vietnam." *Journal of World Investment and Trade* 11, no. 6 (2010): 965-1018.
- Chukwumerije, Okezie. "ICSID Arbitration and Sovereign Immunity." *Anglo-American Law Review* 19 (1990): 166-182.
- Doing Business. Accessed March 8 2015. www.doingbusiness.org.
- . "Economy Profile 2016: Vietnam." Accessed March 8, 2015. <http://www.doingbusiness.org/data/exploreeconomies/vietnam/~media/giawb/doing%20business/documents/profiles/country/VNM.pdf?ver=2>.
- Gaillard, Emmanuel and Yas Banifatemi. "Yukos: Landmark Decision on the Energy Charter Treaty." International Arbitration Group. 2010.
- Heymann, Monika C. E. "International Law and the Settlement of Investment Disputes Relating to China." *Journal of International Economic Law* 11, no. 3 (2008): 507-526.
- Hogan Lovells. "Arbitration in Vietnam: An Introduction." Accessed August 6, 2015. http://www.hoganlovells.com/files/Uploads/Documents/13.10_Hogan%20Lovells%20-%20Arbitration%20in%20Vietnam.pdf.
- Le, Net. *Contract Law in Vietnam*. Alphen aan den Rijn: Wolters Kluwer, 2012.
- Nguyen, Quan Hien. "Cross-Border Transactions in Vietnam and the Vietnam-US Bilateral Trade Agreement." *International Trade and Business Law Review* 8 (2003): 159-184.
- Schreuer, Christoph. "The World Bank/ICSID Dispute Settlement Procedures." University of Vienna. 2005.
- Tucker, Andrew E. L. "The Energy Charter Treaty and 'Compulsory' International State/Investor Arbi-

tration.” *Leiden Journal of International Law* 11, no. 3 (1998): 513-526.

U.S. Department of State. “2014 Investment Climate Statement – Vietnam.” Accessed March 6, 2015. <http://www.state.gov/e/eb/rls/othr/ics/2014/229095.htm>.

Voice of Vietnam. “Vietnam’s outward FDI: Is the tide turning?” Accessed March 6, 2015. <http://english.vov.vn/Economy/Vietnams-outward-FDI-Is-the-tide-turning/287821.vov>.

Weeramantry, J. Romesh. “Investor-State Dispute Settlement Provisions in China’s Investment Treaties.” *ICSID Review* 27, no. 1 (2012): 192-206.