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ARBITRATION LAW

The adoption of the Law on Commercial Arbitration with a hope to remove the shortages in the recent commercial dispute settlement in Vietnam

By Vuong Son Ha/ Luu Tien Ngoc

On June 17, 2010, the 12th Legislature of the National Assembly passed, together with seven other laws, the Law on Commercial Arbitration (“Law 2010”), which will come into force on January 1 next year. This is a legal instrument of important meanings in Vietnam’s economic integration into international community, by which Vietnamese legislators addressed several shortages of current laws essentially based on Ordinance on Commercial Arbitration of 2003 (“Ordinance 2003”) for enabling the arbitration system to gain the public faith of higher degree in dispute settlement.

Some new points of Law 2010 can be briefly cited as below:

Firstly, Law 2010 widened scope of the arbitration competence for dispute settlement

Limited competence scope is one of shortages of current laws rendering commercial arbitration restrained and less attractive in the eyes of the parties to a dispute as it is only able to hear affairs in commercial field as predetermined and listed by law. Thanks to Law 2010, disputes related to rights and interests of the parties arisen out of contractual obligations or non-contractual obligations with respect to non-commercial activities may be settled via arbitration, provided that there is at least a party doing commercial activity or those may be settled by the arbitration under the laws.

As a result, the scope of dispute settlement by the arbitration is no longer limited to disputes in the commercial field as in Ordinance 2003. In addition, the definition of subject is also broadened, according to which “the parties” regardless of being trader or not, can turn to the arbitration for dispute settlement. This provision remedied a gap of Ordinance 2003 where the arbitration is only permitted for settling dispute between “organization and individuals doing business”. It is expected that with the above regulations, the number of contentious affairs referred to the arbitration will increase after Law 2010 comes into force.

Secondly, Law 2010 accepted the foreign nationality of arbitrator and of arbitration

In overcoming another shortage of Ordinance 2003, Law 2010 does not limit the nationality of an arbitrator to Vietnamese nationality only. That means from now on foreigners can be appointed as arbitrator in Vietnam if satisfies all conditions applicable to an arbitrator, being entrusted and selected by the parties to a dispute or appointed by arbitration centre or court. This provision is for the purpose of responding to actual demand in the period of enhanced economic integration by Vietnam to international community where the parties with foreign element may

prefer to cause the arbitration intervention as they can freely to select the most convenient person to participate in the arbitration tribunal.

In addition, for the avoidance of previous confusion, Law 2010 defines that foreign arbitration is one incorporated under the foreign laws on arbitration and operating in accordance with foreign rules on arbitration proceedings, which is selected by the parties to carry out the dispute settlement outside or within Vietnam territory. As a result, its award will be considered as foreign arbitration award regardless of issuance location.

Thirdly, Law 2010 confirmed the right of arbitrators/ arbitration centers to apply the injunctive relieves

In comparison to Ordinance 2003 and in response to the need of the settlement reality, Law 2010 considerably improves the arbitration position by reserving the right to decide on application of a number of injunctive relieves for the arbitration tribunal at the request of either of the parties. This will aid the arbitral proceedings to operate more effectively, to protect rights and legitimate interests of the parties to a dispute. This model is pre-eminent in international commercial arbitration and is suitable with Vietnam reality and Civil Proceedings Code.

Fourthly, Law 2010 more closely prescribed conditions and grounds for abrogation of arbitration award

Under Law 2010, either party wishing request for abrogation of an arbitration award must have sufficiently grounds to prove that the arbitration tribunal has given its award in one of events specified in Law 2010, which details ones relating to evidence or the arbitrator's obligations that adversely affect objectivity and impartiality of arbitration award. This provision aims to minimize the number of arbitration award requested for abrogation and force the parties to carefully consider if they have sufficiently grounds supporting their request for arbitration award abrogation before bring a claim to the court for such request.

Fifthly, Law 2010 tightened protection of consumers

Regarding disputes between enterprises and consumers, although the arbitration clause has been recorded in general terms and conditions for provision of goods or services elaborated in advance, arbitration agreement will be only valid if the supplier obtains the consumer approval for such agreement. This provision is based on the fact that generally, the consumers are put into a position facing risk of being abused by terms and conditions in a pre-printed contract of the goods seller or the service supplier; as a result, regulations protecting consumers in necessary circumstances are needed.

Sixthly, Law 2010 limited the arbitrators' liability

Under 2010, subject to a court verdict, the arbitration tribunal may bear the liability to make compensation to the damaged parties if applying other injunctive relieves or exceeding the request of applicant and causing damages to the applicant, the applied party or a third party. This provision is essentially suitable with legislative practices

and experiences in many countries for the purpose of encouraging the sense of law and the arbitrators' objectivity and impartiality.

Seventhly, Law 2010 set out the arbitration language

Law 2010 allows the parties in a dispute with foreign element or involving a foreign invested enterprise to agree on the language used in arbitral proceedings. In case of lacking such agreement, the language will be decided by the arbitration tribunal. Unlikely to Ordinance 2003, Law 2010 reuses definition of dispute with foreign element in the Civil Code. These provisions let the foreigners mind at rest when investing in Vietnam and clear difference between civil laws and laws on arbitration.

Eighthly, Law 2010 intensified relationship between the court and the arbitration, or so called assistance and supervision role played by the court regarding the arbitration in the course of dispute settlement

The extension of arbitration competence scope is meaningful and enforceable in proceedings only if it is supported by court, e.g. in collecting evidence, applying injunctive relieves, recognition and enforcement of foreign arbitral award, etc. because arbitration is a non-governmental and private jurisdiction, not a State agency. Law 2010 provides a series of new regulations to determine this important legal relationship, in which the arbitration will enjoy a timely assistance from the court, however the principle on the arbitration independence from the court is still ensured during the dispute settlement. Regarding the competence determination between the arbitration and the court, Law 2010 says that in case where there is already an arbitration agreement for dispute, the court will have to refuse receiving the claim brought to it by either of the parties, unless such agreement is considered by the court as null and void or non-enforceable. Furthermore, Law 2010 lists a number of the court assistances to the arbitration, that include: announcing the arbitration agreement is null and void, determining the arbitration tribunal competence; appointing and replacing arbitrator; assisting in evidence collection and storage; ensuring the witness presence; applying injunctive relieves; resolving request for arbitration award abrogation; registering arbitration award. These regulations substantially comply with international arbitration laws and practices, and ensure that the arbitration proceedings will be smoothly conducted without any delay. This is a condition for the arbitration's fruitful operation.

Finally, Law 2010 set out the rules for selecting by the parties the settlement bodies

Law 2010 establishes an important principle that, in the course of arbitral proceedings, if a party has been aware of breach of laws or arbitration agreement, e.g. arbitration agreement is invalid, there is no arbitration agreement or arbitration tribunal has not the competence for dispute settlement, but did not protest within a certain duration, this party will be deemed to be deprived from the right to claim at the arbitration or the court. This provision is for the purpose of effectively preventing abuse activities in the arbitral proceedings, to avoid the prolonged dispute settlement or repeated hearing, which we may see during the implementation of Ordinance 2003.

Though there are still some small points which remain unsolved, in comparison with Ordinance 2003 and precedents, Law 2010, with the above said cited new provisions, is generally recognized as an effective pathfinder for development of arbitration system in Vietnam approaching to standards of modern laws and international arbitral practices and taking into account actual conditions of Vietnam, and a solid foundation for boosting Vietnamese arbitration competitiveness to gain domestic and foreign enterprises' trust for dispute settlement.

Other Sectors

Finance

- Decision No.1420a/QD-BTC dated June 18, 2010 of the Ministry of Finance announcing the list of valuation consultancy organizations permitted to continue their service of enterprise valuation service provision after being suspended in accordance with Decision No. 670/QD-BTC dated March 30, 2010 of Minister of Finance.
- On June 16, 2010, the Ministry of Finance issued Circular 90/2010/TT-BTC providing guidelines for establishment of State budget estimation in 2011.
- Circular No. 89/2010/TT-BTC dated June 16, 2010 of the Ministry of Finance providing guidelines for public reporting regime on the management and use of State properties in State bodies, non-profit professional units, and organizations assigned to manage and use State properties.
- On June 15, 2010, the Ministry of Finance stipulated Circular 88/2010/TT-BTC providing guidelines for implementation of a number of contents in Decree 96/2009/ND-CP dated October 30, 2009 of the Government on dealing with buried or sunk properties, which are found in land, island or sea of Vietnam.
- Circular No. 87/2010/TT-BTC dated June 15, 2010 of the Ministry of Finance providing for the management of and dealing with properties of projects funded by State capital upon termination of these projects.

Banking

- On June 16, 2010, the National Assembly passed Law No. 46/2010/QH12 on the State Bank of Vietnam.
- Circular No. 15/2010/TT-NHNN dated June 16, 2010 of the State Bank of Vietnam providing for the debt classification, extraction for establishment and use of reserves to deal with loan-related risks in operation of small-scale financial institutions.

Taxation

- On June 17, 2010, the National Assembly passed Law No. 48/2010/QH12 on Non-agricultural Land Use Tax.
- Decision No. 899/QD-TCT dated June 18, 2010 of the General Department of Taxation promulgating Regulation on meeting citizens, receiving and dealing with claims and denunciations from citizens at taxation authorities at different levels.

- On June 30, 2010, the Ministry of Finance issued Circular 94/2010/TT-BTC providing guidelines for refund of value-added tax applicable to export goods.
- Circular No. 92/2010/TT-BTC dated June 17, 2010 of the Ministry of Finance providing guidelines for procedures for tax payment deferment and refund of value-added tax applicable to equipment, machinery, specialized means of transport included in technological lines and non domestically produceable construction materials, which are need of being imported to form fixed assets of enterprises.

Trade

- On June 17, 2010, the National Assembly passed Law No. 54/2010/QH12 on Commercial Arbitration.
- Decision No. 1323/QĐ-TCHQ dated June 22, 2010 of the General Department of Customs promulgating process for check of goods classification and application of tax rates to import and export goods during implementation of customs procedures.
- On June 28, 2010, the Ministry of Industry and Trade stipulated Circular No.28/2010/TT-BCT detailing a number of articles of Law on Chemical and Decree No.108/2008/ND-CP dated October 7, 2010 detailing and providing guidelines for implementation of a number of articles of Law on Chemical.
- Circular No. 27/2010/TT-BCT dated June 16, 2010 of the Ministry of Industry and Trade (“MOIT”) on the amendment and supplement to Circular No.34/2009/TT-BCT dated November 17, 2009 of Minister of MOIT on import under tariff quota in 2010 with the tax rate of 0% applicable to goods of Laos origin.
- On June 14, 2010, the Ministry of Industry and Trade, the Ministry of Transport and the Ministry of Finance jointly issued Inter-ministerial Circular No.25/2010/TTLT-BCT-BGTVT-BTC providing for the import of brand new under 16-seat-cars (not second-hand).
- Circular No. 26/2010/TT-BCT dated June 14, 2010 of the Ministry of Finance and Trade providing for the registration of manufacture plan, materials import, and oil and gasoline products consumption.

Labour

- On June 8, 2010, the People's Committee of Hanoi stipulated Decision No.2535/QĐ-UBND authorizing the Director of Hanoi Department of Labour, Invalids and Social Affairs to decide on allowing enterprises and units to work overtime above 200 to 300 hours a year.

- Circular No. 18/2010/TT-BLDTBXH dated June 10, 2010 of the Ministry of Labour, Invalids and Social Affairs providing wages for domestic consulting experts performing consultancy tender package and application of period-based contract form to projects funded by State capital.
- On June 1, 2010, the Ministry of Labour, Invalids and Social Affairs issued Circular No. 16/2010/TT-BLDTBXH providing guidelines for Decision 613/QD-TTg dated May 6, 2010 of the Prime Minister on monthly benefit for people who have full 15 to under 20 actual working years but cannot receive benefit for being unable to work due to expired term.

Transport

- Decree No. 60/2010 ND-CP dated June 3, 2010 of the Government on sanctioning administrative violations in the field of civil aviation.
- On June 23, 2010, the Prime Minister stipulated Decision No. 930/QD-TTg approving the Treaty on Airway Transportation between the Government of the Socialist Republic of Vietnam and the Government of the State of Israel.
- Decision No. 44/2010/QD-TTg dated June 10, 2010 of the Prime Minister on exemption of land use fee and exemption of land rental for constructing facilities of national highways.
- On June 7, 2010, the Ministry of Transport issued Circular No. 13/2010/TT-BGTVT providing for the management of environmental duties in transport branch funded by State budget.

Construction – Real Estate

- Decree No. 71/2010/ND-CP dated June 23, 2010 of the Government detailing and providing guidelines for implementation of Law on Residential Housing.
- On June 11, 2010, the Government stipulated Decree No. 64/2010/ND-CP on urban tree management.
- Decision No. 26/2010/QD-UBND dated June 21, 2010 of the Hanoi People's Committee on the amendment and supplement to and replacement of a number of articles of "Temporary regulations on managing the investment in, construction of and business in new urban area and residential housing projects in the area of Hanoi" promulgated along with Decision No. 153/2006/QD-UBND dated August 31, 2006 of the Hanoi People's Committee.

Natural Resources - Environment

- On June 21, 2010, the Government issued Decree No. 69/2010/ND-CP on bio-safety regarding genetically modified organisms, genetic samples and genetically modified organisms' products.

- Decree No. 65/2010/ND-CP dated June 11, 2010 of the Government detailing and providing guidelines for implementation of a number of articles of Law on Biological Diversity.
- On June 23, 2010, the Prime Minister stipulated Decision No. 931/QD-TTg approving the Protocol between the Government of the Socialist Republic of Vietnam and the Government of the Kingdom of Saudi Arabia on the co-operation in petroleum, gas and minerals.
- Decision No. 769/QD-TTg dated June 3, 2010 of the Prime Minister approving "Programme on fundamental research and survey of hydrate potentials in the seas and continental shelves of Vietnam".

Science - Technology

- On June 15, 2010, the Ministry of Industry and Trade issued Decision No.3129/QD-BCT approving the planning on development of agricultural – forestry - aquacultural processing equipment manufacture industry for the period to 2015 with orientation to 2025.
- Decision No. 45/2010/QD-TTg dated June 14, 2010 of the Prime Minister promulgating Regulation on nuclear control activity.
- On June 21, 2010, the Ministry of Planning and Investment stipulated Circular No. 04/2010/TT-BKHCHN providing guidelines for implementation of a number of articles of Decree No. 49/2009/ND-CP dated May 21, 2009 of the Government on sanctioning administrative violations in technology transfer activities.

Energy

- Law No. 50/2010/QD12 passed on June 17, 2010 by the National Assembly on Economical and Efficient Use of Energy.
- On June 22, 2010, the Government issued Decree No. 70/2010 detailing and providing guidelines for implementation of a number of articles of Law on Nuclear Energy with respect to nuclear power plant.
- Decree No. 68/2010/ND-CP dated June 15, 2010 of the Government on sanctioning violations of law in the field of electricity.
- On June 17, 2010, the Prime Minister stipulated Decision No. 906/QD-TTG approving the direction in planning on development of nuclear power in Vietnam for the period to 2030.

Administration - Judiciary

- Law No. 52/2010/QH12 passed on June 7, 2010 by the National Assembly on Child Adoption.

- On June 14, 2010, the Government issued Decree No. 66/2010/ND-CP promulgating the Regulation on coordinative implementation of the State administration in the operation of sea police and the operational co-ordination between forces in the seas and continental shelves of the Social Republic of Vietnam.
- Decree No. 63/2010/ND-CP dated June 8, 2010 of the Government on supervising the administrative procedures.
- On June 17, 2010, the Ministry of Justice and the Ministry of Home Affairs jointly stipulated Inter-ministerial Circular No. 11/2010/TTLT-BTP-BNV providing guidelines for implementation of the right of self control and self-responsibility taking in performing the duties, apparatus organization, personnel, and management and use of public servants in public non-profit professional units under the judicial branch.

Agriculture

- Decree No. 61/2010/ND-CP dated June 4, 2010 of the Government about the policy on encouraging enterprises to invest in agriculture and rural areas.
- On June 11, 2010, the Prime Minister issued Decree No. 846/QD-TTg on the capital supplement for redeemed import of vaccines, pasteurizing drugs, and plant protection chemicals for national storage.
- Circular No. 14/2010/TT-NHNN dated June 14, 2010 of the State Bank of Vietnam providing detailed guidelines for implementation of Decree No.41/2010/ND-CP dated April 12, 2010 of the Government on credit policy serving the development in agriculture and rural areas.

Investment

- On June 4, 2010, the Government stipulated Decree No. 62/2010/ND-CP on the amendment and supplement to a number of articles of Decree No. 53/2007/ND-CP dated April 4, 2007 of the Government on sanctioning administrative violations in planning and investment field.
- Circular No. 13/2010/TT-BKH dated June 2, 2010 of the Ministry of Planning and Investment providing for the standard forms for reports on investment supervision and evaluation.
- On May 28, 2010, the Ministry of Planning and Investment and the Ministry of Finance jointly issued Inter-ministerial Circular No.12/2010/TTLT-BKHDT-BT detailing and providing guidelines for implementation of the Regulation on foreign experts implementing the ODA programmes and projects, promulgated along with Decision No. 119/2009/QD-TTg dated October 1, 2009 of the Prime Minister.

Miscellaneous

- Law No. 51/2010/QH12 passed on June 17, 2010 by the National Assembly on Handicaps.
- On June 21, 2010, the Hanoi People's Committee stipulated Decision No.25/2010/QD-UBND providing for the policy on encouraging the socialization in the domains of education – training, culture, sports and environment in the area of Hanoi.
- Decision No. 911/QD-TTg dated June 17, 2010 of the Prime Minister approving the project on training lectures of doctor grade for universities and colleges in the period from 2010 to 2020.
- On June 2, 2010, the Prime Minister issued Decision No. 43/2010/QD-TTg promulgating the system of national statistic norms.
- Circular No. 14/2010/TT-BKH dated June 4, 2010 of the Ministry of Planning and Investment providing guidelines for a number of contents about enterprise registration dossiers, order and procedures in accordance with Decree No. 43/2010/ND-CP dated April 15, 2010 of the Government on enterprise registration.

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