

# EPLegal Law Firm

EPLegal Newsletter

October 2023

**'Intelligence beats strength' - Vietnamese saying**

## 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.

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# ELEGAL NEWS

## EVENTS

18th August 2023



Ms. Ngo Quynh Anh - Managing Partner of EPLegal, and Mr. Tony Nguyen – Founder, Sr Partner of EPLegal, as a representative of the Vietnam Business Lawyers Club (VBLC), participated in the Conference regarding the "Construction contract dispute resolution procedures from Dispute Adjudication Board (DAB) to arbitration and practical lessons", hosted by VECAS in Ha Noi.

17th August 2023



Mr. Tony Nguyen - Founder, Sr Partner of EPLegal, as a representative of VBLC, participated in the Cooperation Agreement Signing Ceremony between the Vietnam Bar Federation and the Law Society of Singapore

16th August 2023

EPLegal collaborated with The Law Society of Singapore to host an in-person networking event at the Hanoi Tokyo Hotel. This event took place from 9-11AM, which marked the first event in the three-day Lawyers Go Global mission organised by the Law Society of Singapore's members.



*EPLegal co-hosted a networking session with the Law Society of Singapore in Hanoi*

30th July 2023

EPLegal participated in the ADR Conference, hosted by the Vietnam Business Lawyers Club (VBLC) at the Melia Beach Danang Resort. This conference served as a significant program in the 2023 VBLC Annual Retreat, held from from 29th to 30th July 2023.



*EPLegal partners moderated and gave speeches at the ADR conference of the 2023 VBLC annual retreat*

## LEGAL TALKS

14th August 2023



*Mrs. Ngo Quynh Anh attended the online Legal Seminar of Vietnam Law Newspaper on the topic of the impending danger of capital contribution fraud*

For more detailed information, please feel free to visit: [LINK](#)

10th August 2023



*Mrs. Nguyen Thanh Tuyen attended the online Legal Seminar of Vietnam Law Newspaper on the topic of the legality of non-notarised and unauthenticated land use right transfer contracts*

For more detailed information, please feel free to visit: [LINK](#)

## RANKINGS

**Mr. Tony Nguyen – Founding partner of EPLegal named as the future leader in : Arbitration 2023**

**30 July 2023: EPLegal has been recognised for remarkable achievements in the IFLR1000 2023 rankings.**



The IFLR1000 logo consists of the text 'IFLR1000' in a serif font, where the '1000' is rendered in a lighter, grey color and has a slightly larger, more stylized appearance.

Published by Law Business Research Limited, an independent publishing group headquartered in London, Who's Who Legal offers comprehensive research, analysis, and reports on the global legal services marketplace. Since 1996, Who's Who Legal has been instrumental in identifying the pre-eminent legal practitioners in various areas of business law. In the realm of arbitration, Who's Who Legal meticulously selects the world's leading international arbitrators and eminent arbitration lawyers through a rigorous process of independent research, client endorsements, and peer evaluations.

EPLegal is delighted to extend our heartfelt congratulations to our esteemed Founder and Sr Partner, Mr. Tony Nguyen, on being distinguished as the "2023 Future Leader in Arbitration" by Who's Who Legal. This esteemed recognition marks Mr. Tony's third consecutive year receiving this title, and it is a source of immense pride that he is one of only five Vietnamese lawyers featured in Who's Who Legal: Arbitration 2023. This honor underscores Mr. Tony's exceptional accomplishments and expertise in the field of arbitration.

IFLR1000 is a leading international legal market research product specialised in ranking financial and corporate law firms and lawyers. EPLegal is immensely proud to announce that our dedicated Partners have earned many well-deserved titles for their exceptional legal acumen and unwavering dedication.

Highly Regarded Lawyer – Mr. Tony Nguyen

Highly Regarded Lawyer and Women Leaders – Mrs. Annie Ngo.

These prestigious rankings truly reflect the relentless dedication, expertise, and commitment of our exceptional team at EPLegal. As a firm, we have always strived to deliver the highest standards of service to our clients, and this recognition is a testament to our unwavering pursuit of excellence.

## LEGAL ARTICLES



26th July 2023, we were pleased to introduce an article titled "Vietnamese Court Sets Aside Arbitral Award for Failure to Legalise POA: An Abuse of Due Process Requirements".

This article, authored by our Founding Partner, Tony Nguyen, and Associate, Dan Pham, was featured on the Kluwer Arbitration Blog. This Article delves into Decision 1768, a controversial decision that has garnered substantial criticism within the legal community in Vietnam and has created waves of uncertainty in the practice of arbitration in the country. It highlights the significant hurdles to Vietnam to become a friendly seat of arbitration, especially for foreign parties.

The full article can be assessed at: <https://arbitrationblog.kluwerarbitration.com>

On 08<sup>th</sup> August 2023, we are thrilled to introduce an enlightening article titled "*Oil & Gas industry in Vietnam*". This article, authored by our Managing Partner, Annie Ngo, and Associate, Dan Pham, was featured on the Chambers and Partners. From the introduction of Vietnam's Petroleum Law 2022 to tax incentives, renewable energy targets, and LNG trends, this article explores the intricacies and challenges shaping the country's energy transition journey.



Moreover, this Article provides invaluable insights into the regulatory landscape, recent legal changes, and promising opportunities for investors in this dynamic industry.

For further information, please visit the following link:

<https://practiceguides.chambers.com/practice-guides/energy-oil-gas-2023/vietnam/trends-and-developments>

## EPLEGAL UPDATES

No.	Documents	Issuing authority	Issued date	Effective date
<b>I. Energy – Oil &amp; Gas</b>				
1.	Petroleum Law No. 12/2022/QH15	National Assembly	14/11/2022	01/7/2023
2.	Decree No. 45/2023/ND-CP elaborating on the Petroleum Law	The Government of Vietnam	01/7/2023	01/7/2023
3.	Decision No. 866/QD-TTg approving the plan for exploration, extraction, processing and use of minerals for the period of 2021-2030, with a vision to 2050	The Prime Minister of Vietnam	18/7/2023	18/7/2023
4.	Decision No. 893/QD-TTg approving the national energy master plan for the period of 2021 - 2030, with a vision to 2050	The Prime Minister of Vietnam	26/7/2023	26/7/2023
<b>II. Finance – Banking</b>				
5.	Circular No. 08/2023/TT-NHNN setting conditions for foreign loans not guaranteed by the Government	The State Bank of Vietnam	30/6/2023	15/8/2023
6.	Circular No. 09/2023/TT-NHNN guiding the implementation of the Law on anti-money laundering	The State Bank of Vietnam	28/7/2023	28/7/2023
<b>III. Construction</b>				
7.	Decree No. 35/2023/ND-CP on amendments to some Articles of Decrees in the field of state management of the Ministry of Construction	The Government of Vietnam	20/6/2023	20/6/2023
8.	Circular No. 05/2023/TT-BXD of the Ministry of Construction	Ministry of Construction	01/8/2023	20/9/2023
<b>IV. Enterprise – Investment</b>				
9.	Circular No. 30/2023/TT-BTC providing guidelines for registration, depositing, corporate actions, transfer of ownership, settlement for transactions and organisation of trading market for corporate bonds privately placed in the domestic market	The Ministry of Finance of Vietnam	17/5/2023	01/7/2023

<b>V. Environment</b>				
10.	Circular No. 04/2023/TT-BTNMT suspending the implementation of some provisions of Circular No. 02/2022/TT-BTNMT	The Ministry of Natural Resources and Environment	06/7/2023	06/7/2023
11.	Decision No. 2064/QĐ-BTNMT on the announcement of the minimum flow value in downstream of reservoirs and dams of irrigation and hydroelectric projects	The Ministry of Natural Resources and Environment	24/7/2023	24/7/2023
<b>VI. Shipping</b>				
12.	Decision No. 886/QĐ-TTg approving the master plan, policies, solutions and resources for the development of Vietnam's seaport system in the 2021 - 2030 period, with a vision to 2050	The Prime Minister of Vietnam	24/7/2023	24/7/2023
<b>VII. Tax</b>				
13.	Decree No. 44/2023/NĐ-CP prescribing value-added tax reduction under Resolution No. 101/2023QH15 of the National Assembly of Vietnam	The Government of Vietnam	30/6/2023	01/7/2023
<b>VIII. Labor</b>				
14.	Decree No. 42/2023/NĐ-CP adjusting retirement pensions, social insurance allowances and monthly benefits	The Government of Vietnam	29/6/2023	14/8/2023
15.	Circular No. 06/2023/TT-BLĐTBXH providing guidelines on adjustments to pensions, social insurance allowances, and monthly allowance	The Ministry of Labor - War Invalids and Social Affairs	29/6/2023	14/8/2023
<b>IX. Others</b>				
16.	Decree No. 13/2023/NĐ-CP on the protection of personal data	The Government of Vietnam	17/4/2023	01/7/2023
17.	Decree No. 47/2023/NĐ-CP amending and supplementing several articles of the Decree No. 62/2017/ NĐ-CP detailing a number of Articles and measures to implement the Law on Property Auction	The Government of Vietnam	03/7/2023	01/9/2023

18.	Circular No. 33/2023/TT-BTC stipulating the determination of the origin of imports and exports	The Ministry of Finance of Vietnam	31/5/2023	15/07/2023
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Recently, the following legislation in several sectors entered into effect:

## ENERGY – OIL & GAS

### a) Petroleum Law No. 12/2022/QH15 dated 14th November 2022

Vietnam's Petroleum Law 2022 was officially approved on 14th November 2022 and came into effect on 1st July 2023 (the “**Petroleum Law**”). This new legislation demonstrates a significant increase in flexibility, harmonisation, and alignment with international standards, as well as a reflection of the current dynamics within the country's oil and gas industry.

#### 1. *Petroleum contract terms*

The new Petroleum Law brings about significant changes, including an extension of the duration of petroleum contracts. Under the previous Petroleum Law 1993, contracts had a maximum duration of 25 years. However, the new law extends this period to 30 years. For petroleum blocks eligible for investment incentives and special investment incentives, the maximum contract term is further extended to 35 years. These modifications aim to provide potential investors and existing stakeholders with a more extended and stable investment horizon.

#### 2. *Tax incentives*

Under normal circumstances, the corporate income tax rates for activities related to the exploration and extraction of oil and other valuable resources in Vietnam typically range from 32% to 50%. Additionally, the crude oil export tax is typically set between 6% and 25%. However, when an oil and gas block meets the criteria for receiving special investment incentives, investors in such a block may benefit from advantageous tax provisions. These provisions include a reduced corporate income tax rate of 25%, a lower crude oil export tax rate of 5%, and the ability to recover a maximum of 80% of the costs associated with oil production.

#### 3. *Introducing a full legal framework for the exploitation, implementation and state management of a petroleum project*

#### 4. *Accounting, auditing, taxation and finalisation works*

With the implementation of the new Petroleum Law, the Vietnamese government may attract more investors to foster the sustainable growth of Vietnam's oil and gas industry.

### b) Decree No. 45/2023/ND-CP dated 1st July 2023 elaborating on the Petroleum Law

Decree No. 45/2023/ND-CP (“**Decree 45**”) complements the Petroleum Law to introduce a new Model of Petroleum Production Sharing Contract (PSC) and provide comprehensive guidance, with a particular focus on the selection of contractors for petroleum contracts, safety regulations in oil and gas operations, and incentives for oil and gas activities.

Decree 45 provides specific criteria, application requirements, and procedures for approving oil and gas blocks eligible for incentives in the oil and gas sector. PetroVietnam shall be responsible for aggregating the qualified

oil & gas blocks and submitting requests for approval to the Ministry of Industry and Trade, relevant Ministries and the Prime Minister within the regulated time limit.

Decree 45 provides detailed regulations governing the selection of contractors for the execution of petroleum contracts. To be eligible, participating contractors must meet the following criteria:

- Experience and Qualifications, including experience in executing petroleum operations and petroleum contracts; technical and financial capacity and available funding sources for the execution of petroleum operations;
- Technical Specifications, such as field development and extraction obligations; methods of implementation and optimal technology on environmental protection and reduction of carbon dioxide emission; and
- Financial Conditions: pertinent economic conditions involved in the host country's profit oil, profit gas ratio and participating interests (via PVN); cost recovery; financial commitment and other obligations (commissions, training costs, donations to petroleum scientific research and technology development fund, etc).

The guidance encapsulated within Decree No. 45/2023/ND-CP represents a substantial step forward in improving the effectiveness and practicality of the new Petroleum Law.

## CONSTRUCTION

### **Decree No. 35/2023/ND-CP dated 20th June 2023 on amendments to some Articles of Decrees in the field of state management**

Decree No. 35/2023/ND-CP ("**Decree 35**") introduces modifications to the advance payment levels established in Decree No. 37/2015/ND-CP on detailed regulations on construction contracts ("**Decree 37**"). Accordingly, the level of advance payment shall not exceed 30% (instead of 50% under Decree 37) of the contract value at the time of signing. However, in cases where projects receive investment approval from the Prime Minister, the option to approve a higher advance payment level is vested in Ministers, Heads of Ministerial-level agencies, or the Provincial People's Committee.

Furthermore, Decree 35 mandates that the level of advance payment, along with its amount, payment date, and terms for payment recovery, must be explicitly outlined in the bid invitation, request for proposals, and specified within the contract, in accordance with the laws and the progress of the contract's implementation.

## TAX

### **Decree No. 44/2023/ND-CP dated 30th June 2023 prescribing value-added tax reduction under Resolution No. 101/2023/QH15**

Decree No. 44/2023/ND-CP ("**Decree 44**") plays a pivotal role in implementing the provisions set forth in Resolution No. 101/2023/QH15 ("**Resolution 101**"). The primary objective of Decree 44 is to stimulate economic growth and enhance consumer affordability by reducing the value-added tax (VAT) rate by 2% for specific products and services.

A central feature of Decree 44 is the reduction of the VAT rate by 2%, previously set at 10%, for a select group of products and services. Decree 44 does not expand the scope of the VAT rate reduction beyond what was established in Decree No. 15/2022/ND-CP. To maintain clarity and transparency, Decree 44 includes a comprehensive list of goods and services that are not eligible for the 2% VAT reduction. This list is detailed

with product and HS codes, providing taxpayers with a clear reference for determining the applicability of the reduced VAT rate.

Another significant aspect of Decree 44 is the uniform application of the 2% VAT reduction throughout the entire supply chain, including importation, production, processing, and trade. The only exception to this uniformity is coal extraction.

Regarding documentation and record-keeping, Decree 44 establishes specific requirements. Entities employing the deduction method for VAT submission must indicate the "8%" rate on VAT invoices. In cases where different VAT rates apply to various goods or services being sold, the applicable VAT rate for each item must be clearly specified on the invoice.

The introduction of Decree 44 has proven effective in addressing limitations and issues that arose from previous decrees concerning tax deduction policies.

## BANKING & FINANCE

### **Circular No. 08/2023/TT-NHNN dated 30th June 2023 on requirements for foreign loans without Government's guarantee**

On 30th June 2023, the Governor of the State Bank of Vietnam (the “**SBV**”) issued Circular No. 08/2023/TT-NHNN on requirements for foreign loans without the Government’s guarantee (“**Circular 08**”). Circular 08 comes into force on 15th August 2023 and replaces Circular 12/2014/TT-NHNN (“**Circular 12**”).

Accordingly, Circular 08 applies to:

- Residents that are enterprises, cooperatives, cooperative unions, credit institutions and foreign bank branches (FBBs) duly established and operating in Vietnam and known as the parties applying for foreign loans (“borrowers”);
- Credit institutions or FBBs in Vietnam where borrowers’ accounts are opened to serve their foreign borrowing and repayment of foreign loan debts.

Compared to Circular 12, Circular 08 adopts a strict approach to regulate additional requirements by borrowers that are not credit institutions or FBBs for using foreign loans. Accordingly, the Vietnamese borrowers shall prove their foreign loan use purposes as follows:

- Short-term foreign loans (for a term of less than 01 year) are not allowed for M&A purposes. Short-term loans can only be taken out to restructure Vietnamese borrowers’ foreign debts, pay their short-term debts payable in cash (excluding outstanding principal amounts of onshore loans), and implement investment projects and production – business operations.
- Medium or long-term foreign loans (for a term of over 01 year) can only be used to finance Vietnamese borrowers’ investment projects, business plans or other projects, or to restructure their foreign debts.

The application dossier to prove borrowers’ foreign loan purposes shall include: (i) the investment certificate, investment registration certificate, or written approval of investment policy under the Law on Investment and relevant laws (in case of financing investment projects); (ii) the plan for the use of foreign loan capital (in case of financing business plans or other projects); (iii) the debt restructuring plan (in case of restructuring the borrower’s foreign debts).

Circular 08 also governs the deposit of unused loans. If the foreign loans have been withdrawn but temporarily not yet used for lawful use purposes as prescribed by Circular 08, the borrowers are allowed to deposit such foreign loan capital sources to the credit institutions and FBBs in Vietnam. The deposit term shall not exceed one month. In addition, the borrowers are responsible for tracking these loans in case of being inspected by competent authorities.

Under this Circular, foreign loans in Vietnamese Dong are permitted in certain circumstances. Specifically, foreign loans will be distributed and repaid in foreign currency, but the debt obligation is denominated in Vietnamese Dong.

To facilitate the parties' agreement on interest and indemnities, Circular 08 removes the restriction on borrowing costs. However, this removal imposes some uncertainty when the borrowers are still required to comply with upcoming conditions from the SBV. Therefore, the involved parties should closely follow up and keep updated with the SBV from time to time.

Fundamental changes under Circular 08 have note-worthy impacts on foreign lenders and Vietnamese borrowers, addressing the limitations and issues arising from antecedent Circular 12.

## DATA PROTECTION

### **Decree No. 13/2023/ND-CP dated 17th April 2023 on protection of personal data**

As of 1st July 2023, Decree No. 13/2023/ND-CP ("Decree 13") is the primary legislation governing personal data protection in Vietnam. Decree 13 applies to:

- Vietnamese agencies, organisations and individuals;
- Foreign authorities, entities and individuals in Vietnam;
- Vietnamese agencies, organisations and individuals that operate in foreign countries; and
- Foreign agencies, organisations and individuals that directly process or are involved in processing personal data in Vietnam.

Decree 13 protects 11 fundamental rights of the Data subject, including the "right to be informed". Accordingly, the Data subject must be notified about their personal data processing, except for some limited grounds. Additionally, data subjects have the right to provide their consent, which is valid when given voluntarily and with a clear understanding of the specific details outlined in Decree 13. Consent should be documented in formats that are reproducible in writing, including electronic formats. Importantly, silence or non-response does not constitute consent. If a data subject withdraws their consent, their personal data must be deleted within 72 hours, unless otherwise required by law.

Moreover, entities in breach of personal data protection may face administrative sanctions, or criminal prosecution, depending on the gravity of the breach. Remarkably, the Draft Decree on Sanctions Against Administrative Violations in Cybersecurity (Draft Cybersecurity Administrative Sanctions Decree), which was released on 20th September 2021 and underwent public consultation, remains pending. Several provisions on administrative sanctions in the field of postal services, telecommunications, radio frequencies, information technology and electronic transactions are stipulated under the existing Decree 15/2020/ND-CP dated 3rd February 2020. Therefore, there is a need to validate the Draft Cybersecurity Administrative Sanctions Decree soon to set out specific administrative violations and their corresponding penalties, sanction levels, and remedial measures with regard to violations in personal data protection.

The guidance provided by Decree 13 represents a significant step forward in establishing a legal framework for

data processing activities and protecting individuals' privacy in Vietnam. With the implementation of Decree 13, enterprises face heightened compliance requirements and potential penalties for non-compliance.

## LEGAL ANALYSIS

**Title:** Vietnamese Court Sets Aside Arbitral Award for POA Legalization Failure

**Summary:**

This legal analysis discusses a controversial decision by the People's Court of Ho Chi Minh City (HCMC Court), where an arbitral award was set aside due to issues related to the legalization of a power of attorney (POA). The decision has raised concerns in the legal community and impacts Vietnam's reputation as an international arbitration seat.

**Sections:**

1. Background

Under the Law on Commercial Arbitration 2010, both domestic and international arbitral awards can be set aside on the basis that the arbitral award contravenes the “fundamental principles of Vietnamese law.”

2. The Case: Decision 1768/QĐ-PQTT Dated June 10, 2020

- Tai Seng Bavet Sez Co., Ltd and Chunghwa Telecom Vietnam Co., Ltd.

4. Problems with Decision 1768

- The HCMC Court did not explain how a non-legalised power of attorney could result in a breach of the fundamental principles of Vietnamese law.
- Decision 1768 addresses inconsistencies with international arbitration practices.

6. Mitigating Risks Arising from Decision 1768

- Parties are advised to obtain a legalised POA when they authorise their counsel representing them in arbitration proceedings in Vietnam.

## Vietnamese Court Sets Aside Arbitral Award for Failure to Legalise POA: An Abuse of Due Process Requirements

Tony Nguyen, Manh Pham (EPLegal)

Under the **Law on Commercial Arbitration 2010 (“LCA”)**, both domestic and international arbitral awards can be set aside on the basis that the arbitral award contravenes the “fundamental principles of Vietnamese law.” This concept, however, is undefined and broad, causing much uncertainty, especially in light of decisions of the Vietnamese courts.

In 2020, the People’s Court of Ho Chi Minh City (“HCMC Court”) set aside a Vietnam-seated arbitral award on the basis that a power of attorney issued by a foreign company to its Vietnamese lawyers to represent it in the arbitration was not legalised by the consulate of Vietnam in Cambodia. The HCMC Court held that the arbitral tribunal’s acceptance of the power of attorney that was not legalised contravenes the fundamental principles of Vietnamese law and therefore the award was liable to be set aside. This controversial decision has invited much criticism from the legal profession in Vietnam as the wide and uncertain grounds under which a party may challenge an award under the LCA continue to hinder Vietnam’s popularity as a seat for international arbitration.

### Summary of Decision 1768/QĐ-PQTT Dated 10 June 2020 (“Decision 1768”)

On 25 September 2016, Tai Seng Bavet Sez Co., Ltd (“Tai Seng”) (a Cambodian company) and Chunghwa Telecom Vietnam Co., Ltd (“Chunghwa”) (a Vietnamese company) signed a service contract (“Contract”). Article 22 stipulated that if resolution through negotiation and conciliation cannot be reached, “the arbitration body of Vietnam, Cambodia or a third party will conduct arbitration” and that “[the] undisputed parts must still be performed.”

A dispute subsequently arose between the parties, whereby Tai Seng alleged that Chunghwa did not fulfil its obligations under the Contract. Tai Seng commenced an arbitration against Chunghwa with the Vietnam International Arbitration Center (“VIAC”). In accordance with the VIAC Rules, a tribunal consisting of three arbitrators was appointed. On 5 June 2019, the tribunal issued its final arbitral award, Award No. 44/18 HCM, wherein the tribunal upheld some of Tai Seng’s claims and awarded to Tai Seng damages of USD 61,290, legal costs of USD 7,279, arbitration costs of USD 75,107, and other reasonable expenses in the sum of USD 3,178.52.

Chunghwa challenged the award before the HCMC Court on the grounds that the power of attorney issued by Tai Seng to its Vietnamese lawyers to represent it in the arbitration (the “POA”) was not legalised by the consulate of Vietnam in Cambodia and therefore was non-compliant with the provisions of Article 4 of Decree No. 111/2011/ND-CP (“Decree 111/2011”).<sup>1</sup> Consequently, the arbitral tribunal should not have accepted the POA. According to Chunghwa, the arbitral tribunal’s acceptance of the POA therefore contravenes the fundamental principles of Vietnamese law and the award should be set aside.

#### *The Procuracy’s Opinion*

Commenting on this case, the Procuracy<sup>2</sup> opined that the POA was not legalised in accordance with Article 2.2 of Decree 111/2011 and was therefore not valid under Article 4.2 Decree 111/2011 for use in Vietnam. Pursuant to Article 68.2.(dd) of the LCA (which provides that an arbitral award shall be set aside if it contravenes the

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<sup>1</sup> Article 4.2 of Decree 111/2011 dated 5 December 2011 (which regulates the consular certification and legalization process in Vietnam) provides that: “To be recognized and used in Vietnam, papers and documents of foreign countries must be consularly legalized, except the cases specified in Article 9 of this Decree.”

<sup>2</sup> Under Vietnamese law, hearings for all civil cases are attended by the People’s Procuracy of Ho Chi Minh City (“Procuracy”) (i.e., the public prosecutor of Vietnam), who will express its independent opinion on the case. The Procuracy’s opinions are not binding on a judge but will have advisory value.

“fundamental principle of Vietnamese law”), the Procuracy advised the competent court to set aside Award No. 44/18 HCM.

### *The Court’s Decision and Reasoning*

The HCMC Court agreed with the Procuracy’s opinion and added that the POA is not a type of document that is exempted from legalisation under Article 9 of Decree 111/2011. Additionally, the HCMC Court held that the arbitration clause did neither specify a form of arbitration (i.e., ad hoc or institutional arbitration) nor which arbitration institution should administer the arbitration. Therefore, it was wrongful for VIAC to have accepted Tai Seng’s notice of arbitration and to have administered the arbitration between the parties.

On these grounds, the Court issued Decision 1768 to set aside Award No. 44/18 HCM.

## **The Problems with Decision 1768**

According to Decision 1768, a failure by a foreign party to legalise a power of attorney in Vietnamese arbitral proceedings would amount to a contravention of “the fundamental principles of Vietnamese Law.” Yet, the HCMC Court did not explain how a non-legalised power of attorney could result in a breach of the fundamental principles of Vietnamese law, for example because it threatens the justice and impartiality of the Vietnamese legal system, nor did it identify the types of documents that must be legalised for use in arbitration in Vietnam. In fact, it is absurd and irreconcilable with other Vietnamese laws and regulations on arbitration.

Firstly, Article 9(4) of the Decree 111/2011 provides that papers and documents need not be legalised if not required by the receiving Vietnamese or foreign organisation under the relevant Vietnamese or foreign laws. The receiving organisation in this case would be VIAC. Nothing in the Rules of VIAC or Vietnamese legislation requires that a POA issued by a party to an arbitration must be legalised. There was therefore no legal basis for the HCMC Court to find that a non-legalised POA in arbitration proceedings would violate any law or regulation of Vietnam, much less “the fundamental principles of Vietnamese law.” The Procuracy and the HCMC Court may have confused arbitration with Vietnamese court proceedings, where a represented party must obtain a POA that is apostilled and legalised.

Secondly, Article 14(2)(dd) of Resolution 01/2014 issued by the Supreme People’s Court of Vietnam clarifies that the fundamental principles of Vietnamese law means “the fundamental rules of conduct having overall effect over formulation and implementation of Vietnamese Law.” It is unclear how the issue of legalisation of a POA could violate the fundamental rules of conduct having overall formulation and implementation of law. The form of a POA granted by a party to its counsel has no impact on the fairness or impartiality of an arbitration.

Thirdly, Article 13 of the LCA provides that if a party, having been aware of an (alleged) violation of the Law or the arbitration agreement, continued with the arbitral proceeding without objecting to it within the regulated timeline, it will lose the right of objection in arbitration and in court. The HCMC Court did not take into account the fact that Chunghwa never objected to the non-legalised POA until the arbitral award was issued.

Decision 1768 is therefore arguably wrong and places foreign parties arbitrating in Vietnam at a significant disadvantage. A construction arbitration like the case at hand usually involves copious amounts of documents and evidence. If a foreign Claimant is required to legalise all of its “foreign” documents to be used in arbitration in Vietnam, that would place a huge burden on the foreign party and would create an unfair advantage for domestic counter-parties because they can point to any non-legalised document used in the arbitration as a ground to apply for the setting aside of the arbitral award.

Decision 1768 is also irreconcilable with the best practices in international arbitration. None of the popular arbitration seats (e.g., New York, England & Wales, Hong Kong, and Singapore) impose any legalisation

requirements on documents to be used in arbitration (which matter is for the tribunal to determine). For example, SIAC Rules 2016, Article 19.2 provides: “The Tribunal shall determine the relevance, materiality and admissibility of all evidence. The Tribunal is not required to apply the rules of evidence of any applicable law in making such determination.”<sup>3</sup> Similarly, the UNCITRAL Arbitration Rules 2021, Article 27.4 provides: “The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.”

In relation to the failure of the arbitration agreement to specify an arbitral institution to administer the arbitration, the HCMC Court did not make it clear whether such failure rendered the arbitration clause invalid, or whether such failure merely meant that any arbitration commenced under the Contract would be an ad hoc arbitration. The Court’s reasoning is inconsistent with Article 43(5) of the LCA, which states that if the arbitration clause fails to indicate the form of arbitration or cannot identify a specific arbitration institution, and the parties could not reach agreement on the same, then the form of arbitration or the arbitration institution to settle the dispute shall be selected at the claimant’s discretion.

### Mitigating the Risks Arising from Decision 1768

The VIAC Rules are so far silent on the issue of legalised POAs. To avoid uncertainty, parties are advised to obtain a legalised POA when they authorise their counsel representing them in arbitration proceedings in Vietnam.

From the VIAC’s perspective, it should formally issue guidance to the disputing parties in relation to whether a POA has to be legalised under its Rules. Such guidance must set out the formality requirements applicable to each category of documents/evidence. Alternatively, VIAC may specify in its Rules that where a party provides a POA in writing, certification and legalisation of the POA is not required unless requested by the opposing party(ies) giving notice within a certain period.

As for potential law reform, the LCA should be amended to clarify that the strict procedural rules of court proceedings shall not apply to arbitration; instead, procedural requirements under the LCA should be simplified to allow arbitral institutions to define their own requirements in relation to procedural matters. More importantly, the concept of contravention of the “fundamental principles of Vietnamese law” must be redefined in the LCA to include only very serious defects or breaches in the award or in the conduct of the arbitral proceedings that contravene the public policy of Vietnam of maintaining the fair and orderly administration of justice.

### Conclusion

Decision 1768 is a controversial decision which has invited much criticism from the legal profession in Vietnam and has caused ripples of uncertainty in Vietnamese arbitration practice. It highlights the significant hurdles to Vietnam establishing itself as a safe seat for arbitration, especially for foreign parties.

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<sup>3</sup> LCIA Arbitration Rules 2020, Article 22.1.(iv) also allows the Arbitral Tribunal to order any party to make documents available for inspection by the Arbitral Tribunal, other party or expert.

HCMC – Head Office

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