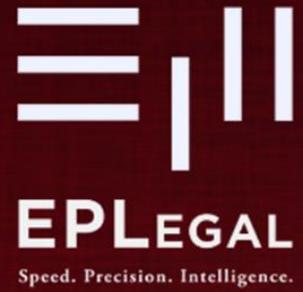


# NEWSLETTER

## ELEGAL LAW FIRM

February 2024



# HAPPY NEW YEAR

## SPECIAL VOLUME



### ABOUT US

EPLegal is a boutique firm, founded in Vietnam, operating throughout South East Asia and the UK. The firm specialises in cross-border investment & commercial transaction, and dispute resolutions (including arbitration, mediation, and litigation). Our firm drives results across numerous industries including Energy, Construction, Real Estate, Aviation, Finance, and many more.

### IN THIS VOLUME:

- News from EPLegal
- EPLegal continues to be remarkably named as a Tier 2 firm in Shipping and Aviation practice by the Legal 500 in 2023.
- Legal Updates
- Circular No. 20/2023/TT-BCT on working hours and rest periods of offshore petroleum workers.
- Procurement Law No.222/2023/QH15.
- Decree No. 78/2023/ND-CP amending and supplementing several articles of Decree No. 32/2017/ND-CP on State investment credit.





# ELEGAL NEWS

## EVENT

17th and 19th January 2024

19th January 2024



Our Founding/Sr Partner, Mr. Tony Nguyen, was invited by the Vietnam Mediation Center (VMC) to serve as the guest speaker at the seminars held in Hanoi and Ho Chi Minh City. The seminar “International Dispute Resolution in a Post-Pandemic Era: Trends and Challenges” was designed to discuss the evolving nature of dispute resolution in a world recovering from the global pandemic.

Our Managing Partner, Mrs. Annie Ngo, was officially admitted as an Arbitrator of the Ho Chi Minh City Commercial Arbitration Center (TRACENT). Moreover, TRACENT held its Conference to summarize the work in 2023 and outline the work program for 2024. The event was attended by distinguished guests, the Executive Board, and the TRACENT Arbitrators.

18th January 2024

17th January 2024



EPLegal’s Partners, Mr. Tony Nguyen and Mrs. Annie Ngo held the seminar with topics related to “Net Zero” and renewable energy as well as mediation and “ESG” (Environmental - Social – Governance). The training session took place successfully with the participation of many GES Scholars coming from Hanoi.

Our Managing Partner, Mrs. Annie Ngo, attended the first day of the International Scientific Seminar on Hanoi and Ho Chi Minh City Urban Railway System Development. The seminar was jointly organized by the People’s Committees of Hanoi City and Ho Chi Minh City.



16th January 2024



EPLegal's Founding/Sr Partner, Mr. Tony Nguyen, was honored to speak at the Mediation Seminar held as part of the Malaysian International Mediation Center's 25th-anniversary event.

27th December 2023



Our Managing Partner, Ms. Annie Ngo, was honored with the prestigious role of speaker at the workshop, "Renewable Energy Development According to PDP VIII: Perspectives from Regulations and Practices".

27th December 2023



Our Founding/Sr Partner, Mr. Tony Nguyen, was honored with a Certificate of Appreciation from the Minister of Justice. This recognition is a testament to Mr. Tony Nguyen's outstanding contributions over the past 15 years in upholding and implementing the Law on Lawyers.

25th December 2023



Our Managing Partner, Mrs. Annie Ngo, had the honor of being invited to attend the workshop "Petroleum Law 2022 and Practical Application". This event was organized by the Petroleum Exploration and Exploitation Corporation ("PVEP") on 22 December 2023, at Ninh Binh Legend Hotel & Convention Center.



25th December 2023

2024

fivehundred magazine > Banking and Finance Yearbook 2023 > Q&A: EP Legal

## Q&A: EP Legal



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We are excited to share an exclusive Q&A session that takes you behind the scenes of our dynamic world at the intersection of Banking and Finance. Dive into the insightful conversation to discover how EP Legal navigates challenges, embraces innovation, and delivers client-centric solutions to shape the future of the financial landscape.

Link to the Exclusive Q&A:

- <https://www.legal500.com/.../banking-and-.../qa-ep-legal/>
- <https://indd.adobe.com/view/fd8d08df-15bb-4556-81de...>
- <https://www.legalbusiness.co.uk/banking-and-finance-yearbook-2023/sponsored-qa-ep-legal/>

EP Legal is delighted to share that our firm continues to be remarkably named as a Tier 2 firm in Shipping and Aviation practice by the Legal 500 this year. Our firm maintains a consistent presence in other significant practice areas, including Dispute Resolution (both Arbitration and Litigation) (Tier 3) and Projects and Energy (Tier 3).

A special tribute is extended to our distinguished legal professionals who have played pivotal roles in steering EP Legal to new heights:

- Mr. Tony Nguyen: Founding Partner
- Mrs. Annie Ngo: Managing Partner
- Mrs. Tuyen Nguyen: Partner.

Recognizing excellence in the work, we also celebrate our Rising Star, Mr. John Nguyen - Associate.



## ELEGAL UPDATES

No.	Documents	Issuing authority	Issued date	Effective date
<b>I. Energy – Oil &amp; Gas</b>				
1.	Decree No. 02/2024/ND-CP on transferring electricity projects as public assets to the Electricity of Vietnam (EVN)	The Government of Vietnam	10/1/2024	1/3/2024
2.	Circular No. 20/2023/TT-BCT on working hours and rest periods for employees engaged in specialized tasks within the offshore oil and gas exploration and extraction field.	Minister of Industry and Trade	8/11/2023	25/12/2023
3.	Circular No. 19/2023/TT-BCT on methods for establishing the electricity selling price framework applicable to solar and wind power plants	Ministry of Industry and Trade	1/11/2023	19/12/2023
<b>II. Finance – Banking</b>				
4.	Circular No. 14/2023/TTNHNN on the internal control system of non-bank credit institutions	The State Bank of Vietnam	20/11/2023	1/10/2024
5.	Decree No. 83/2023/ND-CP amending Decree No. 95/2018/ND-CP prescribing issuance, registration, depositing, listing and trading of government debt instruments on the securities market	The Government of Vietnam	29/11/2023	15/1/2024
6.	Decree No. 78/2023/ND-CP amending and supplementing several articles of Decree No. 32/2017/ND-CP on State investment credit	The Government of Vietnam	7/11/2023	22/12/2023
7.	Circular No. 13/2023/TT-NHNN amending and supplementing certain provisions of the Circulars governing the issuance of licenses, organisation, activities, documentation, procedures, and processes for approving certain modifications in commercial banks and foreign bank branches	The State Bank of Vietnam	31/10/2023	14/12/2023
<b>III. Procurement</b>				
8.	Law on Procurement No. 222/2023/QH15	National Assembly of Vietnam	23/6/2023	1/1/2024

No.	Documents	Issuing authority	Issued date	Effective date
<b>IV. Enterprise – Investment</b>				
9.	Circular No. 69/2023/TT-BTC amending and supplementing several articles of Circular No. 57/2021/TT-BTC stipulating a roadmap for the restructuring of the stock trading market, bond trading market, derivatives trading market, and other securities trading markets.	Ministry of Finance	15/11/2023	30/12/2023
10.	Decree No. 78/2023/ND-CP amending and supplementing several articles of Decree No. 32/2017/ND-CP on State investment credit	The Government of Vietnam	7/11/2023	22/12/2023
<b>V. Environment</b>				
11.	Circular No. 15/2023/TT-BTNMT prescribing the provision and sharing of information and data on natural resource and environmental monitoring	Ministry of Natural Resources and Environment	30/10/2023	15/12/2023
12.	Circular No. 19/2023/TT-BTNMT amending and annulling some circulars that belong to the Minister of Natural Resources and Environment's issuing competence.	Ministry of Natural Resources and Environment	15/11/2023	30/12/2023
<b>VI. Tax</b>				
13.	Decree No. 82/2023/ND-CP amending Decree No. 120/2016/ND-CP elaborating law on fees and charges	The Government of Vietnam	28/11/2023	12/1/2024
14.	Resolution No. 107/2023/QH15 on application of top-up tax under the global anti-base erosion rules	National Assembly of Vietnam	29/11/2023	1/1/2024
<b>VII. Labor</b>				
15.	Decision No. 8086/QD-TLD on the issuance of regulations on the principles for constructing and allocating the financial budget of the labor union for the year 2024	Vietnam General Confederation of Labour	10/10/2023	1/1/2024
16.	Resolution No. 104/2023/QH15 on the State Budget Estimate for the year 2024	National Assembly of Vietnam	10/11/2023	25/12/2023
<b>VIII. Others</b>				
17.				
18.	Law on Medical Examination and Treatment	National Assembly of Vietnam	9/1/2023	1/1/2024



No.	Documents	Issuing authority	Issued date	Effective date
19.	Law on Emulation and Commendation	National Assembly of Vietnam	15/6/2022	1/1/2024
20.	Circular No. 66/2023/TT-BCA amending some articles of Circular No. 55/2021/TT-BCA on elaboration of residence law; Circular No. 56/2021/TT-BCA on forms used for residence registration and management and Circular No. 57/2021/TT-BCA on procedures for residence registration	Ministry of Public Security of Vietnam	17/11/2023	1/1/2024



Recently, the following legislation in several sectors entered into effect:

## LAND LAW

### Land Law (Amendment) 2024

On 18 January 2024, the long-awaited amended Land Law (“**the Amended Law**”) was officially passed by the National Assembly. The Amended Law will come into effect on 01 January 2025, except for some special provisions, and is expected to have a far-reaching impact on society. The Amended Law comprises 16 chapters and 260 articles that detail the rights and obligations surrounding land ownership. In brief, the Amended Law focuses on protecting the rights of citizens, promoting the development of socio-economic projects, removing legal barriers, and ensuring transparency in state management.

The Amended Law is expected to bring about significant changes and adjustments as follows:

(i) **Annually-updated land price table**

The Amended Law incorporates regulations governing annual land price tables to ensure that they closely align with actual market developments and provide an expanded scope of application. Under the Amended Law, the Provincial People’s Committee is responsible for submitting revisions, amendments, and supplements to the land price table to the People’s Council for approval. These changes will be published and applied from 1 January of the following year, or the Committee can amend and supplement the table throughout the year as needed. The Government will be in charge of developing detailed regulations to ensure that the land price list is in line with the market.

(ii) **Favorable regulations for citizens**

The Amended Law has been enacted with the objective of safeguarding the rights of citizens. It seeks to expand land ownership to Vietnamese citizens, including those who reside and work overseas. The law also promotes land policy towards ethnic minorities and upholds the rights and interests of people whose land is recovered. Additionally, it ensures transparency in land use planning and administrative procedures.

(iii) **31 cases of land recovery for socio-economic development**

The Amended Law specifically enumerates cases where the State shall recover land for socio-economic developments. These include the following projects: construction of public works, construction of state agency headquarters and public works, land fund development, underground works, etc. This regulation has also led to the creation of conditions that are highly conducive to the growth of production and business, as it enables the development of projects such as industrial parks, economic zones, high-tech zones, high-tech agricultural zones, and industrial clusters, among others.

In addition, the Amended Law also prescribes the procedures for land recovery that ensure democracy, objectivity, and fairness. Pursuant to Article 91 of the Amended Law, besides the procedure of compensation, support, and resettlement, the land recovery process also provides the participation of citizens, assuring that the people whose land is recovered shall receive compensation and resettlement prior to the completion of the recovery process.

(iv) **Effective use of agricultural land**

The agricultural sector is also a beneficiary of these legal changes. The Amended Law allows the expansion of "the limit for receiving transfer of agricultural land use rights for individuals to no more than 15 times the



limit for individual agricultural land allocation for each type of land" and other regulations on "concentration of agricultural land" and "accumulation of agricultural land" create conditions for agriculture to develop rapidly, sustainably, and effectively.

By and large, the adoption of the amended Land Law can be seen as a positive signal as well as hope for the recovery of the real estate market. Furthermore, implementing a well-regulated legal framework that aligns with existing practices will enable investors to execute new projects seamlessly, thereby facilitating stable and transparent management of the market.

- (v) **Supplement "arbitration" as a dispute settlement resolution regarding commercial activities related to land.**

## ENERGY – OIL & GAS

### a) **Circular No. 20/2023/TT-BCT on working hours and rest periods of offshore petroleum workers**

On 8th November 2023, the Ministry of Industry and Trade issued Circular No. 20/2023/TT-BCT, which regulates working hours and rest periods for employees performing specialised tasks in the field of exploration and exploitation of offshore oil and gas ("**Circular 20**"). This Circular will take effect from 25<sup>th</sup> December 2023 and replaces Circular No. 24/2015/TT-BCT.

Circular 20 provides clear regulations regarding the shifts of employees working regularly or irregularly on offshore oil and gas facilities. For employees working regularly at the offshore oil and gas exploration and extraction field: a work shift not exceeding 12 hours per day; the maximum duration of a work session is 28 days. For employees working irregularly at the offshore oil and gas exploration and extraction field: a work shift not exceeding 12 hours per day; the maximum duration of a work session is 45 days. In addition, before assigning employees to irregular work on offshore oil and gas facilities, the employer must reach an agreement in writing or come to a consensus with the employees regarding the work shifts and sessions.

Circular 20 also provides more specific regulations concerning overtime work to ensure the interests of the employees. The total working hours for a work shift and the overtime hours for employees shall not exceed 14 hours per day; the overtime hours for employees shall not exceed 300 hours per year. Employers must be provided with appropriate rest periods considering those who work regularly and irregularly at the offshore oil and gas exploration and extraction field. In cases of overtime arising, the organisation of overtime work must obtain the consent of the employee and comply with the provisions in Articles 59 and 62 of Decree No. 145/2020/NĐ-CP dated 14<sup>th</sup> December 2020 by the Government, which detail and guide the implementation of certain provisions of the Labor Code regarding labor conditions and labor relations. Accordingly, the employee must be informed and agree on the additional working hours, the location, and the nature of the work; and the employer must notify the Department of Labour, Invalids and Social Affairs, as per legal regulations, when organising overtime work ranging from 200 to 300 hours in a year.

### b) **Decree No. 02/2024/ND-CP on transferring electricity projects as public assets to the Electricity of Vietnam (EVN)**

On 10<sup>th</sup> January 2024, the Government of Vietnam issued Decree No. 02/2024/ND-CP on transferring electricity projects as public assets to the Electricity of Vietnam (EVN) ("**Decree 02**"). Decree 02 will come into effect on 01 March 2024. Overall, Decree 02 is expected to govern the transfer of electricity projects as public assets to EVN in a critical order and procedures with compulsory requirements as follows.

Under Decree 02, electricity projects as public assets transferred to EVN shall include:



- Electricity projects are public assets at state agencies, public service units, people's armed forces units, Communist Party of Vietnam units, Vietnam Fatherland Front, socio-political organizations, professional socio-political organizations, and other legally established associations (collectively called as constituting public assets at agencies, organisations, and units).
- Electricity projects are public assets assigned to enterprises to manage, excluding the state capital component of the enterprises (collectively called as public assets at enterprises).
- Electrical projects associated with technical infrastructure investments funded by state capital are overseen by project management boards, agencies, organizations, and units as investor owners (collectively called as electrical projects of technical infrastructure invested by state capital).
- Electrical projects associated with technical infrastructure that commonly utilised in urban and residential areas, and other projects, shall be transferred by the investor owners to the State under the laws.
- Electrical projects, whose ownership is established by the entire populace and originates outside the state budget (including the augmented value of electricity projects due to investments, renovations, and upgrades by organisations and individuals in existing power projects of the electricity unit). This occurs when organisations and individuals voluntarily transfer ownership rights to the State of Vietnam through EVN in the form of non-refundable capital, and the electricity unit consents to the transfer (collectively called as electricity projects originating outside the state budget).
- Ownership of electrical projects, established by the entire populace through an investment project employing the public-private partnership method, is agreed upon by the involved parties for transfer to the electricity unit according to the project contract, according to the laws or a decision by a competent authority assigning the electricity unit to carry out the transfer task (collectively called as electricity projects invested in the public-private partnership method).

Decree 02 also regulates the requirements and principles of electricity projects transferred to EVN (Article 4, 5 of Decree 02). Notably, the transfer of electrical projects to EVN is carried out through the method of the transferring party recording a reduction in its assets. Simultaneously, EVN records an increase in its assets and an increase in state capital investment to EVN based on the value of the electrical project at the time of transfer.

Regarding the electrical projects originating outside the state budget (as defined above), where the project costs have been calculated into the electricity selling price by the transferring party to the electricity units (except for cases where fixed electricity selling prices – FIT are applied), the remaining project costs for the remaining duration of the project must be deducted from the electricity selling price in the Power Purchase Agreement between the transferring party and the electricity unit.

## PROCUREMENT

### **Law on Procurement No. 222/2023/QH15 dated 23rd June 2023**

The National Assembly of Vietnam officially adopted a new procurement law – the Law on Procurement No. 22/2023/QH15 dated 23rd June 2023 (“**Procurement Law 2023**”). As of 1st January 2024, Procurement Law 2023 will come into effect and replace the Law on Procurement No. 43/2013/QH13 dated 26th November 2013 (“**Procurement Law 2013**”).

In addition to its predecessor – Procurement Law 2013, Procurement Law 2023 extends the application to the bidding packages of investment projects of State-owned enterprises as prescribed in the Law on Enterprises 2020 and wholly State-owned enterprises. Furthermore, Procurement Law 2023 also introduces the inclusion of household businesses as eligible bidders in procurement activities.

Commencing from the effective date of Procurement Law 2023 until 31<sup>st</sup> December 2024, the Government shall decide which bidding packages shall be subject to the online bidding method. Subsequently, commencing from



1<sup>st</sup> January 2025, the online bidding method shall be mandated for all bidding packages, save for specific exceptional circumstances where bidding activities are not facilitated through the Vietnam E-Procurement System. This addition, while building upon the preexisting framework established in Procurement Law 2013, seeks to mandate the public disclosure of all bidding routes, thereby fostering equity, and facilitating comprehensive procedural enhancements.

Procurement Law 2023 supplements notable provisions pertaining to collusive and obstructive acts as follows:

- For collusive acts: Acts of a bidder or investor, duly qualified and experienced, submitting a bid that meets the stipulated requirements in the bidding documents but deliberately refraining from furnishing supplementary documents to prove their capacity and experience at the request of the procuring entity. The aim here is to manipulate the bidding process in favor of one party;
- For interference acts: Acts of transgression against the cybersecurity and safety laws with the intention of disrupting or impeding the online bidding process.

Procurement Law 2023 adds the concept of “additional purchase options” allowing employers to procure additional quantities of goods, consulting, or non-consulting services beyond the originally specified contract amount. The additional purchase option may be applied if:

- The contractor is awarded through competitive bidding or price negotiation;
- The volume of additional purchases does not exceed 30% of the respective contract volume;
- There is an approved cost estimate for additional purchases;
- The additional purchase ensures adherence to unit price parity with goods or services specified in the contract; and
- The additional purchase option is exercised within the contract's validity period.

Of particular note, the return period of bid security is shortened to 14 days from the date the results of contractor and investor selection are approved. This adjustment is aligned with the corresponding bid security provision stipulated in the Law on Public–Private Partnership Investment of 2020. The amount of bid security applicable to investor selection is revised by the Procurement Law of 2023, which follows the scale and nature of business investment projects and specific bidding packages.

The upcoming implementation of the new Procurement Law remarkably protects the legitimate interests of participating parties as well as enhances the transparency and efficiency of bidding activities nationwide.

## BANKING & FINANCE

### **Decree No. 78/2023/ND-CP amending and supplementing several articles of Decree No. 32/2017/ND-CP on State investment credit**

On 7th November 2023, the Government issued Decree No. 78/2023/NĐ-CP, amending and supplementing certain provisions of Decree No. 32/2017/NĐ-CP concerning state investment credit ("**Decree 78**"). Decree 78 will take effect on 22nd December 2023.

Decree 78 has modified the interest rate for loans provided by the Vietnam Development Bank ("**VDB**"). Accordingly, the VDB is determined to set the interest rate for state investment credit loans to offset the costs of capital mobilization, operational machinery, and risk provision for credit agreements starting from the 22nd December 2023, but not lower than 85% of the average lending interest rate of domestic commercial banks based on data provided by the State Bank of Vietnam before the 25th January annually.

Moreover, Decree 78 has also supplemented detailed provisions on the loan amount and lending limits,



specifically:

- (i) In exceptional cases for the realization of economic-social development tasks and national defense-security, where the lending capacity of the VDB and other credit institutions does not meet the needs of a customer, the VDB shall compile documentation requesting credit exceeding the prescribed limit for each case to be submitted to the Ministry of Finance for consolidation and reporting to the Prime Minister for consideration and decision-making.
- (ii) Customers seeking loans or projects proposed by the VDB for credit exceeding the limit mentioned in point i) above must meet credit issuance conditions, have no bad debts in the last three consecutive years prior to the credit issuance year, and have a debt repayment ratio not exceeding three times the equity recorded in quarterly or audited annual financial statements. Additionally, the borrowing purpose must aim to implement economically significant projects, national defense, and security projects essential to serving the essential needs of people's lives in prioritized sectors as encouraged by the National Assembly and Government.
- (iii) The VDB, when requesting credit exceeding the limit mentioned in point i) above, must satisfy specific conditions. For instance, collaborating with other credit institutions to co-lend to projects, ensuring safety ratios in operations, guaranteeing the overall limit of credit issuance outstanding, and ensuring that credit proposals exceeding the limit comply with Decree 78 regulations.

Regarding loan terms, Decree 78 no longer limits loan terms to 12 or 15 years as per Decree 32/2017/NĐ-CP. Instead, the VDB will determine loan terms for each project based on project assessments, production characteristics, business aspects, capital recovery capabilities of each project, and the borrower's repayment capabilities.

## LABOR

### **Decision No. 8086/QĐ-TLĐ on the issuance of regulations on the principles for constructing and allocating the financial budget of the labor union for the year 2024**

On 10th October 2023, Vietnam General Confederation of Labour issued Decision No. 8086/QĐ-TLĐ on the issuance of regulations on the principles for constructing and allocating the financial budget of the labor union for the year 2024 (“**Decision 8086**”). Decision 8086 will take effect on 01 January 2024 until 01 January 2025.

Decision 8060 stipulates the principles of constructing and allocating the financial budget of the labor union in 2024 as follows:

- The number of workers recorded at units includes: the number of workers covered by social insurance as of 30<sup>th</sup> June 2023. It is encouraged for units to gather data close to the time of drafting the 2024 budget, the number of workers in units subject to union fee payment but not participating in social insurance, the anticipated increase (decrease) in the number of workers in the unit during the year.
- The Labor Union funding for 2024 determined at units is derived from the social insurance-contributed wages for average workers during the first six months of 2023, adjusted for workforce growth for workers subject to union fee payment.
- The revenue from union fees in 2024 is determined based on the actual number of union members in grassroots unions multiplied by the salaries and allowances of union members.
- Units shall draft the estimated revenue from union fees in 2024 to increase by 5% compared to the estimated revenue achieved in 2023. In 2024, grassroots unions shall utilize 70% of the total revenue from union fees and 75% of the total labor union fee revenue. Any surplus from the union fees and other sources shall be retained in full (100%) for the use of grassroots unions.



## DISPUTE SETTLEMENT

### **Decision No. 2542/2023/QĐ-PQTT dated 05 December 2023 about the annulment of the arbitral award of the People's Court of Ho Chi Minh City**

The dispute arose from and in connection with a contract of promise sale-purchase ("**Contract**") in March 2017 between Quoc Cuong Gia Lai JSC ("**QC**") and Sunny Island JSC ("**SI**") regarding the Bac Phuoc Kien residential area, Nha Be District, Ho Chi Minh City ("**Project**"). Under the Contract, SI had to transfer 4,800 billion VND to QG, and QC was responsible for transferring the land respectively for the amount of payment received from SI.

The dispute arose when SI only disbursed 2,882 billion VND and halted further payments. In 2020, QG declared to unilaterally terminate the Contract since SI breached the payment obligations and illegally kept the Certificate of land use rights and documents of land clearance (around 65 hectares of project land). QC initiated an arbitration against SI at the Vietnam International Arbitration Centre (VIAC) to resolve the dispute.

Under the award issued on 10 May 2023 ("**Award**"), The VIAC Tribunal decided that QG had properly terminated the Contract and requested SI to return the dossiers of land clearance and compensation received from QG. Further, The VIAC Tribunal stated that SI transferred the dossiers of land clearance and compensation of QC to Sai Gon Joint Stock Commercial Bank ("**SCB**") without the written consent or proper authorisation from QG, which caused a breach of contract and rules of law.

Subsequently, SI applied to set aside the Award to The People's Court of Ho Chi Minh City ("**HCM Court**").

According to the assessment of the HCM Court and the People's Procuracy of Ho Chi Minh City, all grounds demonstrated by SI to set aside the Award were unreasonable, lacked a legal basis, and did not contradict any fundamental principles of Vietnamese law.

However, during the proceeding of resolving the SI's application to set aside the Award, the HCM Court was informed by the Ministry of Public Security (Department of Investigation of Corruption, Economic Crime and Smuggling – C04) stating that the dossiers of land clearance and compensation for 65 hectares that the VIAC Tribunal ordered SI to return to QG is now evidence in a serious criminal case related to Van Thinh Phat Group.

Therefore, the HCM Court set aside the Award based on Article 68.2.d of Law on Commercial Arbitration 2010 ("**LCA**"). Article 68.2.d of LCA ruled that the evidence provided by the parties on which the Tribunal relies to issue the award is counterfeit; an arbitrator receives money, assets or other material benefits from one disputing party, thus affecting the objectivity and impartiality of the award.



## LEGAL ANALYSIS

### **The concept of foreign arbitration and the seat of arbitration - issues in the practice of implementing the law on commercial arbitration and proposals for reform**

#### **Summary:**

This legal analysis discusses Vietnam's current approach to the nationality of arbitral award being significantly different from international norms and practices. Currently, the distinction between the “physical place” where arbitral proceedings take place, including hearings, and the “seat of arbitration” (or *Lex Arbitri*), has been blurred by the definition of foreign arbitration and foreign arbitral awards under the LCA.

This situation leads disputing parties to avoid bringing their disputes to Vietnam for resolution due to the lack of support in the arbitral proceedings. Furthermore, the award, once issued, will lack nationality and prove challenging to obtain recognition and enforcement in Vietnam.

#### **Sections:**

#### **1. Current regulations of Vietnamese arbitration laws on the nationality of arbitral awards**

- Article 3.11 of the Law on Commercial Arbitration 2010 (“LCA”) defines foreign arbitration as “*an arbitration formed under a foreign law on arbitration and selected as agreed by the parties to settle a dispute outside or within the Vietnamese territory*”.
- Article 3.8 of the LCA defines the seat of arbitration as follows: “*The seat of arbitration*” means a place where an Arbitral Tribunal settles disputes, as agreed by the parties or as decided by the Arbitral Tribunal in the absence of parties’ agreement. If a seat of arbitration is within the Vietnamese territory, must be considered as issued in Vietnam, regardless of the place where the Arbitral Tribunal holds a hearing to issue such award.”

#### **2. The practice of the Vietnamese Courts concerning nationality in arbitral awards**

##### **Case study:**

- Decision No. 11/2019/QD-PQTT dated 11 September 2019 of the People’s Court of Hanoi annulled the VIAC award dated 10 April 2019.
- In Decision No. 1499/2012/KDTM-QD dated 28 September 2012 of the People's Court of Ho Chi Minh City declared that ICC Arbitral Tribunal of Case No. 18158/CYK did not have jurisdiction to settle the dispute between a Japanese Company and the People’s Committee of City H.

#### **3. Proposed amendments to certain legal provisions within the 2010 LCA concerning the nationality of arbitral awards**

The legal analysis proposes amendments to certain definitions such as “Seat of arbitration”, “Foreign arbitration”, “Foreign arbitral award” and “Seat of arbitration” stipulated respectively in Articles 3.8, 3.11, 3.12, and Article 11 of the LCA.

This legal analysis, authored by our Founding Partner – Mr. Tony Nguyen, was featured on “Tap Chi Dien Tu Phap Ly” of International Business and Law Academy (IBLA), Vietnam Lawyers’ Association. Full text of the legal analysis can be assessed at: <https://phaply.net.vn/xac-dinh-quoc-tich-phan-quyet-trong-tai-quoc-te-bat-cap-va-gop-y-hoan-thien-a257601.html>



## THE CONCEPT OF FOREIGN ARBITRATION AND THE SEAT OF ARBITRATION - ISSUES IN THE PRACTICE OF IMPLEMENTING THE LAW ON COMMERCIAL ARBITRATION AND PROPOSALS FOR REFORM

Nguyen Trung Nam, Founding and Sr. Partner of EPLegal Limited

### 1. Current regulations of Vietnamese arbitration laws on the nationality of arbitral awards

In international practice, determining seat of arbitration is crucial as it will determine the *Lex Arbitri*. The *Lex Arbitri* refers to the applicable law to arbitral proceedings, specifying the competent courts to intervene or assist in the arbitral proceedings, and the competent courts to consider setting aside of an arbitral award. In the laws of the most nations worldwide, in alignment with the approach of the UNCITRAL Model Law, an arbitral award is conventionally considered as issued at the seat of arbitration, regardless of where the award is physically signed or the arbitration rules of the involved institutions.

In Vietnam, determining the nationality of foreign arbitral awards presents several shortcomings due to differences in Vietnamese legal regulations and practices in comparison with international norms. Article 3.11 of the Law on Commercial Arbitration 2010 (“**LCA**”) defines foreign arbitration as “*an arbitration formed under a foreign law on arbitration and selected as agreed by the parties to settle a dispute outside or within the Vietnamese territory*”. Accordingly, a foreign arbitral award refers to an award rendered by an arbitrator from outside Vietnam's territory or within Vietnam's territory, selected by the parties to resolve a chosen dispute.<sup>1</sup> On the other hand, Article 3.8 of the LCA defines the *seat of arbitration* as follows:

*“Seat of arbitration” means a place where an Arbitral Tribunal settles disputes, as agreed by the parties or as decided by the Arbitral Tribunal in the absence of parties’ agreement. If a seat of arbitration is within the Vietnamese territory, must be considered as issued in Vietnam, regardless of the place where the Arbitral Tribunal holds a hearing to issue such award.”*

The above definition fails to clarify the distinction between the “*physical place*”, which refers to where arbitration proceedings take place, including holding hearings; and the “*legal place*” (or *Lex arbitri*). Despite not being explicitly distinguished, the interpretive language of Article 3.8 implies that “*the seat of arbitration*” may differ from the physical place where the Arbitral Tribunal holds hearing to resolve disputes. Unfortunately, this distinction has been blurred by the definition of foreign arbitration and foreign arbitral awards under the LCA. This confusion has led to Vietnam's current approach to the nationality of arbitral awards being significantly different from international norms and practices.

Specifically, as per the definition in the LCA and the Code of Civil Procedure 2015 (“**CPC 2015**”), if the Arbitral Tribunal, appointed by the parties to settle a case, is established in accordance with foreign arbitration law, any award rendered by the Arbitral Tribunal will be classified as a foreign arbitral award, regardless of whether the place where the award rendered is within or outside the territory of Vietnam. The term “*foreign arbitration law*” as interpreted by Vietnamese courts includes the procedural rules of foreign arbitral institutions such as the ICC, UNCITRAL, or SCMA. Therefore, an award rendered by an arbitral tribunal established under ICC or UNCITRAL arbitration rules, even if the seat of arbitration is in Vietnam, will be regarded as a foreign arbitral award. This approach is inconsistent with the UNCITRAL Model Law (“**Model Law**”) or the New York Convention 1958, in which the distinction between domestic and foreign arbitral

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<sup>1</sup> Article 3.12 of LCA.



awards is based on the seat of arbitration.<sup>2</sup> Many countries' laws, including those of the UK,<sup>3</sup> Singapore, and South Korea (countries that adopt the Model Law), also recognise the above regulations.

Currently, a situation arises where numerous ICC and UNCITRAL awards have the seat of arbitration in Vietnam, are considered foreign arbitral awards. Consequently, the disputing party must undertake consular legalisation procedures in a third country (such as Singapore) via office of the arbitral institution in that country, and subsequently bring it back to Vietnam to seek enforcement as a foreign arbitral award. However, the laws of Singapore (as well as those of any country worldwide) do not recognise this award as their domestic arbitral award since the seat of arbitration is in Vietnam. In other words, this award may have no nationality, and disputing parties would not receive support from the courts or legal system of Vietnam in the arbitral proceedings. This situation leads disputing parties to avoid bringing their disputes to Vietnam for resolution due to the lack of support in the arbitral proceedings. Furthermore, the award, once issued, will lack nationality and prove challenging to secure recognition and enforcement in Vietnam.

## 2. The practice of the Vietnamese Courts concerning nationality of arbitral awards.

In Decision No. 11/2019/QĐ-PQTT dated 11 September 2019 (“**Decision 11**”), the People’s Court of Hanoi (“**Hanoi People’s Court**”) set aside the arbitral award dated 10 April 2019 of the Vietnam International Arbitration Center (“**VIAC**”) regarding a dispute arising from the Contract for hydroelectric project design and construction in Vietnam (“**Contract**”) between the Vinh Son - Song Hinh Hydropower Joint Stock Company (“**VSH**”) and a Chinese contractor consortium. Although the Contract did not specify the exact seat of arbitration, the parties subsequently agreed to propose Hanoi, Vietnam as the seat of arbitration, in accordance with VIAC Rules. However, during the dispute resolution process, VSH initiated a lawsuit against two arbitrators of the arbitral tribunal at the Hanoi People’s Court. This action led the arbitral tribunal to decide to hold the hearing in Osaka, Japan, and to issue the award there. One of the reasons for setting aside the award in this case was that although the parties had agreed on Hanoi, Vietnam as the seat of arbitration, the arbitral tribunal held the hearing in Osaka; which was deemed inconsistent with the parties' agreement. In the author’s opinion, this case involved confusion between the concepts of the seat of arbitration and the physical place where the hearings took place. While the parties agreed on the seat of arbitration in Hanoi (as defined in Article 3.8 of the LCA), it did not necessarily imply an agreement on the physical place for holding the hearing in Hanoi. Therefore, the arbitral tribunal’s decision to hold the hearing in Osaka did not breach the parties' agreement on the seat of arbitration. In the context of the the increasing prevalence of online arbitral proceedings post-COVID-19, where many arbitral hearings are being conducted over the internet. This has posed challenges in ascertaining the specific physical place where hearings take place to resolve the dispute. Hence, it is increasingly crucial to distinguish between these two concepts to avoid confusion similar to the aforementioned case.

In Decision No. 1499/2012/KĐTM-QĐ dated 28 September 2012 (“**Decision 1499**”), the People's Court of Ho Chi Minh City (“**HCMC People’s Court**”) issued a decision to declare that the International Arbitral Tribunal ICC (“**ICC Arbitral Tribunal**”) of case No. 18158/CYK did not have jurisdiction to settle the dispute between

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<sup>2</sup> James Hope, ‘Awards: Form, Content, Effect’ (Global Arbitration Review, 2021) <<https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/2nd-edition/article/awards-form-content-effect>> access date 15 November 2023.

<sup>3</sup> Article 100 of Chapter III of the Arbitration Act 1996 on the recognition and enforcement of foreign arbitral awards reflects the approach consistent with the New York Convention 1958 that an award will be distinguished as domestic or foreign based on where the award is rendered. Accordingly, a foreign award will rendered, by agreement of the parties, in the territory of a country other than the UK.



Obayashi Corporation (Japan) and the People's Committee of City H regarding the Agreement of Construction Package Contract (“**Agreement**”). According to the Agreement, the substantive law governing dispute resolution was Vietnamese law. The seat of arbitration was Ho Chi Minh City. The ICC Arbitral Tribunal comprised three arbitrators with the dispute resolution language being English. However, in Decision 1499, HCMC People's Court stated that the ICC Arbitral Tribunal was established under the laws of the Republic of France, implying it was established under foreign law (as per Article 3.11 of the LCA). Therefore, despite the seat of arbitration being in Vietnam, the ICC Arbitral Tribunal was deemed to be as a foreign arbitral tribunal.

Consequently, based on the analysis from Decision 11 and Decision 1499, it can be understood that Vietnam is determining the nationality of arbitral awards based on the "nationality" of the arbitral tribunals or arbitration centers rather than the places where the awards are issued. This is not in line with the approach of the New York Convention of 1958 or international practices as analysed previously. These are a clear examples of arbitral awards that, despite having seat of arbitration in Vietnam, do not carry Vietnamese “nationality” and have no nationality whatsoever. The party attempting to challenge any aspect of the arbitral proceedings would not be able to seek support from any country's court. Furthermore, the party seeking to set of the arbitral award would also face difficulties due to the inability to find a competent court!

### **3. Proposed amendments to certain legal regulations within the 2010 LCA concerning the nationality of arbitral awards.**

In conclusion, the distinction between Vietnamese arbitration and foreign arbitration needs to be established based on the criteria of *Lex Arbitri*, which relates to the seat of arbitration. This helps determine in which territorial jurisdiction the arbitral proceedings take place, as well as the nationality of the arbitral award. This is a significant issue concerning the recognition and enforcement of foreign arbitral awards in Vietnam, under the New York Convention 1958, of which Vietnam is a Member State.

Based on the above analysis, the author proposes amendments to certain definitions such as “Seat of arbitration”, “Foreign arbitration”, “Foreign arbitral award” and “Seat of arbitration” stipulated respectively in Articles 3.8, 3.11, 3.12, and Article 11 of the LCA, specifically:

*Firstly*, regarding the concept of “The seat of arbitration” under Article 3.8 of the LCA. The author proposes an amendment as follows: *“The seat of arbitration means a legal place in which an Arbitral Tribunal settles disputes, as agreed by the parties or as decided by the Arbitral Tribunal in the absence of parties’ agreement. If the seat of arbitration is within the Vietnamese territory, the arbitral award must be considered as issued in Vietnam, regardless of the place where the Arbitral Tribunal holds a hearing to issue such award”*.

*Secondly*, regarding the concept of “Foreign arbitration” under Article 3.11 LCA. The author proposes amended wording to read: *“Foreign arbitration means an Arbitration that has the seat of arbitration outside the Vietnamese territory”*.

*Thirdly*, regarding the concept of “Foreign arbitral award” under Article 3.12 LCA. The author proposes the following amendment: *“Foreign arbitral award means the award rendered by the Foreign arbitration”*.

*Fourthly*, regarding the concept of “Seat of arbitration” under Article 11 LCA. The author proposes the following amendment:

*“1. The parties have the right to agree on the seat of arbitration (within or outside the territory of Vietnam). In the absence of such agreement, the Arbitral Tribunal shall determine such seat of arbitration;*



2. Unless otherwise agreed by the parties, the Arbitral Tribunal may hold the hearing at a place and in a manner regarded as appropriate for its members to exchange opinions, for taking witnesses' statements, consulting experts, or assess goods, assets or other documents, without affecting the seat of arbitration"

The author's above proposed amendments will help effectively and comprehensively address the legal and practical challenges that Vietnam is currently facing in terms of determining the seat of arbitration, distinguishing it from the place of hearing, and determining the nationality of the arbitral award.



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