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Arbitration

Laying the table for guidelines of commercial arbitration regulations

The issuance of Ordinance on Commercial Arbitration in February 2003 highlighted the salient development of the legal framework on arbitration in Vietnam. The Ordinance was hoped to breathe a healthy wind to the development of the local arbitration system, thus creating favourable conditions for changing businesses' awareness on use of local dispute settlement mechanisms. However, till date, half year since the Ordinance entered into full force, it is still seen that there is no increase in the number of petitions lodged to local arbitration centers.

To facilitate the procedures for establishment of arbitration centers and encourage such way of disputes settlement, on January 15, 2004, the Government issued Decree No. 25/2004/ND-CP guiding in details the implementation of a number of articles of the Ordinance on Commercial Arbitration.

Under Decree 25, commercial arbitration has the jurisdiction to solve disputes arising in commercial activities construed in much broader terms than those defined by the prevailing Commercial law, among parties who are business individuals or organizations. Commercial activities under the Ordinance include the sale and purchase of goods; supply of services; distribution; acting as commercial agents or representatives; consignment; leasing and hiring; hire-purchase; construction; consultancy; technical services; licensing; investment; banking and finance; insurance; exploration and exploitation; transport of cargo and passengers by air, sea, rail or road; and other commercial activities as provided for by law.

This Decree instructed to establish three arbitration centers, one in Hanoi, another in Da Nang and the last in Ho Chi Minh city. However, in other areas, the founding of arbitration centers may be considered but must be based on the situation of socio-economic development of such areas. As for those set up before the effective date of the Ordinance, such Ordinance puts no threat to their existence but requires to make their charter revised in accordance with the Ordinance and Decree.

Similarly to the regulations governing enterprises' establishment, name of arbitration centers are determined by their founders and must include the phrase "Arbitration Center". Name of newly-established center should not coincide or confusingly similar to existing others and should not violate the national tradition, culture, morality and fine customs. The arbitration centers are also allowed to have their own logo but should not use national flag, Communist Party's flag, national emblem, portrait of the national presidents or design of Vietnamese currencies.

Arbitration centers are allowed to open their branches and representative offices in or outside the provinces where their headquarters locate to carry out their activities. Branch, the dependent subsidiary of arbitration center, is entitled to perform a part or wholly the functions of the center and must operate pursuant to the center's charter. Such branch must register its operation at Department of Justice where situated the branch. After obtaining the branch's certificate of registration, the arbitration center has to inform the Ministry of Justice in writing on such. In case the newly established branch locate outside the province situated the center's head office, it must also notice in writing to the

Department of Justice of the center's province . As the involvement with quite a lot of bodies, to some extents, the registration procedures of branch is pretty complicated in compare with that of arbitration center itself.

As for the establishment of representative offices, arbitration centers are only required to notice to the Department of Justice where the center locates and Department of Justice where its representative office locate.

The Decree 25 also provides for the fees for establishment of arbitration centers and court's fees for settlement of arbitration related cases. Accordingly, fee for establishment of an arbitration center is VND500,000, for registration of operation is VND200,000. Court's fees for requesting the relevant court to revoke of arbitration's award or to apply, change, repeal the injunctive relief is VND500,000. The fee to appeal the court's decisions is VND300,000. Fee for requesting the relevant court to appoint or replace arbitrators is VND100,000.

The Decree 25 has not yet mentioned to procedures for application of injunctive relief. There is an unclear matter when the Ordinance stipulates in Article 61 that an arbitration agreement entered into before the effective date of this Ordinance will be carried out in accordance with the laws applicable at the time it is entered into. The Ordinance requires and the Decree 25 also reconfirms, that charter and rules of existing arbitration centers must be revised to be in line with new regulations. At the moment, businesses are concerning about how much they will be affected when they have arbitration agreements executed before the effectiveness of the Ordinance but being implemented. How arbitration centers will deal with those requirements when previously executed arbitration agreements are brought to them for settlement.

Disputants face difficulties with their selection of foreign arbitrators

The commercial arbitration regime for settlement of disputes was first introduced in Vietnam in 1963 with the advent of the Foreign Trade Arbitration Committee and then, the Vietnam Maritime Arbitration Council. In 1993, this regime set a big pace forward with the status of independence for arbitration system. In this period, the Vietnam International Arbitration Centre was born thanking to the amalgamation of the above two organizations and dealt with case where foreign disputants were involved in investment contract or investment. Then, one year after, Governmental Decree No. 116/CP laid the legal basis for the foundation of a handful of private Economic Arbitration Centres locating mainly in big cities. As no reference in this document was made to the nationality of the disputants, it thereby created the possibility for the participation of foreigners provided that they met one of the provided jurisdictional requirements.

However, the greatest change in this field occurred thanks to the recent introduction of the Ordinance on Commercial Arbitration. The legislature believe that such ordinance which taking effect in the mid-year of 2003 has offered a more viable option for settlement of the disputes aroused in the commercial activities. Advantages of arbitrary method are expected to be generated from the ordinance's three pivotal provisos in comparison with the previous legal documents governing the arbitration system. Firstly, broader definition of commercial disputes under the jurisdiction of arbitration such as the additional inclusion of construction, insurance, banking and finance, etc. Secondly, better exploitation of the State power of the people's court system with regards to

arbitrators selection, application of injunctive relief, abolishment and enforcement of the arbitration award. Lastly, the involvement of many "foreign elements" in arbitration proceeding such as the application of foreign arbitration rules, the participation of qualified foreign arbitrators and offshore place and language of arbitration.

Despite, these provisions receive the warmly welcome from foreign traders and arbitrators, they cause many headache as the involvement of offshore arbitrators in the procedures such as application for injunctive relief and appointment of arbitration. Pursuant to these provisions, during the settlement process, party to the dispute is entitled to send application for the implementation of injunctive relief to provincial people's court where the arbitration council accepts to hear the case if they believe that their legitimate rights are or may be violated. But troublesome problems will arise if the arbitration council is set up in a foreign country such as: whether there is a court in that foreign country deemed provincial court like that of Vietnam; if yes, it is viable that foreign court can grant decision on injunctive relief in relation to assets in the country; even if the foreign court can render such decision, such decision shall only be enforceable provided that this decision fully satisfies conditions and requirements stipulated in the Ordinance on Recognition and Enforcement of Foreign Court's verdicts of which the prerequisite for the recognition and enforcement is that foreign country has signed a bilateral agreement on legal assistance with Vietnam. However, according to the Ministry of Justice, it is of worthy note that Vietnam has so far only entered into bilateral agreement on legal assistance with very few foreign countries.

In similar situation, can a foreign court appoint an arbitrator whenever parties fail to reach the consensus agreement in selecting arbitrators, albeit this right is clearly vested in the Ordinance. Besides, despite the Ordinance enables any party to the dispute bring the arbitration award to the provincial court for its abolishment of such in case they do not agree with it, there remains a lot of obstacles as aforesaid mentioned. These are caused by the fact that the abolishment, if any, will also be made by an offshore court.

Another interesting but not less confusing matter is that with the alien elements permitted under the ordinance including awarding location and foreign arbitrator, whether the arbitral award is regarded as Vietnamese one. If the answer is yes, it is noteworthy to learn that according to another legal document, Ordinance on Recognition and Enforcement of Foreign Arbitral Awards in Vietnam in September 1995, one award satisfying either mentioned criteria is likely be considered as foreign arbitration one. Therefore, the result of such difference is that this foreign arbitral award shall not be enforceable in Vietnam unless it is recognized and enforced by the court of Vietnam pursuant to procedures and formalities set forth in the Ordinance on Recognition and Enforcement of Foreign Arbitral Awards of Vietnam. With much more risk, if such this dispute not arising out of commercial acts prescribed in the Commercial Law, the arbitral on such may not be enforceable in Vietnam.

Though being newly issued in January 2004, Decree 25 (as described above) however, just focus mainly on procedures for establishment and operation of arbitration centres than those of disputants' main anxiety, the viability of arbitration's decision. Foreigners are still waiting for a clearer distinction between foreign arbitration award and Vietnamese one before they can make up their mind to select to arbitrate their disputes.

Healthcare and Pharmaceuticals

Healthcare sector under pressure to serve growing demands

Further to the Ordinance on the private medical and pharmaceutical practice (Ordinance) passed by the Standing Committee of the National Assembly on February 25, 2003 and the Decree 103/2003/ND-CP dated September 12, 2003 detailing the Ordinance, the Ministry of Health (MOH) issued on January 06, 2004 the Circular 01/2004/TT-BYT guiding for private medical and pharmaceutical practice (Circular 01).

Since the recognition of the need for private investment in medical and pharmaceutical in mid-1993, the Government allowed private Vietnamese and foreign companies to establish clinics and hospitals. In fact, the number of private clinics, hospitals and the like have been on rise and incessantly modernized to reach all people when the public sector has been unable to satisfy the people healthcare needs.

With 7 chapters, 79 articles and 6 annexes, the Circular 01 is considered relatively comprehensive in comparison with the previous fragmented legal documents. Circular 01 governs essentially the conditions and procedures to be granted the Certificate of private medicine and pharmacy practitioner (Certificate of practitioner) and the Certificate of Eligibility to practise private medical and pharmaceutical professions (Certificate of Eligibility).

To obtain the Certificate of practitioner, there is no significant change in requirements for application dossier except those on 5 year experience in practice including 3 years in practising their speciality, applicable to foreigners and Vietnamese residing abroad.

To grant the Certificate of Eligibility to foreign invested hospitals or clinics, the letter of recommendation of Vietnam General Association of Medicine and Pharmacy, and the letter of request from provincial Department of Health where the foreign invested hospital or clinic is located, are no longer required.

It is however noted that under the Circular 01, foreigners, who have been allowed to examine and treat medically in the traditional medical clinics, must be able to speak and understand Vietnamese or otherwise have an interpreter.

The application dossiers for granting of the Certificates in the fields of private medical, pharmaceutical, traditional medical and pharmaceutical practice as well as the private practice regarding vaccine and medical bio-products and medical equipments manufacturing will be considered by the Department of Treatment, the Drug Administration of Vietnam, the Department of Traditional Medicine, the General Department of Preventive Medicine and HIV/AIDS Control and the Department of Medical Equipments and Construction, all under the MOH.

Foreign individuals, organizations and Vietnamese people residing abroad are entitled to invest in the healthcare sector, including traditional medicine. Especially, it is expressly stipulated in paragraph 2 of Article 61 of the Ordinance that, for the first instance, the MOH encourages foreign investors and Viet Kieu to invest in manufacturing drugs and medical equipments in Vietnam. With this policy, the Government aims at cutting down the importation of foreign drugs and medical equipments, an increasing trend during the

past years. In this regard, the modernization of the Vietnamese medical and pharmaceutical industry is visible and also represents a substantial opportunity for foreign investment.

The Circular 01 had been effective, resulting in the abrogation of a series of legal documents. It is also worthy to put signals that all Certificates of practitioner and Certificates of Eligibility which have been temporarily granted or extended shall be valid until the end of March 31, 2004. However, individuals and organizations holding the Certificates before June 01, 2003 are entitled to practise until the expiry date stipulated in the Certificates. And 3 months before the expiry date, if they wish to continue to practise private medical and pharmaceutical professions, they must apply for new Certificates under the provisions of the Ordinance, Decree 103/2003/ND-CP and this Circular 01.

Other documents

- The Ministry of Culture and Information and the Ministry of Health jointly issued Circular 01/2004/TTLT-BVHTT-BYT dated January 12, 2004 guiding for advertisement activities in healthcare sector.

Intellectual Property

Changes to patent registration in Vietnam

Vietnam intellectual property (IP) system is on the way of integration. The progress naturally leads to the need of simplification and harmonization of Vietnam's legal framework.

To seek the implementation of the commitments to international community and to facilitate the business activities, Vietnam Government is planning to make amendments to its laws governing the IP related matter. One of the efforts is to make amendments to Circular No. 3055/TT-SHCN, which guides the procedures for establishing IP rights.

On November 5, 2003, the Ministry of Science and Technology issued Circular No. 30/2003/TT-BKHCHN providing Guidelines for implementation of Procedures for Establishment of Industrial Property Rights with Respect to Invention and Utility Solutions.

The Circular is principally formulated on the basis of amendments, supplements and developments of relevant provisions provided in Circular 3055. Circular 30 will therefore substitute for corresponding parts on Circular 3055.

In this article, we note some main outstanding points of the new document, which generally streamlines the filing requirements for obtaining an invention registration, shortens the processing time limits and concretizes some regulations that internally set and applied by the National Office of Intellectual Property (NOIP).

Simpler filing requirements

Under Circular 30, Deed of Assignment from the author(s) to the applicant is not required at the filing date (although the NOIP may subsequently request those

documents in case of doubt). Number of set of documents are also reduced. The applicant now is required to submit 1 request instead of as previously provided. Besides, the priority documents (if any) is no longer required to be translated to Vietnamese except in certain case as requested by the NOIP.

Another improvement is in certification of original documents. Power of Attorney will no longer need to be notarized by a Notary Public. This document simply need to be signed by his own (in case the applicant is individual) and signed by an authorized officer of entity and affixed with its seal (if any) (in case the applicant is an entity). Furthermore, it is possible for the applicant to certify that a document enclosed to the application is a true copy of the original.

Shorter time limits for application consideration

The time limit for formality examination has been shortened from three months to one month (counted from the filing date). Meanwhile, time limit for substantive examination has been shortened from 18 months to 12 months calculated (i) from the date of receipt of the examination demand (if it is filed after the publication date of the patent application) or (ii) from the application publication date (if the examination request is filed before the application publication date).

All amendments or supplements made to an application (no matter if it is initially made by applicants or as requested by the NOIP) will extend the time limits for application processing to 15 days or 30 days (depend upon such change is made on formality or substantive examination process).

Besides, time limits for any amendments, supplements and oppositions against the NOIP's decisions can only be extended one time and the extension shall not exceed the time limit originally set by the NOIP. This new regulation will avoid that processing time of an application is prolonged to years when the involved parties consecutively request for some extensions.

Other important amendments and supplements

Formal opposition

Although in the past design application was required to be published in the IP Gazette, there is no formal opposition procedure. This has now been rectified. The NOIP shall be responsible for responding any opposition/support opinion from any third parties in the substantive examination process such opinion. The Circular 3055 is silent in this matter, and in several cases, the NOIP makes its decision without consideration of third party's opinions.

Shortening processing duration

According to Circular 30, the applicant can request the NOIP to shorten time for processing his application with surcharge fee. However the NOIP keeps the right to refuse such request.

Maintenance of the validity of patents

The annuity fee is calculated from the granting date (the first year of annuity is the year patent is registered). Therefore, there will be 3 methods used to calculate the annuity fees depending upon the applicable laws for particular cases: (i) for patent registered before July 2, 1996 (the date when Civil Code takes into effect) the renewal date is counted from priority date; (ii) for patent registered from July 2, 1996 to November 27, 2003 (the date Circular 30 takes into effect), the renewal date is filing date; (iii) for patent registered from November 27, 2003 the renewal date is counted from registration date.

Restoration of a patent registration

In the case when the validity of a patent registration is suspended due to non-payment of the required annuity fee, within 6 months but not later than 12 months from the due date, and there is no request to invalidate that registration by third party, the patent owner is entitled to recover the suspended registration with an surcharge fee. Any third party who started to use patent/utility solution in period of suspension, shall have the right as the prior user's right.

Other Sectors

Taxation

- The Government issued Decree 100/2004/ND-CP dated February 25, 2004 on sanctions against administrative violations in taxation sector.
- The Ministry of Finance issued Decision 17/2004/QD-BTC dated February 12, 2004, on the import duty tariff of wine and motorbikes imported from EU.

Trade

- On January 30, 2004, the Ministry of Finance issued Circular 05/2004/TT-BTC, guiding the management of prices of goods and services ordered by the State and paid by the State budget.

Land

- On February 09, 2004 the Prime Minister issued Directive 05/2004/CT-TTg on the implementation of 2003 Law on Land.

Banking

- The Governor of the State Bank of Vietnam issued Decision 118/2004/QD-NHNN dated February 03, 2004, on the cancellation of banking code, amendment of and supplementation to the symbol of country code, city code in code system of banks, credit institutions and the State Treasury issued with Decision 59/2000/QD-NHNN2 dated February 22, 2000.

Fees & Charges

- On February 12, 2004 the Minister of Finance issued Decision 16/2004/QD-BTC on the fee levels of quota for exportation of garments and textiles to EU and USA market.

- The Ministry of Finance issued Circular 06/2004/TT-BTC on February 04, 2004, guiding the implementation of the Government's Decree 106/2004/ND-CP dated September 23, 2003, dealing with administrative violations in fees and charges sector.

Bidding

- Circular 01/2004/TT-BKH dated February 02, 2004 of the Ministry of Planning and Investment, guiding the implementation of the Government's Decree 66/2003/ND-CP dated June 12, 2003, on amendment of and supplementation to a number of articles of Regulation on bidding.

Miscellaneous

- Decision 05/2004/QD-BBCVT dated January 20, 2004 of the Ministry of Post and Telecommunication, issuing the Regulation on National postal Code. *It is hoped Vietnam will have postal codes soon after this Decision.*
- On January 29, 2004, the Ministry of Public Security issued Decision 71/2004/QD-BCA(A11), issuing Regulations on safety in the management, supply and use of Internet services in Vietnam.

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